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Sd/-
S.K. Verma

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DELHI LAW REVIEW
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Editorial Note

As you are aware, Law Faculty has been publishing its own law journal which reflects the views of scholars on current legal problems. The Delhi Law Review, which has set the goal of excellence for itself, is one of the premier journals in the third-world countries. It has been continuously striving towards that goal and has managed to retain its position so far. The journal has been with us since 1972 except for a brief period of seven years between 1983-1989. It has been regularly publishing scholarly articles of its own teaching Faculty, as well as of its students, besides attracting good number of excellent articles from eminent scholars from other parts of India and abroad. It is hoped that this tradition will continue.

The Faculty proudly presents Vol. XIX of 1997 to its readers, which has tried to emulate and improve upon the standards of excellence set for itself in previous issues.

Professor B.P. Srivastava, a towering personality of the Faculty, retired in July 1997 after having served the Delhi University with distinction for a period of around 26 years. His brief profile has been penned by Professor B. Errabbi and appears in this volume. Another teacher, Mr. M.S. Shukla, has also retired in June 1998. The Faculty wishes them a meaningful and long active life.

Vol. XVIII of the journal was a special issue of 1996 which carried the articles presented at the Conference on "Legal Dimensions of Free Market Economy" organized by the Faculty under its DSA Programme. Because of that, R.V. Kelkar Memorial Lecture, organized in the memory of late Prof. R.V. Kelkar, delivered by Mr. P.P. Rao, senior Supreme Court lawyer on "Prisoners' Right to Life and Liberty" could not be published earlier and finds its rightful place in this issue. This year's R.V. Kelkar Memorial lecture, delivered by Hon'ble Justice Jaspal Singh of Delhi High Court on "Law of Rape in India" in March 1998 is also featured in this issue.

As a part of the Platinum Jubilee Celebrations of the University of Delhi, the Faculty organised a one day seminar on *Election Laws and Criminalization of Politics* in March this year. The Election Commissioner J.M. Lyngdoh delivered the inaugural address which is reproduced in this issue of the Review. This issue also carries an article written by a foreign scholar from Columbia University.

There are equally informative and scholarly articles and notes contributed by the colleagues from the Faculty. The students, which comprise a most important segment of the Faculty, deserve to be given their rightful representation in the Faculty's journal. This issue carries three articles contributed by students. The research endeavours by students will certainly help them to face the task of social engineering and to confront social problems with

a view to finding out solutions through their reading and writing. It certainly helps them to become good researchers, lawyers, judges etc. To all these authors and those who contributed book reviews, I personally extend my appreciation and thanks.

During this year, the Bar Council of India has circulated a new course-structure for LL.B. course. The Faculty of Law is in the process of implementing the restructured scheme after fulfilling all the statutory requirements.

At the end, I must thank my friend and colleague, Prof. B. Errabbi, the editor of this volume, who took all the pains to see that the volume lives up to its name. I also express my gratitude to the other members of the editorial board: Prof. Harish Chander, Prof. Lakshmi Jambholkar and Dr. J.L. Kaul.

It is my sincere hope that this issue of the Review will receive the desired response from its readers, and their constructive suggestions and contributions are welcome as they help in improving the Review further.

In conclusion I must thank Mr. Amit Sayal, Sita Fine Arts Pvt Ltd., for undertaking the Printing of the Journal, which he has done with meticulous care and caution. He deserves all our appreciations.

S.K. Verma*

* Head & Dean, Faculty of Law, Delhi University

Prof. B.P. Srivatsava

A Brief Profile of a Retiring Colleague

As we bid farewell to Prof. B.P. Srivatsava on the eve of his retirement on 2.7.97, it is customary and indeed my privilege to present his brief profile, recounting his association with, and contribution to, the development of legal education in the country and in particular, in the Faculty of Law, Delhi University. After a bright academic career studded with excellence and the accompanying gold medals and scholarships, he joined the Faculty of Law, Lucknow University in 1956 as a lecturer. He was also a student of the Columbia Law School, New York, USA, for a year in 1964 where he went on a fellowship and a grant from the Columbia University and the Fullbright Foundation, respectively, and obtained the degree of M.C.L (Master of Comparitive Law). The Law Faculty, Delhi University has been fortunate to have him as a distinguished member of its teaching Faculty since 1970 where he spent most of his teaching career except for a three and a half year period from October 1979 to April, 1982 during which period he worked as a Professor of Law at the University of Dar es Salaam, Tanzania. Of his long and illustrious teaching career spanning over 41 years, he spent 26 years in the Delhi Law Faculty, winning acclaim and admiration of his students and colleagues alike for his teaching and scholastic abilities. He inspired several generations of students both at the LL.B. and LL.M. levels with his deep and profound knowledge, scholarship, dedication and sincerity. His wit, humour, and generous and helpful attitude had endeared him to his friends and colleagues. One of the striking features of his association with the Law Faculty has been that he never clamoured for, and held, positions of power. In fact he assiduously shunned such positions. He preferred to remain in the background and play the role of a friend, guide and philosopher which he performed with meticulous care and distinction whenever that was sought and needed from him not only by his friends and colleagues but also by some of the successive Deans of the Faculty and the Professors-In-Charge of Campus Law Centre. It was not in his nature to offer unsolicited advice, nor was it his temperament to interfere in the affairs of others unless his help, guidance and counsel were sought.

Another admirable feature of his character as a teacher, has been not only his strong belief in the rule of Law but also his ceaseless insistence on its observance by all concerned in the Faculty. He adopted steadfastly the brook no-nonsence approach to all demands for its relaxation whether it was by students or teachers. He was, indeed, a strict disciplinarian.

Prof. B.P. Srivatsava is a gifted draftsman. His expertise in drafting representations to the higher echelons of the university administration has been taken advantage of by many of his friends and colleagues. The University also

utilised his services for conducting several departmental enquires, thus reposing its confidence in his ability, integrity and legal acumen.

As a scholar, he is endowed with a sharp intellect and a rare gift of incisive analytical skills which, by dint of destiny, have not been utilised to their full potential. Those who have closer interaction with him will appreciate that it is no exaggeration to say that Prof. B.P. Srivatsava is analytical skills personified.

His contribution to the Indian legal literature has been modest. He wrote on various contemporary issues of constitutional law which include protection to civil servants, freedom of speech and obscene publication, prospective over-ruling, amendability of fundamental rights, the Bhopal settlement order and the conflict between social activism and judicial activism and the Tulsiram Patel case and its implication for the civil services etc. His writings, published in prestigious national and international law journals, have been marked by clarity precision of language, originality and incisive analysis. Presently, he is engaged in writing a book on election law and a collaborative venture on constitutional law which is intended to be a part of Halsbury's Laws of India series being commissioned by the Butterworths India Ltd.

He had participated and contributed scholarly and thought provoking papers in several national as well as international seminars. He also delivered several lectures at the Indian Institute of Public Administration on Consumer Protection and consumer justice.

Although his retirement from service of the Delhi University will be a great loss to the Law Faculty, we comfort ourselves with the surmise that what will be our loss in the Faculty will be somebody's gain elsewhere.

Therefore, in conclusion, we pray the God Almighty for his long and active life. We assure him that we would continue to cherish with reverence the memories of his long association with us as a friend, colleague, guide and philosopher.

B. Errabbi*

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

ELECTION LAWS AND CRIMINALISATION OF POLITICS*

By

*Shri J.M. Lyngdoh***

Justice Nanavati, Professor Verma and Friends,

Thank You enormously for inviting me to this Seminar and for trusting yourselves with someone like me for the next half-hour or so.

For a once-grossly illiterate ex-British colony, the miniscule minority of middle class English-educated lawyer-politicians of which scoured every constitutional model and assembled for us an impossibly inclusive and idealistic holdall around a nucleus of parliamentary democracy, we haven't done too badly. For example, agriculture is self-sufficient; the industrial base is among the world's top ten; the professional class is about the largest anywhere; India is almost unique among independent countries, with a continuously peaceful and constitutional transfer of power from one regime to another.

The trouble is that the Soviet-style autarky which India followed for long paid greater attention to conceptualising, system-building, dimensions of magnitude, quantity rather than quality had left out incentives, innovation, and practicability. With our natural proclivities, it meant just more and more rhetoric and ritual.

To make it worse, though the Soviet system unembarrassedly opted for full employment and subsidized and high-quality education apart from subsidized housing and health care, India didn't. So half the population is still illiterate and nearly 50 years into the Constitution of India, Article 45 of its Directive Principles of State Policy regarding provision for free and compulsory education within 10 years, has been conveniently forgotten; Article 47 of the same Directive Principles notwithstanding, Indian children are some of the most undernourished as Professor Amartya Sen, master of Trinity College, Cambridge keeps emphasizing. General health-care is near non-existent and

* This essay represents a slightly modified version of the inaugural address delivered by Ho'ble shri J.M. Lyngdoh, Election Commissioner of India, at a seminar on "Election Laws and Criminalisation of Politics", organised by the Faculty of Law, Delhi University on 21 March, 1998.

** Election Commissioner of India.

what is, is of the poorest quality; general housing is abysmal. (UNDP's Human Development Report 1997, in terms of human development indices longevity, education and reasonable income computes India as 138th in a list of 175 countries.) And amorphous and non-strategic planning and spreading the butter too thinly everywhere have meant-purposeless expenditure deteriorating into wholesale malpractice.

So politics, never aseptic at the best of times, anywhere, has in India become the investment with the highest returns, and therefore, associated with the survival of the dirtiest. It has been taken over by the rural majority whose rustic virtues of nepotism and bossism are anathema to the western-type urban democracy's principles of universalism, professionalism and impartiality. So, booth capturing, lying, cheating, forging, abducting, and murdering during elections and creaming off funds when holding office, have become political attractions. Financial bankruptcy of State Governments has become a latter-day common place. And the undisputed supremacy of the market has obliterated differences in party ideology and facilitated horse-trading, defections..... And it hasn't helped that Capitalism has prevailed over Socialism in the world power-struggle, that the Soviet Union has disintegrated and that India has been forced to re-integrate with the market without preparation. Apart from unwittingly entering the second and the most vicious phase of colonial exploitation brought about by information technology, globalisation and the World Trade Organisation Regime.

The Indian Penal Code and the Criminal Procedure Code, designed to keep a Victorian India quiet, no longer suffice. Lord Macaulay, on his creation, the Indian Penal Code, said: "Our principle is simply this - uniformity when you can have it; diversity and you must have it; but in all cases certainty." The trouble is that crimes like the Hawala Scam are as uncertain as the Uncertainty Theory in quantum physics. And how do you deal with a malevolent George Soros who speculates on your currency to bring down your economy in ruins?

The Representation of the People Act, 1951, poorly drafted, is even more inadequate. Section 8 of the 1951 Act is the main provision on the disqualification for candidature for election to Parliament and State Legislatures. This Section divides offences into 3 groups, the groups being in descending order of disapprobation. For bribery or rape, for example, mere conviction disqualifies. For offences such as hoarding or profiteering or contravention of the Dowry Prohibition Act, conviction and a sentence of not less than 6 months are necessary. For residuary offences, a conviction and a sentence of not less than 2 years are required. The disqualification is 6 years for offences under Sub Section(1), the sentence of imprisonment plus 6 years for offences under Sub Sections (2) & (3).

But Section 8(1) lists only a few offences. And there are glaring absurdities. For example, the minimum punishment for rape under the Indian

Penal Code is 10 years' imprisonment whereas the disqualification for a convicted rapist electoral candidate is only 6 years. He can become an MP or MLA serving the last part of his sentence in jail.

Section 8 goes further and allows an MP or MLA, convicted of rape, for example, to file an appeal or apply for revision within 3 months and to remain MP or MLA until the appeal or application is disposed of. And usually, disposal here has been interpreted as final disposal by the highest court in the land. So it is like the Jarndyce and Jarndyce situation in Dickens' 'Bleak House' where litigation outlives parties, interests and even public memory. As though not enough, for whatever reason, this dispensation was allowed even to non-MPs and non MLAs till the 1998 Elections.

The Election Commission has recommended that persons convicted for 1 year for any offence whatsoever be disqualified. But we need to go further. All those formally charged by a court in cases of moral turpitude and heinous offences like murder. dacoity and rioting should be disqualified. And disqualification should encompass those without justifiable means of livelihood, (not ostensible Victorian England naively assumed the possibility of full employment and castigated the poor for their 'leziness') tax evaders, Government dues evaders, drug-traffickers, prostitution-racketeers, smugglers and bootleggers. A committee of District Judge, District Magistrate, Superintendent of Police and representatives of the Press should ensure the police maintain proper record of such persons.

Sections 8A, 9 and 10A are disqualifications for corrupt practices, for dismissal for corruption or for disloyalty and failure to lodge an account of election expenses, respectively.

Sections 9A and 10 are temporary disqualifications for subsisting Government contracts and for holding office in a company in the capital of which the appropriate Government has at least a 25% share.

A voter is disqualified under Section 11A for being convicted for offences which include bribery and undue influence or personating. As well as for corrupt practices as understood in the Representation of People Act, 1951.

The Election Commission has recommended enhanced punishment for electoral offences in Chapter IXA of the Indian Penal Code and Chapter III of Part VII of the Representation of People Act, 1951 since the present punishment is inadequate. Details on this have been given to the seminar organizers for distribution. But even provisions as they are are not being properly enforced in the absence of police personnel at many polling stations. (In States like Bihar, polling stations without policemen are taken over by booth-capturers and Presiding Officers are frightened into collusion). The Home Ministry made its own contribution to the first round voting chaos in Bihar by making a gratuitous law and order review a day before in Patna, and

directing the State Government to use patrolling parties instead of static deputations at polling stations, after pushing out as many policemen as possible to Assam, on the sly. For each Parliamentary constituency at the rate of 2 policemen per polling booth 3,000 men are required. The total force provided by the Home Ministry is about 800 companies (IGPs who retired before I joined Service are still retaining their jeeps and constables), works out to about 56,000 men for the whole country. Even allowing for staggered polls and shifting forces between the State, the number is woefully inadequate. Most States hold their own police in contempt and want only Central police forces to man their polling stations, counting centres and ballot-box strong-rooms. But what is more serious is that if a candidate is guilty of the corrupt practice of spending more than the prescribed limit, the Election Commission can do nothing against him. The only remedy is for his rival to file an election petition before the High Court. But case-congestion in courts often does not allow disposal within 5 years, thereby nullifying the petition. There would be some relief, at least, if the Representation of People Act, 1951 could specifically debar State Governments from withdrawing election-related cases as part of their patronage.

The Representation of People Act, 1951 confines its scope to the conduct of elections. It has no control over defections. But mass-post-electoral defections have been manipulated by a brute majority Government under the Constitution of India in the guise of the Tenth Schedule. And formally legalized and even encouraged, defections are so cancerous to current Indian politics that they should be removed from the Constitution. And defection, without qualification, ought to be made an offence of criminal breach of mandate under the Indian Penal Code. This should be in addition to the defector's losing his seat in Parliament or the Assembly.

Operating within a huge vacume, the Election Commission in the 1998 General Election requested political parties, in a meeting as well as through the media, not to field criminals. And people were asked through the media not to vote for criminals. As many as 3 ministers from Bihar were kept under house arrest to restrain them from interfering with the polls. Some candidates were also arrested. Candidates were made to file sworn affidavits stating they had not been convicted of the various offences under section 8 of the Act. One candidate who gave a false declaration was later disqualified. To facilitate the filing of accurate election petitions before the High Court, candidates were, for the first time, required to file expenditure accounts in 3 parts showing personal expenditure, party expenditure and expenditure by friends etc. within 30 days of the declaration of the results. Copies of these were made freely available to everyone. And since Justice Kuldeep Singh's Common Cause Judgement had allowed the Election Commission to take expenditure accounts from political parties also, this year the Election Commission will be able to match a party's account of expenditure on a candidate 'A' with his account of the party's

expenditure on him. Though frankly, the level of expenditure in the 1998 Elections was much less because of very limited use of loudspeakers and practically no use of posters; on the other hand the expenditure ceiling had increased. Computerisation in Election Commission was accelerated to monitor round-wise counting results to ensure no cheating in counting. But an increasingly crude polity and progressive harshness and intrusion into ground details by the Election Commission can only mean the end of democracy altogether.

In conclusion, I would like to submit the following reform proposals for the purpose of discussion by the participants of the Seminar.

ELECTORAL OFFENCES
EXISTING AND PROPOSED PUNISHMENTS

Section	Nature of offences	whether cognisable or non-cognisable	whether it should be cognisable or non-cognisable in future	existing punishment	Proposed punishment
1	2	3	4	5	6
	I- INDIAN PENAL CODE				
171/B/171/E	Bribery at elections	Non-cogni-sable	Cognisable	Imprisonment upto one year or fine, or both	Imprisonment upto 3 years or fine or both
	Bribery by treating	-do-	-do-	Fine only	Imprisonment upto 6 months or fine or both
171/C/171/E	Undue influence at elections	-do	-do-	Imprisonment upto one year or fine or both	Imprisonment upto 3 years or fine or both
171/D/171/E	Presentation at an election	Cognisable	-do-	Imprisonment upto one year, or fine or both	As at present
171/G	False statement in connection with an election	Non-cognisable		Fine	Imprisonment upto 3 years or fine or both.

1	2	3	4	5	6
171/H	Illegal payments in connection with an election	Non-cognisable	Non-cognisable	Fine upto five hundred rupees	Imprisonment for a minimum period of 1 year and extending upto 5 years and fine.
171/I	Failure to keep election accounts	-do-	-do-	Fine upto five hundered rupees extending upto	Imprisonment for minimum period of six months and 1 year and fine
II - REPRESENTATION OF THE PEOPLE ACT, 1950					
31	Making false declaration	Non-cognisable	Non-cognisable	Imprisonment upto one year or fine or both	Imprisonment upto 2 years or fine or both.
32	Breach of official duty in connection with the preparation. etc,	-do-	-do-	Fine upto five hundred rupees	Imprisonment for 3 months minimum and upto 2 years and fine.
REPRESENTATION OF THE PEOPLE ACT, 1951					
125	Promoting enimity between classes in connection with election	Cognisable	Cognisable	Imprisonment upto 3 years or fine or both	Imprisonment for minimum period of 6 months and extending upto 3 years and fine.
126	Prohibition of public meetings on the day preceding the election day and on the election day.	Non-Cognisable	Cognisable	Fine upto Rs. 250/-	Imprisonment upto 3 years and fine.
127	Disturbances at election meetings	-do-	-do-	Imprisonment upto 3 months, or fine upto Rs. 1000/- or both.	Imprisonment upto 1 year and fine
127A	Restriction on the printing of pamphlets, posters, etc.	-do-	Non-Cognisable	Imprisonment upto six months or fine upto Rs. 2000/- or both.	Imprisonment upto 2 year or fine or both
128	Maintenance of secrecy of voting	Non-cognisable	Cognisable	Imprisonment upto 3 months or fine or both	Imprisonment upto 1 year or fine or both
129	Officers, etc., at elections not to act for candidates or to influence voting.	Cognisable	-do-	Imprisonment upto 6 months or fine or both	Imprisonment upto 3 years or fine or both

1	2	3	4	5	6
130	Prohibition of canvassing in or near polling stations	-do-	-do-	Fine upto Rs. 250/-	Imprisonment upto 1 year or fine or both.
131	Penalty for disorderly conduct in or near polling stations.	-do-	-do-	Imprisonment upto 3 months or fine or both	Imprisonment upto 1 year or fine or both
132	Penalty for misconduct at the polling station	-do-	-do-	Imprisonment upto 3 months or fine or both	Imprisonment upto 1 year or fine or both
132A	Penalty for failure to observe procedure for voting	Non-cognisable	-do-	Ballot paper liable to be cancelled	Imprisonment upto 3 year or fine or both.
133	Penalty for illegal hiring of procuring of conveyances at election	-do-	-do-	Fine upto Rs. 1000/-	Imprisonment upto 3 years or minimum Rs. 1000/- & Rs. 5000/- or both
134	Breaches of official duty in connection with elections	Cognisable	Cognisable	Fine upto Rs. 500/-	Imprisonment upto 3 year or fine or both.
134A	Penalty for Government servants for acting as election agent, polling agent or counting agent.	Non-cognisable	Cognisable	Imprisonment upto 3 months or fine or both	Imprisonment upto 1 year or fine or both
135	Removal of ballot papers from polling station	Cognisable	Cognisable	Imprisonment upto one year or with fine upto 500/- or both.	Imprisonment for a year or fine or both
135A	Offence of booth capturing	Non-cognisable	Cognisable	Imprisonment for a term upto 6 months to 2 years and fine	Imprisonment for a term from 1 year to 5 years and fine.
136	Other offences	Cognisable	Cognisable	Imprisonment for a term upto 2 years or fine or both.	Imprisonment upto 3 years or fine or 1000/- to Rs. 5000/- or both
137	Any other person	Cognisable	Cognisable	Imprisonment upto 6 months or fine or both.	Imprisonment upto 2 years or fine or both

LAW OF RAPE IN INDIA : SOME REFLECTIONS*

*Mr. Justice Jaspal Singh***

It is said that a good teacher affects eternity; he can never tell where his influence stops. Prof. Kelkar was one such teacher. Simple and unassuming he had the charm of a cheerful temperament. I last came out of his class room as his student more than forty years ago. It is still sun-shine. He was really worth a thousand priests. My thanks to Prof. Verma for having provided me with the opportunity to deliver this lecture organised in his sweet memory.

I propose to speak to you today on certain aspects of law of rape. These are stray thoughts. I have made an effort to arrange them, and believing that the more one says, the less people remember; the fewer the words, the greater the profit, I propose to be very brief.

In *Sudesh Jhaku* v. *K.C.J. & Others*[1] while suggesting to the Law Commission and the Legislature to give a fresh look to the law of Rape. I said:[2]

> "And, if they really decide to look into it, what about defining the offense in gender-neutral terms? I think law reform community will have no objection to it"

In that context, I felt the necessity of quoting the following passage from the "Note, Rape & Rape Laws : Sexism in Society & the law" appearing in 1973 in the 61 California Law Review:

> Men who are sexually assaulted shall have the same protection as female victims, and women who sexually assault men or other women should be liable for conviction as conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of reinforcing the status of women as sexual possessions."

It would not be possible to deny that a male too may, in certain cases, be subjected to sexual assault by the person born from his own ribs and such assaults by the female species of the hamasapiens may be mentally and physically as shattering as where the victim is a woman. It is an age of

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* This is a slightly modified version of Prof. R.V. Kelkar Memorial Lecture delivered by honourable Mr. Justice Jaspal Singh. The lecture was organised under the auspices of the Faculty of Law, University of Delhi on March 28, 1998.

** Judge, High Court of Delhi.

1 (1996) 62 Delhi Law Times, 563

2 Id. at 574.

aggressive man and aggressive woman. I do not think, the subject has stirred the legal community in India so far though this has been a subject of discussion in Europe and in the United States of America in particular. I am confident that this voice will not remain in the wilderness for long.

In *Sudesh Jhaku's case*[3] it was contended, *inter alia*, that, as in section 375 of the Indian Penal Code, the words "sexual intercourse" and "penetration" have not been defined, and that, therefore, read in conjunction they should be taken to mean penetration of any part of male's body or any foreign object into any part of female's body without her consent. It was argued that there was need for expanded understanding of rape in the law and that it was time to give a goodbye to the traditional approach which, it was contended, reflected male views and male standards. The argument was rejected and one of the grounds of rejection was that the change could be brought about not through interpretative process of the courts but through legislation by artificially extending the definition of rape. However, the judgement makes an impassioned plea for change. The following observations are pertinent :[4]

> "The concept of crime undoubtedly keeps on changing with the change in political, economic and social set up of the country. The Constitution, therefore, confers powers both on Central and State Legislatures to make laws in this regard. Such right includes power to define a crime and provide for its punishment. Let the Legislature intervene and go into the soul of the matter. Rape is a serious matter though, unfortunately, it is not attracting serious discussion. Not even in law schools[5]. The seriousness of the offense with respect to oral intercourse or vaginal penetration otherwise than with penis is not realised though involves an act of sadism which is likely to cause the victim far greater pain and physical damage than rape itself[6]. Take for example, vaginal penetration by a bottle. In such case the shock, trauma and long-term psychological damage to the victim will be at least as serious as that which befalls rape victims and yet it would not be rape as defined in Section 375. Admittedly it would also be not an offense under Section 377 of the Code. It would thus be an offense punishable under Section 354 of the Code which provides maximum sentence of only two years. Does it not, to use the words of *Wordsworth*, display "voluptuous unconcern" of the ground realities: This surely fails to protect the integrity of woman and shows a bias against them

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3 See supra n. 1.

4 See supra n. 1 at. pp. 573-574

5 Susan Estrich, *Teaching Rape Law*, The Yale Law Journal (1992)

6 Jennifer Tenkin, *Towards a Modern Law of Rape*, The Modern Law Review (1982)

a bias continuing right from the days when the law of rape was concerned with theft of virginity and protection of property rights[7]. And when we think of integrity of the person violation of which "society cannot and must not tolerate[8] we think not only of women clad in chiffon, draped in misty soft powder sprinkled with a swansdown puff challenging to sink ships and stop heart beats, though they also are no less important, but of also those bare-faced a la Bankim Chandra's imprisoned within the confines of female subordination and restricted life chances.

I strongly feel that even if rape is taken to mean sexual intercourse without consent and "sexual intercourse" is confined to natural intercourse, the legislature must come out with a provision in the Indian Penal Code providing equally stringent punishment for non-consensual sexual penetration such as insertion of foreign objects into the vagina. The present law besides ignoring the larger issues of humiliation, degradation and violence reduces to a mockery a female's right to her bodily integrity.

Yet another thing which disturbed my judicial conscience in *Sudesh Jhaku's case* was the plight of very young and seriously traumatised children required to appear as witness in an open court. I observed[9]:

> "I hope that while the child is in the witness box every effort will be made by the learned trial judge to lessen her ordeal and that he will take care that nothing is said or done which causes unnecessary distress to her. The Prosecutor in his zeal might undervalue the child's feelings, there is need to keep a check on it. The defence counsel undoubtedly have a primary duty to their clients but they owe a duty towards the court and the judicial system also. They are expected to avoid needless abuse and harassment of the witness. If the court notices any departure from his course of conduct, it should rise to the occasion promptly and effectively. Child sexual abuse being one of the most serious and damaging criminal offences, the trial judge shall handle the proceedings with considerable sensivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. The feasibility of giving breaks during questioning may also be kept in mind though such breaks need not be long. If the Prosecution establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined

7 See Bracton, The laws and Customs of England, Vol. II FO 147

8 Susan Estrich, *Teaching Rape Law*, The Yale Law Journal (1992)

9 See supra n. 1 at 576

> favourably to provide such a screen. I may notice that the reason for such a step may not necessarily be a fear of the accused. It may of the courtroom itself. However, here is a word of caution. Since demeanour of a witness is always of some importance, the screen, if provided, should not come in the way of the trial judge to notice it. One thing more before I draw the curtain. It relates to child support persons in the courtroom. On that Mr. Jaitely had drawn my attention to the *Report of the special Adviser to the Minister of National health and Welfare on Child. Sexual Abuse in Canada. Reaching for Solutions. 1991.* In fact the guidelines delineated above have drawn inspiration from the said Report and as regards the child support this is what it states:
>
> > "There are situations in which it is desirable to have a social worker or other friendly but "neutral" adult visible to the child, or even sitting beside a young child who is testifying. While some judges have permitted this, others have not. There have been cases where the judge has ordered supportive persons to leave the court room, along with other members of "the public". I am leaving the matter to the good sense of the learned trial judge. However, one thing is certain. The proceedings have to be in the camera."

Why am I mentioning it when it is already there in the judgment? I am constrained to mention it because despite my best efforts, the Delhi High Court has done nothing in that direction and the child witness continues to suffer harassment and indignities. The lack of attention to children's rights in the new order is particularly disturbing when one considers that sexual maltreatment of children which is increasing at an alarming pace, essentially goes unnoticed. Right to be free from sexual exploitation has to be perceived as a human right and requires immediate attention. It is unfortunate that what is suggested by one wing of the judiciary to ameliorate their condition is ignored by its other wing.

The Supreme Court has been saying time and again that the courts are expected to show great responsibility while trying an accused on charges of rape and that they must deal with such cases utmost sensitivity[10]. The Supreme Court in 1996, and perhaps for the first time, decried casting of stigma on the victim on account of her having been promiscuous in the past. In *The State of Punjab v. Gurmit Singh & Ors.*[11] It observed[12]

10 *State of A.P.* v. *Gangula Satya Murthy*, 1997 Cri. L.J., 774

11 A.I.R. 1996 S.C. 1393 See also *State of A.P.* v. *Gangula Satya Murthy*, 1997 Criminal L.J 774 (SC);

12 Id. at 1403.

"Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has right to refuse to submit herself to sexual intercourse to anyone and everyone.... no stigma.... should be cast against such a witness by the courts, for after all it is the accused and not the victim who is on trial in the court."

In 1988, that is, almost eight years before the judgement of the Supreme Court in *Gurmit Singh's case.* an Additional District and Sessions Judge of Delhi while dealing with the question had observed in *State v. Parminder Singh etc.*[13]

"In fact, general evidence of person's sexual history - her "chasity" - is of very little value. Chief Justice Bray of the *South Australlian Supreme Court* pointed out in 1977 that no reasonable person could believe that "a willingness to have sexual intercourse outside marriage with *someone* is equal to (a willingness to) have sexual intercourse outside marriage with *anyone" (R.V. Gunj exparte stephenson* (1977) 17b S.A.S.R. 166 at 167). Prior consensual activity, without regard to surrounding circumstances, does not suggest subsequent consent. Contemporary sexual behaviour comes in many varieties reflecting differing degrees of interpersonal commitment.

The assumption underlying an interference from, say, reputation for a propensity to consent, to consent with the accused, is that the former evidence shows some character trait, some stable element of personality, which is likely to produce generally consistent behaviour across varying situations. But while this assumption has a great deal in common with traditional personality theory in psychology[14], empirical research has failed to verify the existence of personal disposition or even that behaviour is consistent across different situations[15]. Modern psychology, while not rejecting the existence of character traits, emphasises the importance of situation factors. Behaviour of an individual in a given instance is likely to be determined by an interaction between "psychic structure" and "situation". psychological studies suggest that, in the absence of comprehensive information about an individual's history and personality, the chances of accurate prediction are very low unless the individual is placed in substantially similar situations. It follows that a woman's reputation with respect to "chastity" is of little use in deciding whether she consented to intercourse with the accused."

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13 Sessions Case No. 5/85 decided by Jaspal Singh, Additional Sessions Judge on May 19, 1988

14 G. Allport, 'Personality - A Psychological Interpretation (New York, 1937)

15 15. H. Hartshorna & M.A. Maqy, "Studies in Deceit" (N.Y. 1928); W. Mischel, "Personality and Assessment" (N.Y. 1968)

Despite what the Supreme Court has said on the point, one finds some judges of the High Courts still viewing such victims with "the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion". Reliefs are still being granted to the persons accused of commission of rape on the mere allegation that the victim was "a lady of loose and licentious character"[16]

What is further disconcerting is that while the Penal Code has been amended to provide more stringent punishment to the persons guilty of commission of rape and while the Supreme Court has also been advocating deterrent punishment in such cases, some judges have felt that awarding of compensation to the victim would be adequate punishment. Reference in this connection may be made to a Division Bench judgement of the Bombay High Court in *Suresh Balkrishna Nakhava* v. *State of Maharashtra*[17] wherein a minor was raped repeatedly and impregnated and yet sentence was reduced to six months R.I. and a fine of Rs. 1000/- firstly on the ground that the victim, though minor, was a consenting party and secondly because the accused had deposited some amount for future maintenance of the victim. What makes the order most unfortunate is that the victim was not even considered fit to participate in the negotiations though by that time she had attained majority and her views were not even invited. It may not be out of place to mention that the Supreme Court in *Gurmit Singh's case*[18] had declined to award compensation as no scheme for grant of compensation had been formulated in terms of *Delhi Domestic Working Womens' Forum* v. *Union of India*[19]

I think it is time to not only give a fresh look to the law but also to sufficiently train the judges. It is only the judges who can make the law respectable and they must realise that it is the spirit and not the form of law that keeps justice alive. It was not for nothing that *Cardozo*,[20] *Jerome Frank* and *Harold Lasswell* who were the precursors of a flowering of Freudian empirical research in judicial behaviour shifted the focus of attention away from law as an impersonal ideological entity to the human judges. Cardozo has rightly observed that deep below consciousness are other forces, the likes and the dislikes, the predilictions and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge but then a judge has to be trained to overcome these predilections and prejudices. If he has what is styled as the judicial

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16 *Rohit Bansal* v. *State of Delhi* Crl. Misc. (Main) No.2619 of 1996 decided by a single judge of Delhi High Court on January 13,1997

17 1998 Cri. L.J., 284

18 See supra n. 11

19 1995 (1) SCC 14

20 Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven, Yale University Press, 1921)

temperament, he may well emancipate himself from what ails an ordinary mortal. Some judges, I am sorry to say, display lack of that temperament too.

I honestly feel that what to talk of common man, even professional understanding of the phenomenon of rape, the psychology of the rapist and the needs of the victim is still inadequate. Let us encourage research and understanding in this sphere. But, at the same time, let me, for particular attention of young women students refer to a controversial best seller by *Katic Roiphe* called "*The Morning After: Sex. Fear and Feminism on Campus*". It describes how young women on campuses are being encouraged to constantly see themselves as victims in every sexual encounter. This, she argues, is ironically the result of a mushrooming of date-rape workshops, sexual harassment, peer-counselling groups and women's centre hot lines on campuses. Ironic, because feminism which should have been a liberating influence on the sexuality. is in fact helping to produce self-images of victimisation in women. Let all concerned give a thought to it.

PRISONERS' RIGHT TO LIFE AND LIBERTY*

by

*P.P. Rao***

My friend and former colleague, Prof. Raghunath Kelkar, was born in the month of March over 70 years ago. He did his Law Degree course from Kohlapur Law College and obtained his post-graduate Degree from Bombay University. In 1955 he joined this prestigious University and, in due course, rose to become a Professor of Law. I joined the Faculty in 1961. During my stint of about six years as a Lecturer, our friendship matured into fraternal relationship. He had a magnetic personality with charming manners. He was intelligent and well-read. As a fresher in the Faculty, I received guidance from Kelkar. His appreciation of my case comments and short articles published now and then encouraged me to work more. He was often seen in the company of Prof. K. Ponnuswamy and Prof. B. Sivaramayya. All four of us used to frequent the Coffee House during the breaks between classes. There was no topic under the sun which we did not discuss, from the latest literature to the latest movie in Plaza or Odeon.

Kelkar had a disciplined mind and a strong sense of duty. He used to spend long hours in the library and also participate in seminars and panel discussions with thorough preparation. He was conscientious teacher and a painstaking researcher. I remember the trouble he took to collect primary material about persons released under the Probation of Offenders Act, 1958, from several institutions, unmindful of the strain on his meagre savings and time. He had an original mind and a positive approach to life. Till the end he tried to live upto the best traditions of the teaching profession.

In 1967 I was in a serious dilemma, unable to leave my permanent job in the Law Faculty when late Mr. N.C. Chatterjee, Senior Advocate, advised me to join the Bar. Kelkar told me not to miss the opportunity of joining the chambers of such an illustrious leader of the Bar who was keen to take me under his wings. His advice helped me to take the plunge into the legal profession. He showed me a bigger flat to shift, keeping in view my requirement of additional space for practice. I lived in that flat for 22 years before shifting to my own house.

During the Emergency, Kelkar suffered a lot. After the Emergency, one day he came and presented to me a copy of the first edition of his book "Outlines of Criminal Procedure". I noticed his sense of fulfilment and congratulated him on

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* Prof. R.V. Kelkar Memorial Lecture organised under the auspices of the Faculty of Law, University of Delhi on Saturday, March 02, 1996

** Senior Advocate, Supreme Court of India

his first major publication. The second edition is proof of the demand for the book. Again in 1984, I received an autographed copy of the second edition which I have preserved as a precious memento. His book 'Lectures on Criminal Procedure' was also popular.

Whenever I needed any guidance in Criminal law, Kelkar was always there to help. In *Mr. A.R. Antulay's* case, I needed the note of the First Law Commission headed by Macaulay on Sections 161 to 165 of the Indian Penal Code. It was not available in the Supreme Court Bar Library. I rang up Mr. Kelkar. He located it over night and gave it to me. A friend in need is a friend indeed! Unfortunately, his health began to fail and eventually his life was cut short. On November 18, 1986, the legal community lost a sincere and dedicated teacher in Mr. Kelkar. The following lines from Cardinal Newman's portrait of a gentleman seem to fit Kelkar:-

> "He is one who never inflicts pain. He may be right or wrong in his opinion, but he is too clear-headed to be unjust, he is as simple as he is forcible, and as brief as he is decisive. Nowhere shall we find greater candour, consideration, indulgence: he throws himself into the minds of his opponents, he accounts for their mistakes. He knows the weakness of human reason as well as its strength, its province and its limits."

PRISONS AND PRISONERS

Last December I was in Port Blair. I saw the infamous Cellular Jail and acquainted myself with the conditions of prisoners who were incarcerated there during the freedom struggle. Among them was Vir Savarkar, a revolutionary of the highest order. His name is permanently associated with the cell in which he was kept for almost a decade. Later I also attended the sound and light show after sunset. It gave an idea of the inhuman conditions in which several freedom fighters were kept for long periods. Among them were Hindus, Muslims, Sikhs and Christians belonging to different parts and speaking different languages. The largest number was of Bengalis, followed by Punjabis. Vir Savarkar did not know, for over two years, that his own brother was also lodged in another cell in the same jail. I saw the execution chamber. The noose is hanging loosely. The collapsible wooden planks on which the condemned prisoner was made to stand while the noose was put around his neck, the lever operated by the executioner as well as the deep pit into which the body would fall on pressing the lever are all intact. It was a grim scene. We can never redeem the debt we awe to those heroes and martyrs.

The framers of the Constitution were by and large political leaders and political sufferers who had first-hand experience of prison life. Pt. Jawahar Lal Nehru, Maulana Azad, Dr. Rajendra Prasad, C. Rajagopalachari, Sardar Vallabhbhai Patel, Sarojini Naidu, Gobind Ballabh Pant, to name a few, had languished in prisons during the struggle for Independence. They knew the value of personal liberty.

The Universal Declaration of Human Rights, 1948 recognised the inherent dignity of human beings. Art. 3 of the Declaration says "Every one has the right to life, liberty and security of person. Art. 5 declares that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. Art. 8 reads: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law." Art. 9 affirms: "No one shall be subjected to arbitrary arrest, detention or exile." Art. 10 says that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Art. 11 is equally important. It says: "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for the defence."

FUNDAMENTAL RIGHTS OF PRISONERS

The Constitution of India by incorporating the basic human rights in Part III and guaranteeing their enforcement through the superior Judiciary has made the law of prisoners more civilised. Article 21 declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 guarantees protection against arrest and detention in certain cases. It says that no person who is arrested shall be detained in the custody without being informed, as soon as may, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice.[1] It requires that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.[2] It mandates that no law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board is satisfied that there is sufficient cause for such detention.[3] There are several other safeguards incorporated in Art. 22 such as the right to know the grounds of detention and the right to make a representation[4] etc. Each one of them is a valuable human right.

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1 See Article 22(1) of the Constitution of India

2 Article 22(2)

3 Article 22(4)

4 Article 22(5) declares:

"When any person is detained in pursuanace of an order made under any law providing for preventive detention, the authority making the order, shall, as

Prisoners may be classified as detenus, undertrial prisoners and convicts. The question whether prisoners are entitled to the fundamental right to life and personal liberty came up for consideration in *State of Maharashtra* v. *Prabhakar Pandurang Sanzgiri*[5]. While in detention under the Defence of India Rules, 1962, Sanzgiri wrote a book of scientific interest and sought permission from the State Govt. to send the manuscript out of the jail for publication. On rejection of his request, he filed a Writ Petition which was allowed by the Bombay High Court. The Govt. preferred an appeal contending that the Bombay Conditions of Detention Order, 1951 conferred only certain privileges on the detenu; publication of book was not one of them. Therefore, the detenu had no right to publish the book. The Supreme Court rejected the contention and held that the conditions are restrictions on the personal liberty of a detenu; not privileges conferred on him.[6] Subject to the conditions contained in the Order, the liberty remains unaffected.[7] There was no condition in the 1951 Order prohibiting a detenu from writing a book or sending it for publication. The State of Maharashtra infringed the personal liberty of the detenu.[8] The Court observed that if the argument of the State Govt. were to be accepted, it would mean that the detenu could be starved to death if there was no condition of providing food to the detenu.[9]

D. Bhuvan Mohan Patnaik's case[10], raised a lively issue. The petitioners were naxalite prisoners undergoing sentences in the Central Jail at Visakhapatnam. Live wire mechanism was installed on the top of the compound wall of the jail in order to prevent any attempt on the part of the prisoners to escape by scaling the walls. The live wire was fixed at a height of 14' from ground level. It had no direct contact with the wall and no possibility of leakage of current through the wall. The prison walls themselves were situated at a distance of 20 feet from the cells where the prisoners were lodged. All prisoners were warned of the existence of the live wire. In a petition filed in the Supreme Court they contended that under Section 224 IPC if a prisoner escaped, the maximum sentence of imprisonment that could be awarded was two years whereas a prisoner lodged in the jail who attempted to escape by scaling the wall is subjected to the penalty of instantaneous death without any

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soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

5 (1996), 1 SCR 702

6 Id. at 708

7 Ibid

8 Ibid

9 Ibid

10 *Bhuvan Mohan Patnaik* v. *State of A.p.*, (1975) 2 SCR 24

trial and without observing any procedure established by law. After giving serious thought to the contention, the Court held that whatever be the nature and extent of the prisoners' fundamental right to life and personal liberty, they have no fundamental freedom to escape from lawful custody. Therefore, they cannot complain of the installation of a live wire mechanism.[11] Incidentally, the Court declared that convicts are not by mere reason of conviction, deprived of all the fundamental rights which they otherwise possessed including protection of life and liberty guaranteed by Art. 21.[12]

SOLITARY CONFINEMENT

Sunil Batra v. *Delhi Administration*[13] is a landmark judgment by a Constitution Bench in the area of fundamental rights of prisoners. Under Section 30(2) of the Prisoners Act, 1894 every prisoner under sentence of death shall be confined to a cell apart from all other prisoners and shall be placed by day and by night under the charge of a guard. Sunil Batra was sentenced to death having been found guilty of a gruesome murder compounded with robbery. He challanged the same invoking Articles 14, 19 and 21. The plight of a prisoner kept in solitary confinement is pathetic. In the words of V.R. Krishna Iyer, J.

> "Grim walls glare at him from all sides night and day; his food is inserted into the room and his excretory needs must be fulfilled within the same space. No pillow to rest his restless head, no light inside, save the bulb that burns blindly through the night from outside. No human face or voice or view except the warder's constant compulsory intrusion into the prisoner's privacy and the routine revolutions of officials' visitations, punctuated by a few regulated visits of permitted relatives or friends, with iron bars and peering warder's presence in between. No exercise except a generous half hour, morning and evening, in a small, walled enclosure from where he may do asanas were he yogi, do meditation were he sanyasi and practise communion with Nature were he Wordsworth or Whiteman or break down in a speechless sorrow were he but common clay. A few books, yes; newspaper? No. Talk to others? No; save echoes of one's own soliloquies; no sight of others except the stone mercy in pathetic fallacy."[14]

The Supreme Court upheld the contention of Batra and declared:

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11 Id at 30

12 Id at 26 and 27

13 (1979) 1 SCR 392

14 Id. at 424

> "Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. Is a person under death sentence or undertrial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears? Emphatically no..... The convict is not senteced to imprisonment. He is not senteced to solitary confinement. He is a guest in custody, in the safe keeping of the host-jailor until the terminal hour of terrestrial farewell whisks him away to the halter. This is trusteeship in the hands of the Superintendent, not imprisonment in the true sense."[15]

BAR FETTERS

In another part of the same judgment, the Supreme Court dealt with the case of *Charles Sobraj*. His grievance was against the disablement, by bar fetters of undertrials and for unlimited duration. The Judges visited the Tihar Jail and saw Sobraj standing in chains in the yard, with iron on wrists, iron on the ankles, iron on waist and iron to link up firmly rivetted at appropriate places. There were a number of undertrial prisoners with bar fetters in the jail and many of them were minors.

Reacting sharply to the plea of prison authorities based on security aspect, the Court observed:

> "Assuming a few are likely to escape, would you shoot a hundred prisoners or whip everyone every day or fetter all suspect to prevent one jumping jail? These wild apprehesions have no value in our human order, if Articles 14, 19 and 21 are the prime actors in the constitutional play..... Life and liberty are precious values. Arbitrary action which tortuously tears into the flesh of a living man is too serious to be reconciled with Articles 14 or 19 or even by way of abundant caution."[16]

The Court laid down a set of conditions precedent for placing bar fetters on prisoners. These are applicable to all prisoners.

HANDCUFFS

In *Prem Shankar Shukla* v. *Delhi Administration,*[17] the complaint was against handcuffing of undertrial prisoners by escorts while taking them from the jail to Court and back as a matter of routine. This provided the occasion for

15 Id. at 428 and 451

16 Id. at 472 and 475

17 (1980) 3 SCR 855

the Supreme Court to emphasise that the guarantee of human dignity forms part of a constitutional culture. The Court declared that handcuffing is prima facie inhuman and, therefore, unreasonable.

> "Absent fair procedure and objective monitoring to inflict 'irons' is to resort to zoological strategies repugnant to Art. 21..... Insurance against escape does not compulsorily require handcuffing. There are other measures whereby an escort can keep safe custody of a detenu without the indignity and cruelty implicit in handcuffs or other iron contraptions."[18]

In *Citizens for Democracy* v. *State of Assam & Ors.*,[19] the Supreme Court received a letter from Mr. Kuldip Nayar, an eminent journalist and President of Citizens for Democracy, stating that he found to his horror in the Government Hospital, Guwahati, seven TADA detenus put in one room, handcuffed to their bed despite the fact that the room in which they were locked had bars and was locked. Outside a posse of policemen stood with guns on their shoulders. He was told by the detenus that they had to pay for their medicine from their own pockets. He approached the Court to intervene in the matter. The Court treated the letter as a Writ Petition on behalf of the detenus and called upon the State of Assam to reply. The State pleaded that the detenus were hardcore ULFA activists and earlier as many as fifty one detenus had escaped from custody including eleven terrorists from different hospitals and seven of them had escaped from Guwahati Medical College Hospital. Relying on the law declared in *Prem Shankar Shukla*[20] and *Sunil Batra*[21] the Court held that the detenus cannot be in a worse condition while in hospital under treatment as patients as compared to the Jail, because while in Jail, they were not handcuffed. The handcuffing and in addition tying the patients-prisoners with ropes when lodged in the hospital is inhuman and in utter violation of the human rights guaranteed under the International law and the law of the land.[22] The Court observed that in order to safeguard against any attempt to escape extra armed guards can be deployed around the ward of the hospital where the detenus are lodged.[23] The Court issued a general direction that such handcuffing should be resorted to only with the permission of the Magistrate concerned granted after being satisfied that a particular prisoner is likely to jump jail or break out of the

18 Id. at 872

19 (1995) 3 SCC 743

20 See Supra n. 17

21 See Supra n. 13

22 See Supra n. 19 at 750

23 Ibid

custody.[24] I had the privilege of assisting the Court in this case on the request of the Court.

EXECUTION OF DEATH SENTENCE

One of the questions considered in *Deena @ Deen Dayal* v. *UOI & Ors*[25] was whether a sentence of death can be executed in a cruel, or degrading manner. The Court held that hanging by rope does not violate Art. 21 because it causes no greater pain than any other known method of executing the death sentence and that it involves no barbarity, torture or degradation.[26] The Court declared:

> "The concern of law has to be to ensure that the various steps which are attendant upon or incidental to the execution of any sentence, more so the death sentence, do not constitute punishments by themselves. If a prisoner is sentenced to death, it is lawful to execute that punishment and that only. He cannot be subjected to humiliation, torture or degradation before the execution of that sentence, not even as necessary steps in the execution of that sentence. That would amount to inflicting a punishment on the prisoner which does not have the authority of law. Humaneness is the hallmark of civilised laws. Therefore, torture, brutality, barbarity, humilation and degradation of any kind is impermissible in the execution of any sentence."[27]

In *Attorney General of India* v. *Lachma Devi & Ors.*,[28] the Court declared that the execution of death sentence by public hanging would be a barbaric practice, clearly violative of Art. 21 of the Constitution. Very rarely, the Attorney General moves the Court suo motu challenging the judgement of a High Court. In this case, the Rajasthan High Court had directed execution of death sentence by public hanging at the stadium ground or Ramlila ground of Jaipur after giving wide-spread publicity through the media of the date, time and place of such execution. However, by a subsequent order the Court directed that the execution of the death sentence should be carried out in terms of the procedure provided in the Rules mentioned in the Jail Manual only, unless by that time any amendment was made in the rules. The Jail Manual did not contain any provision permitting public hanging. The Court declared:

> "The direction for execution of the death sentence by public hanging is, to our mind, unconstitutional and we may make it clear that if any Jail

[24] Id at 751

[25] (1984) 1 SCR 1

[26] Id. at 58 and 59

[27] Id. at 59

[28] (1989) Suppl 1 SCC 264

> Manual were to provide public hanging, we would declare it to be violative of Article 21 of the Constitution. It is undoubtedly true that the crime of which the accused have been found guilty.... is barbaric and a disgrace and shame on any civilised society which no society should tolerate; but a barbaric crime does not have to be visited with a barbaric penalty such as public hanging. We should wholly and unconditionally delete the direction given by the High Court in regard to the execution of the death sentence by public hanging."[29]

This pronouncement underlines that a condemned prisoner is entitled to die with dignity and he cannot be subjected to any barbaric manner of execution of death sentence. You are all aware of the reports about the manner in which Zulfikar Ali Bhutto was hanged.

CUSTODIAL CRIME

In *Raghbir Singh* v. *State of Haryana*,[30] the Court came across a case of murder of a suspect in police lock-up. Following a theft in some Officer's house, the police took into custody a few suspects and began to torture them as part of the process of investigation. One of the tortured suspects succumbed to his injuries. Medical examination revealed that death was caused due to asphyxiation. The police investigator was convicted under section 302, I.P.C. and awarded life sentence. The Supreme Court while dismissing the Special Leave Petition expressed its concern about the violation of human rights in police lock up. The court observed:

> "We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy; the violation is perpetrated by the Police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-ups, if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order."[31]

[29] Id. at 264 and 265

[30] (1980) 3 SCC 70

[31] Id. at 71

WOMEN PRISONERS

In *Sheela Barse* v. *State of Maharashtra*,[32] the Petitioner, a Journalist, in a letter addressed to the Court complained of custodial violations of rights of women prisoners while confined in the lock-up. She had interviewed some women prisoners lodged in the Bombay Central Jail and learnt that they had been assaulted by the police. The Court treated the letter as a Writ Petition and called upon the I.G. prisons, Maharashtra, the I.G. police and the Superintendent of the Central Jail to answer. The Court also directed the director of college of Social Work, Bombay, to visit the Jail, interview the prisoners named in the complaint and submit a report. After persuing the report the Court directed that there should be separate lock ups for female suspects which should only be guarded by female constables. Female suspects should not be kept in a police lock-up in which male suspects are detained. Interrogation of females should be carried out only in the presence of female police officers/constables.[33] The Sessions judge should make surprise visits to the police lock-ups in the city periodically.[34] The magistrate before whom an arrested person is produced should inquire from him or her whether he or she had any complaint of torture or mal-treatment in police custody.[35] The prisoners should be provided legal assistance.[36]

Right to health is a fundamental right flowing from Art. 21. it is available to all persons including prisoners. In Pt. *Parmanand Katara* vs. *Union of India*[37] the Supreme Court held that the State has an obligation to the patient whether he be an innocent person or be criminal liable to punishment under the laws of the society to preserve life. The laws do not contemplate death by negligence which tantamounts to legal punishment.[38] Under Art. 21 a doctor at the Government hospital is duty bound to extend medical assistance for preserving life.[39]

Tukaram & another v. *State of Maharashtra*[40] is a case of alleged custodial rape. It is widely known as Mathura rape case. Mathura was a teenage girl at the relevant time. Her parents died when she was a child. She was living with her

32 (1983) 2 SCC 96
33 Id. at 103
34 Ibid
35 Id. at 104
36 Id. at 103
37 A.I.R. 1989 S.C. 2039
38 Id. at 2043
39 Ibid
40 (1979) 1 SCR 810

brother Gama. She developed intimacy with one Ashok. They decided to marry and left the place. Gama lodged a report at the police station alleging that Ashok and his people had kidnapped Mathura. The Head Constable called all of them to the police station. After talking to them he sent out Ashok and others, but asked Mathura to wait. Ashok and others waited outside the police station for Mathura to join them. The Head Constable took Mathura into a latrine and raped her. Thereafter another constable fondled her private parts, but could not rape her as he was highly intoxicated. After some time Ashok and others grew suspicious and shouted. A crowd getherd at the police station. A complaint was lodged and she was examined by a doctor. The presence of semen was noticed on the girl's clothes. The two Policemen were tried for rape. They were acquitted by the Trial Court, but on appeal the High Court convicted them. The Supreme Court allowed their appeal taking the view that sexual inter-course took place with her consent.[41] The judgment of the Supreme Court was severely criticised by women activists and others. Later on the law was amended by inserting section 114A in the Evidence Act provideing for presumption as to absence of consent in certain prosecutions for rape. If the woman alleged to have been raped states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. This presumption will arise only where sexual inter-course by the accused is proved and the question is whether it was with or without the consent of the woman. Simultaneously the Criminal Procedure Code was also amended providing for a trial in rape cases in camera.

PROCEDURAL SAFEGUARDS

In *Madhav Hoskot* v. *State of Maharashtra*[42] the Supreme Court dealt with another facet of fair and reasonable procedure. The petitioner who was a Reader in Saurashtra University started issuing conterfeit degrees and was prosecuted for various offences including forgery. The Court convicted him but let him of lightly by sentencing him to simple imprisonment till the rising of the Court and some fine. Cross appeals were filed, one by the State for enhancement of sentence and the other challenging the conviction and sentence. The High Court allowed the State appeal and enhanced the sentence to three years R.I. while dismissing the appeal against conviction. This was in November, 1973. The appellant filed a special leave petition in the Supreme Court four years later. He explianed the delay stating that a copy of the judgment pronounced in 1973 was granted to him by the High Court in 1978. The Court pointed out that the history of personal libery is largely the history of procedural safeguards and one component of fair procedure is at least a single right of appeal on facts against

41 Id. 817
42 (1979) 1 SCR 192

conviction which is provided in the Criminal Procedure Code.[43] Article 21 mandates service of a copy of the judgement to the prisoner in time to file an appeal and providing free legal service to a prisoner who is indigent.[44] While dismissing the Special Leave Petition the Court gave general directions to trial courts and jail authorities.

In the area of basic human rights, the Supreme Court has made significant contribution by giving very liberal interpretation to the provisions of Part-III and in particular the fundamental right to life and personal liberty. No other fundamental right has received such expansive interpretation as this most basic right. However, it is a matter of deep regret, that it is this very right which is violated most. Increasing incidence of custodial crime is a matter of serious concern to every citizen of India. The revelations in the on going inquiry into the custodial death of Rajan Pillai seem to indicate a deplorable state of affairs in the capital's most widely known jail. As more and more VIPs are being lodged in Tihar Jail, one has reason to hope that the conditions will improve. The Supreme Court alone cannot ensure protection of this precious right. It also depends on the Government, the police and the jail authorities.

So far I have dealt with the rights of prisoners as they exist in books, i.e. in the Constitution and the Judgments of the Supreme Court. Law on paper and the law in operation on ground are not always identical. The need for prison reforms has been felt since long. The National Police Commission (1977-80) looked into issues like arrest; detention in custody, interrogation of women and delay in investigation (which contributes to undue detention in custody of non-convicted persons). Besides highlighting the need to adhere to the law, the Police Commission made wide ranging suggestions for amendment of the law and procedures to cut down delays at the investigation and trial stage and to obviate custodial violence and lock-up illegalities. The NPC favoured a system of periodic visits to inspect and report on police lock-ups. The All India Committee on Jail Reforms (1980-83) chaired by Justice A.N. Mulla in its report observed that : "Overcrowded prisons, the prolonged detention of undertrial prisoners, unsatisfatory living conditions and allegations of the indifferent and even inhuman behaviour by prison staff had repeatedly attracted the attention of critics over the years. Unfortunately, little has changed. There have been no worthwhile reforms affecting the basic issues of relevance to prison administration in India." Not only the National Police Commission and the Mulla Committee but also Justice Krishna Iyer's Committee and the National Human Rights Commission have made numerous valuable recommendations to bring about improvements and reform in the jail administration and in the entire criminal justice system.

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43 Id. 203

44 Ibid

In December, 1994 the Common Wealth Human Rights initiative organised a workshop on "BEHIND PRISON WALLS - POLICE, PRISON AND HUMAN RIGHTS" at Delhi. Deligates from Sri Lanka, Pakistan and Bangladesh also participated in the workshop. Subsequently a report on the workshop was published. It throws considerable light on the conditions prevailing in prisons in our neighbourhood. I am quoting a few lines about each country from the said Report to show that prisoners' rights are in jeopardy in all countries of the region.

PAKISTAN

"Third-degree methods are used for obtaining confessions. Torture in police custody has become the norm rather than an exception. Sometimes relatives of suspects are detained in police custody to force them to disclose the whereabouts of suspects or accused."

"Seventy five to eighty percent of women in jails were in for Hudood offences. (The Hudood ordinance promulgated during the regime of Zia-Ul-Haque lays down that if a victim of rape fails to prove her innocence, she is guilty of adultery). In some of the cases that went before the courts, the judge had to rule that the Hudood charge had been wrongfully made."

"Violence against women continued to worsen. A woman was raped every three hours, every other woman raped was a minor, and every fourth victim was gang-raped. In an increasing number of cases influential persons were involved in such crimes."

"Police excesses against women in custody were a routine. The Hudood ordinance came handy for taking women into custody and the requirement that a close examination of women should only be made by women and that arrested women should be transferred to judicial custody was customarily ignored."

BANGLADESH

"There are cases in which persons are arrested at random without warrants in contravention of Section 54 of the Criminal Procedure Code. This section, although innocent in appearance, has given the police power to detain whom they will."

"There are reports that the police, in its endeavour to complete a case successfully, often exerts pressure on the detainee with the result that the accused either suffers serious injury or expires due to 'heart failure'. Autopsies when carried out, if the state of the body so permits, often tell a different story. At a time when several human rights activists all over the world are striving to uphold human dignity at home, at work, in prison and elsewhere, prisoners of all categories continue to suffer horribly, particularly in the Third World. Bangladesh is no exception. Little is known about prison conditions and the

treatment of prisoners in Bangladesh and little has been done to ameliorate the conditions which, thanks to the efforts of a few non-governmental organisations, have been brought to light."

"While our socio-cultural system is distinctly unfriendly towards women, the male-dominated police force is affected by a gender bias in its attitude towards women undertrials and prisoners. The hostility is more pronounced where the female victim is poor, helpless and illiterate. Most police stations do not have female constables or officers, so that women usually find themselves at the mercy of male officers and constables. The power of the police is often beyond control by law or authority and becomes even more unaccountable since the state itself depends on these police powers and condones their misuse."

SRI LANKA

"Three factors have contributed to the incidence of custodial violence, the first is the possibility of keeping detainees incommunicado under national security laws. Secondly, there is no accountability for what is done while in custody. Thirdly, confession obtained while in custody are admissible in trials under these laws. When an alleged voluntary confession is marked as evidence, it is per se admissible. Without further proof, and on the basis of his or her confession alone, an accused can be sentenced. Further, the burden of proof that the confession may not have been voluntary is cast on the accused."

In the course of his inaugural address, Justice V.R. Krishna Iyer observed as follows: "The Indian Supreme Court has held that arresting and handcuffing a person offends his inherent dignity and is violative of his human rights. Notwithstanding the decision of the courts, the police have been marrily carrying on with their practice and, shall I say, the judges have been looking on nonchalantly as prisoners or arrestees are brought handcuffed, before them. The lawyers are often times indifferent to or insensitive to this unfortunate breach of human rights except when lawyers are handcuffed. We must seek activisation of the benches and the bar. We need conscientisation of policemen and policewomen. We have to start a new era. How can that be achieved?..... Now I come to prisons. Look, behind the dark cells and tall bricks of law, because every edifice is made of bricks of law. What is happening there? Nobody knows. The outside world does not know. It is a cosmos by itself and sex or shall I say sex tourism is commonly flourishing inside prisons. Young persons are brought in and they circulate like currency notes. Sex and harrassment occur inside prisons. Sex-straved adult prisoners, sex terrorists inside. We have no way of stopping it. Sometimes even prison managements are party to it..... What is a prison for? Is it to brutalise a person, to embitter him, to make him hostile or more hostile to society? or is it to redeem the inner being that is there in every person? We talk of dignity. Dignity is a materialist manifestation of

divinity. There is divinity in every person and a dignity in him or her. How are we going to protect this dignity and divinity in every person?"

The National Law School of India University, Bangalore has started Human Rights Orientation Course for Police Officers in the State of Karnataka. The Delhi University may consider starting similar Orientation Course for the benefit of prison officials including jail doctors, not only those manning Tihar Jail, but also others who are manning jails in different parts of the country. They should be made to feel that every prisoner is a human being and is entitled to live with dignity inside the jail also and it is the duty of jail staff to protect his basic human rights. In the ultimate analysis the people of India should be increasingly vigilant and zealously preserve and protect their basic rights. Eternal vigilance is the price of liberty!

NEED FOR A CONSTITUTIONAL REQUIREMENT OF EQUAL OPPORTUNITY IN EMPLOYMENT IN PRIVATE CORPORATIONS : AN INDIAN PERSPECTIVE

Carlos A. Austin[*]

INTRODUCTION

A number of socialist experiments have failed in the later part of the century. As a result, from Asia to Africa to Latin America one message has rung with a special resonance and meaning: governments do not manage economies very well. Countries the world over, are abandoning state-managed economies and embracing capitalist system. In India, the sitution is no different. There is too much poverty and illiteracy and malnutrition. And there are not enough roads, ports, electricity and clean water, nor the financial capital to do anything about them. The government figured it had little choice but to submit to capitalism or see the country literally fall apart. But where the memory of colonial exploitation is only 50 years short, concerns abound regarding the "recolonization" of the nation by "unscrupulous capitalists". Few Indians have forgotten, India was in fact originally colonized by the English in the form of a multinational company, the East India Company. The ensuing economic anxiety has penetrated the Indian mindset and has in fact gone to the heart of the social and political fabric of the nation, its Constitution.

The Indian Constitution in several places provides for economic justice and equality of opportunity. The founders of the post-colonial state crafted a Constitution that envisioned a Government that would wield the majority of the economic power. They also provided mechanisms to help ensure that all the castes and classes in the country would have an opportunity to participate in the economy. Now that this economic power will be transferred to the private sector, is there any justification - whether based on constitutional grounds or public policy concerns-to insist that the private corporations also provide opportunities to all castes and classes of India? This paper responds to the question as to whether by way of constitutional or public policy arguments a case can be made for the application of some sort of equality of opportunity requirement for the impending Indian capitalist revolution.

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I : SOLUTIONS IMPOSED BY THE JUDICIARY

We must address one pervasive issue, before we begin direct analysis: the threshold issue of judicial review. To what extent and in what circumstances can an Indian court impose a judicial solution on a socio-economic problem? The concepts of judicial restraint and activism have been widely debated in each of the major common law jurisdictions. And the Supreme Court of India is no stranger to an activist stance in order to support the poor. It is understood that legislation is the preferred option to provide relief to the country's social and economic ills, but the judiciary also has a role to play. Justice Krishna Iyer expresses the Court's view:

> "The best solution [is legislation], but when law-makers take far too long for social patience to suffer, courts have to make do with interpretation and carve on wood and sculpt on stone without waiting for the the distant marble."[1]

Article 37 of the Constitution asserts that it is the duty of the State to apply the Directive Principles in making laws. This is of course primarily understood to be applied to legislators. But the judiciary has also been incorporated as part of the State under Article 37 and hence has applied the Directive Principles when issuing judgements.[2] This view of judicial activism has been expounded by the Supreme Court in *State of Kerala* v. *T.P. Roshna*[3]. The Court found a government plan of admission to medical school unconstitutional. It, however, provided suggestions for proper implementation, observing that merely striking down the statute would not have achieved justice, but rather would have aggravated the injustice. The Court states:

> "The root of the grievance and the fruit of the writ are not individual but collective and while the 'adversary system' makes the judge a mere umpire, traditionally speaking, the community orientation of the judicial function, so *desirable in the Third World Remedial jurisprudence, transforms the Court's power into affirmative structuring of redress so as to make it personally meaningful and*

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1 *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1548

2 *Kesavananda Bharti* v. *State of Kerala* AIR 1973 SC 1461 at 1952 (Per Methew, J.) See also *State of Kerala* v. *N.M. Thomas*, AIR 1976 SC 490; *K.C. Vasantha Kumar* v. *State of Karnataka*, AIR 1985 SC 1495 at 1502

3 AIR 1979 SC 765

socially relevant. Frustration of invalidity is part of the judicial duty; fulfillment of legality is complementary"[4].

The Court has found that in India's special circumstances judicial restraint will not always achieve justice, asserting, in fact, that if interests of the poor are at stake, jurisprudence should be proactive.[5]

It is with this backdrop of justice that we turn to the question posed in Section II.

II: Can a Private Corporation be considered part of the State?

In order to make the constitutional argument, there are two questions to address. The threshold issue would be whether private companies can be included in the definition of the State as per Article 12, in order that the relevant fundamental rights of Part III of the Constitution can be applied to them. Then, if certain fundamental rights can be applied, the question is whether or not equality of opportunity is significant enough, among those rights, to be applied to industrialists.

Article 12 of the Constitution defines the State as follows:

> "Definition. In this Part, unless the context otherwise required, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or *other authorities* within the territory of India or under the control of the Government of India." [emphasis added].

The argument for a possible expansion of the traditional concept of the State lies in the words "other authorities." Can private corporate entities be included within this concept? Before analyzing whether expansion of the traditional concepts is reasonable, however, it is important first to review the case law regarding how the courts have viewed the scope given to the definition of the State.

The first case to address this matter was *University of Madras* v. *Shantha Bai*[6]. A woman was denied entry into a college at Udipi, which was affiliated

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4 Id. at 776; [emphasis added]. See also *Pradeep Jain* v. *Union of India* AIR 1984 SC 1420; *Dinesh Kumar* v. *Moti Lal Nehru Medical College,* AIR 1985 SC 1059 and AIR 1986 SC 1877; *K.C. Vasantha Kumar* v. *State of Karnataka,* AIR 1985 SC 1495.

5 In *Peoples Union for Democratic Rights* v. *Union of India* AIR 1984 SC at 1478, Justice (later Chief Justice) Bhagwati wrote that "the time has now come when the courts must be the courts of the poor and struggling masses of the country. They must shed their character as upholders of the status quo."

6 AIR 1954 Mad. 67

with the University of Madras. The University had instructed all institutions affiliated with it not to allow female students without its permission so that it could ensure that proper facilities were available for them. The lower court found that the order had violated Article 15(1)[7] of the Constitution. The High Court, however, reversed on the grounds that Article 15(1) is only applicable to the "State". The Court understood that "other authorities" should be interpreted consistently with the principle of "*ejusdem-generis.*" Therefore, since each of the entities quoted before "other authorities" in Article 12 are authorities exercising governmental functions, other authorities should also share that quality. As a university does not, it cannot be considered as included within the definition of the State.

The Supreme Court subsequently overruled the *University of Madras* case in *Rajasthan State Electricity Board* v. *Mohanlal*[8]. Here, the petitioner respondent claimed that his right to equality under Articles 14 and 16 was violated because a worker with less seniority had been promoted before him. The court first had to address the question as to whether the Electricity Board was the State according to Article 12. The appellant, relying on the logic of the University of Madras decision, claimed that the Electricity Board did not exercise any governmental function or sovereign power, but was engaged in commerce. The Court thought the rule of *ejusdem-generis* inapplicable, as there was no common genus running through each of the entities cited in Article 12. The Court instead relied on the dictionary meaning of authority, "a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue producing public enterprise."[9] The court went on to suggest that "all bodies created by a statute on which powers are conferred to carry out governmental or quasi governmental functions"[10] can be considered "other authorities" under Article 12.

The Court did not expressly limit the application to such bodies, but the Court did impose such a requirement in *Sukhdev Singh* v. *Bhagatram*[11]. Employees of the Industrial Finance Corporation, the Life Insurance Corporation and the Oil and Natural Gas Commission claimed that their fundamental rights under Articles 14 and 16 were violated; because their discharge was against the company's regulations. In considering the question, the Court held that other authorities must satisfy a sovereign power requirement

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7 Article 15(1) states "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

8 AIR 1967 SC 1857

9 Id. 1862

10 Ibid.

11 (1975) 1 SCC 421

to be considered as State, claiming that each of the corporations were incorporated by statute empowering them to make regulations. This statute, it was argued, gave their regulations the force of law. In a separate opinion, Justice Mathew argued for an expansion of the concept of the State to bodies weilding power due to the changing nature of the economy. He explained that the Constitution provided that individuals' fundamental freedom should be protected against the intrusion of the Government because the State was seen to wield great power. The state was not only expected to wield great judicial, executive and legislative power, but also the founders foresaw a State that would be heavily involved in commerce as permitted in Article 298.[12] Justice Mathew went on to argue that since the economy had evolved into one where the State did not directly wield the economic power, the constitutional limitations must be applied to those that did—the government companies. He then suggested that any company that was an instrumentality of the State should not be permitted to infringe upon fundamental freedoms. In this 1975 case, Justice Matthew did however, deny the application of Article 12 to private corporations. The agency and instrumentality test as originally asserted by Justice Mathew was first applied to a government corporation in *Som Prakash Rekhi* v. *Union of India*.[13] In this case the Court adopted the five criteria test for designating an organisation as an instrumentality of the State derived from *R.D. Shetty* v. *International Airport Authority*.[14] In the *Som Prakash* case the Court derived the following five guidelines:

> "i. One thing is clear, that if the entire share capital of the corporation is held by the Government, that would go a long way towards indicating that the corporation is an instrumentality of Government.
>
> ii. Existence of 'deep and pervasive State Control may afford an indication that the Corporation is a state agency or instrumentality.'
>
> iii. 'It may also be relevant factor... whether the corporation enjoys monopoly statuts which is State conferred or state protected.'
>
> iv. 'If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government.'
>
> v. 'Specifically, if a department of Government is transferred to a corporation it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of government."[15]

The Court went on to explain that no one factor was conclusive, but it was the cumulative effect of all the factors taken together.

This case set the foundation for the interpretation of the words "other authorities" of Article 12. Since the *Som Prakash* case, the Supreme Court has had several cases that have required it to determine whether a government company is the State within the scope of Article 12 and has not hesitated to act under the proper conditions as it did then.[16]

The underlying rationale for the expansion of the concept of the State into the agent or instrumentality of the state doctrine was rooted in the changing nature of the economy. Justice Mathew wrote his opinion in the *Sukhdev Singh* case in 1975. Therefore, a review of two sets of chages in the economy is in order : first, a review of the changes in the economy to which Justice Mathew referred and scond, the changes since his opinion. If the logic of Justice Mathew's opinion is applied, the changes since the 1975 opinion will indicate that a fundamental shift in the doctrine may be in order to preserve the purpose of Part III of the Constitution- the protection of individual rights.

III: A Review of the Economy

The economic policies of India were developed by its first Prime Minister, Pandit Jawaharlal Nehru. His view of India would be predominantly a socialist one. "The key to the solution of the world's problems and of India's problem lies in Socialism, and when I use this word I do so not in a vague humanitarian way but in the scientific economic sense.... I see no way of ending the poverty, the vast unemployment, the degradation and subjection of Indian people except

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12 Article 298 states "The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose"

13 *Som Prakash Rekhi* v. *Union of India* (1981) 1 SCC 449.

14 (1979) 3 SCC 489

15 See supra n. 13 at 471

16 In *A.L. Kalra v. Project and Equipment Corporation* (1984) 3 SCC 316, on the basis of the respondent's own concession and the court's finding of instrumentality, the Supreme Court found the government company to be the State. The corporation was a subsidiary of State Trading Corporation, which was government of India undertaking, seperated and itself became a government of India undertaking. Hence, this government company was determined to be the State.

through socialism."[17] Nehru sought to achieve these goals by creating a mixed economy, with the State playing the dominant role in industries important to the national interest, while the private sector existed only in non-critical areas. "I have no shadow of doubt that if we say 'lop off the private sector', we cannot replace it adequately... Where there is such a vast field to cover, it is foolish to take charge of the whole field, when you are totally incapable of using that huge area yourself. Therefore you must not only permit the private sector but I say encourage it in its own field."[18]

In attempting to avoid the concentration of economic power in a few hands, Nehru, and the other founders of the post-colonial state, thought that government involvement in certain key industries would reconcile economic development with distributive justice.

Gradually, the principles of a mixed economy came to be practiced in a form of state capitalism. The government would set up statutory companies and government companies in order to manage and produce the goods and services of strategic importance to the nation more efficiently. This policy would enable the Government to harness a group of professional managers and talent while maintaining operational autonomy from the State. The State could ensure that the public's interest in strategic industries was maintained because the government was to still keep ultimate control and responsibility of the entities. The change then was not to be seen as structural. The public sector was primarily in infrastructure-basic and capital goods industries e.g. steel, heavy machinery, fertilizers- instead of consumer goods. Due to the long gestation periods, low returns on investment and large initial investments, the government found that it was, at a minimum, important to involve itself in these critical industries. The forgoing changes are those to which Justice Mathew referred.

After the *Sukhdev* case, very minor economic reforms were begun by Indira Gandhi when she returned to power in 1980. Her son, Rajiv Gandhi, expanded these reforms in the latter half of the 1980's under the New economic policy. He

In *central Inland Water Transport Corporation v. Brojo Nath Ganguly* (1986) 3 SCC 156, the government owned all shares, and managed the company. The company performed an important public function of river navigation and hence found to be the State.

In *Star Enterprises v. CIDC of Maharashra Ltd. (1990) 3 SCC 280* the government company again determined to be the State.

In *Lamba Industries* v. *Union of India* (1991) 2 SCC 407 the Court found that whether a government company can be an authority within the meaning of Article 12 is no longer a relevant question. It is a settled fact of law.

17 Bhuleshkar, Ashok V., Indian Economic Structure and Policy, (1982), p. 5.

18 Id. at p. 22.

altered the pattern of industrial production, thereby stimulating a short-lived economic boom.

The most drastic structural shifts to the economy occured in 1991. At the time, there were several factors operating to encourage such changes. The foreign exchange reserves were particularly low, standing at approximately $1 billion, which was insufficient to meet the import bill for more than 2 weeks. Imports for the nation were on the rise, as were import costs due mostly to increases in the cost of oil following the Gulf War. The War also precipitated a sharp fall in remittances from abroad. Moreover, non-resident Indians began significant withdrawl of foreign exchange deposited in the country. India's borrowing from private parties had reached a level at which the nation's ability to make repayments was uncertain. Hence, the country's creditworthiness was in question by international credit rating agencies, making private foreign creditors reluctant to lend more funds.

Then Prime Minister Narasimha Rao and his economic advisers believed that balance of payments problem was due to the Indian currency and other prices being fixed by the State. Therefore, they determined that the State should withdraw from all economic activity, except where absolutely necessary. This withdrawal marked the origins of the dismantling of the public sector enterprises. The Government decided that the economy must be left primarily to private sector companies. It ended the government monopoly in many areas of the economy previously considered fundatmental to the national interest. The Government liberalized foreign investment rules, allowing investment on power, roads, ports, telecommunications, etc. In short the Government had realized it must employ economic policies that made the most efficient use of resources. As a result, it must rely on the market, and not itself, to allocate resources. Foreign investors would also help the Government to come to this realization beacuse the Government would not be able to lure these investors without a capitalist economy.

It is also important to note that this structural change is not an aberration engineered by one political leader. It has become the consensus of the political leaders of India across all of the political parties with widespread support. The Economist reports.

> "At the state and national level, all parties are now united around ...basic propositions:
>
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19 The Economist, April 27, 1996, p. 22.

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19 The Economist, April 27, 1996, p. 22.

The march 8th, 1997 edition of The Economist again hails that

> "[t]he latest Indian Budget, announced on February 28th, seems to mark a final break with India's traditional insistence on creating its own form of socialism. Instead, the country is moving towards the more pro-business policies associated with the booming economies of the Association of South-East Asian Nations (ASEAN)."[20]

The changes in the economy to which Justice Mathew referred altered the form in which the Government did business. The changes since then have shown a fundamental restructuring of the economy in India. The economy will no longer be centrally planned. The Indian socialist experiment has ended. The massive changes that have occured in the economy since the rationale behind the case law on the doctrine of the agent and instrumentality of state was developed, indicate that a fundamental shift in the doctrine is required to continue to protect individual rights. As India continues to dismantle the governmental apparatus in the name of efficiency and to reduce the budget deficit, it will at the same time rid itself of the economic power that the founders envisioned it would maintain. The five criteria test stated explicity in the *Som Prakash* case is based on the concept of a strong government player dominating the economy by varying means- either by the statutory company or by the Government company. Now that the government is shedding its previous policy of guiding the economy from central planning to the invisible band of the market, are the constitutional goals of economic fundamental rights to be only applied to the shell of the government of India? Without the application of economic rights in some form to the private sector, the constitutional promise of equality of opportunity will soon become hollow. The review of the changes in the economy discussed in this section has allowed us to set the stage to now more fully amplify the arguments begun in the previous section.

It is possible to provide a structure for the government to reach at least some of the goals of the founders in connection with the economy. Guidelines should be developed in order to ascertain the nature and benefits of a private player's dominance of the economy. If a private corporation or industry is found to be sufficiently powerful, it could then be considered as part of the State under Article 12. Any such guidelines should consider matters such as number of employees, the company's gross sales as a percentage of industry sales, industry sales as a percentage of GDP, and other criteria that indicate ability to amass great power over the economy and the economic rights of Indians. At this stage, the Court can determine which of the rights are most fundamental and, hence, which rights must not be violated by the private corporation.

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20 The Economist, March 8, 1997, p.29.

The Court has had few opportunities to consider this question. In fact the question as to whether private companies can be considered as part of the State under Article 12 has been considered at length in only one case, *M.C. Mehta* v. *Union of India*.[21] Shiram Foods and Fertiliser Industries was seeking to restart its power plant and manufacture caustic soda, chlorine and its by-products. It was claimed by the community that the private company's operations were hazardous to the health and welfare of the residents. The company's action was questioned in Supreme Court under Article 21.[22] Therefore, the Court was called upon to ascertain whether a private corporation could be considered as State as a threshold question to whether Article 21 could apply. Ultimately, it left the question unanswered, but the Court did provide some helpful analysis.

The Court reviewed the State's concept of the national economy. The industrial policy Resolution, 1948 laid the foundation of the State's position and provided that the State should play a progressively greater role in the economy. However, with the passing of a few years and key events (such as the nationalization of the Life Insurance Companies, which created uncertainty in markets) a clarification in State policy was required.[23] This was done in the Industrial Policy Resolution enacted by the Government in 1956. This Resolution divided the industiral economy into three catagories: Industries in category one were to be exclusively the responsibility of the State; industries in category two were to be progressively owned by the State until such time as the private corporation could supplement the State's efforts; industries in category three would include the remaining industries, which were to be left to the private sector initiative. The objective of this resolution was to be impelmented by way of the Industries (Development and Regulation) Act of 1951. The first schedule of the Act identifies the industries which the State would control due to the public interest at stake.

In analyzing the Resolution and the Act of 1951, the Court noted that the production of fertilizers and chemicals, the primary activity of the defendant, Shiram Foods and Fertiliser Industries, was of national interest. The State was to perform these activities, except during an interim period, when private companies under State regulation would be allowed to participate. It was clear to the Court that the activities performed by the defendants were indeed in the national interest and hence the Court considered the ramifications of the United States doctrine of "State action".

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21 AIR 1987 SC 1086.

22 Article 21 states "No person shall be deprived of his life or personal liberty except according to procedure established by law."

23 See Pattanshetti, C.C., *The Dimensions of India's Industrial Economy*, (1967), p. 12

In general, the individual rights guaranteed under the United States Constitution are protected against violation by the State and not private parties. Therefore, there must be a "State action" for a person to invoke the protection of the Constitution for violation of individual rights. However, a private party's act can be considered a "State action" if it meets certain requirements, defined by the "public function" and "State involvement" doctrines. Under the public function doctrine, if a private person is engaged in an activity seen as governmental in nature, the private person can be deemed to be an organ of the State. As an agent of the State, the private party can then be held to violate individual rights held under the Constitution. Under the State involvement doctrine, if a State is found to be sufficiently involved in the private party's activities, then the private party can be deemed to be a State. Involvement can include the State encouraging, benefiting from, or highly regulating the private actor's activities.

Concurring with both the R.D Shetty case[24] and Justice Mathew in *Sukhdev* v. *Bhagatram*,[25] the Supreme Court in *M.C. Mehta* v. *Union of India*,[26] argued that a body performing a public function or business in the public interest is acting in a governmental capacity. The court observed:[27]

> "[I]nstitutions engaged in matters of high public interest or public functions are by virtue of the nature of the function performed government agencies. Activities which are too fundamental to society are by definition too important not to be considered goevernment functions."

However, the Court did not decide on whether or not the United States State Doctrine is applicable within India. The counsel for the plaintiff and the Court both pointed out obvious difference: while the United States doctrine grew out of the inability to address racial discrimination by private persons, the Indian Constitution contains Article 15(2)[28], and hence the United States

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24 See supra n.14

25 See supra n.11

26 See supra n.21

27 Id. at 1094.

28 Article 15(2) provides that "no citizen shall, on grounds only of religion, race, cast, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to :

a) access to shops, public restaurants, hotels and places of public entertainment; or

b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

historical context from which the doctrine arose is unhelpful in the Indian analysis. But the doctrine's principle is relevant— "State aid, control and regulation [can] so impregnate a private activity as to give it the colour of State action."[29]

Chief Justice Bhagwati raised a significant issue during his analysis. His Lordship observed:[30]

> "Prima facie it is arguable that when the State's power as economic agent, economic enterpreneur and allocator of economic benefits is subjected to limitation of fundamental rights, why should a private corporation under the functional control of the state engaged in an activity which is hazardous to the health and safety of the community and is imbued with public interest and which the State ultimately proposed to exclusively run under its industrial policy, not be subject to the State limitaitons.

We can see the question of whether a private corporation engaged in business in the public interest should be allowed to violate the citizenry's fundamental rights can be analyzed from two perspectives. The State action doctrine articulates one perspective. Why should a private corporation engaged in business in the public interest be exempted from constitutional limitations? The other perspective considers the difference between the government corporation and the private corporation. Are they always clearly distinguishable? An analysis of the Companies Act and associated case law will make it clear that the two—government corporation and private corporation—are treated substantially the same. Moreover, such an analysis will show that the line between a government and non government company is not always very clear. The major difference invloves what is obvious—the major shareholders are different but the tasks performed are quite similar and the manner in which they are held accountable is substaintially the same.

IV: Government Companies and Non-Government Companies: Understanding the Similarities

According to the Companies Act, 1956 a company is created when "formed and registered under" the Companies Act.[31] The certificate of incorporation brings the company into existence and is "conclusive evidence that all the

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29 See. *Supra n. 21* at 1097.

30 Ibid.

31 Section 3(1)

requirements of the Act have been complied with."[32] The major kinds of companies are private, public, foreign and government companies.

Section 3(1)(iii) of the Companies Act, 1956 defines a private company. It provides that certain restrictions on the transferability of shares, on membership, and on the prohibition of the issuance of a prospectus must be included in the articles of association[33] for a company to be private. The creation of a private company only requires a minimum of two subscribers to the memorandum of association.[34] Since a private company is prohibited from issuing a public prospectus, the public is not allowed to invest in a private company. A public company by contrast and by definition is not a private company. Hence, it is not limited in these ways.

A foreign company is a company that is incorporated outside India, with a place of business in India.[35] A place of business has been given judicial interpretation,[36] but such a place is required in order to have a place for service of process. Within thirty days of arrival, the foreign company must file certain documents describing relevant details[37] with the Registrar of the State where the principal place of business is located and with the Registrar in Delhi.

A government company is defined as follows:

> "any company in which not les than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a company which is the subsidiary of a company thus defined.[38]

In addition to the kinds of companies mentioned above, there is now a recognised hazy third category between the private and the public company. A

32 Section 35

33 The articles of association set forth the rules and conditions upon which the corporation is founded.

34 The memorandum of association contains the specific objects for which a corporation is established, outside of which it is illegal to operate.

35 Section 591

36 A/s Dampskib 'Hercules' v. Grand Trunk Pacific Rly C, [1912] 1 kb 222; South India Shipping Corp Ltd. v. Export Import Bank of Korea, [1985] 2 All ER 219 Ch. D; P.J. Johnson v. Astrofiel Armadorn, [1989] 3 Comp LJ5, 10 Ker.

37 Section 592 provides that the foreign company must provide a certified copy of the company charter, status or memorandum and articles; the full address of the registerd or principal office; a list of the directors and the secretary; representatives resident in India; and the address of the principal place of business in India.

38 Section 617

private company can be treated as a *deemed public company*. A private company can be converted into a deemed public company by choice, by default, and by operation of law. A private company becomes a deemed public company by choice, when it passes a special resolution removing from its articles of association the Section 3(1)(iii) requirements.[39] A private company becomes deemed public company by default, when it does not comply with requirements of Section 3(1)(iii) summarized above. To quote the Act: "[w]hen a default is made in complying with any of those provisions, the company shall cease to be entitle to the privileges and exemption conferred by or under the Act.[40] The entire Companies Act would then apply to the converted private company as if it were not private. A private company can be converted by operation of law under four conditions. This conversion can occur, first, when 25% or more of the capital of the private company is owned by public companies; secondly, when the annual turnover of the company exceeds Rs. 10 crores;[41] thirdly, when the private company owns at least 25% of the paid up capital of a public company; or fourthly, when the private company advertises and then accepts or renews a deposit from the public.[42]

The legal recognition of a third category of company between public and private is recent.[43] The Supreme Court asserted that it is flatly wrong to conclude that as a public company is defined as one that is not private, they must be considered mutually exclusive categories.[44] Chief Justice Chandrachud then searched the Act and described companies that retained characterstics of both private and public companies[45] as deemed public companies.

It should also be evident that the category of government company is not mutually exclusive either. The Act's definition of a government company is "any company" which has 51% of its capital from government sources entails that they could be government companies that are public or even foreign. In the

39 Section 44(1)

40 Section 43

41 Or, approximately US$ 2.86 million

42 Section 43-A

43 *Needle Industries (India) Ltd. v. Needle Industries (India) Holding Ltd.*, [1981] 3 SCC 333 at pp. 416-417: (1981) 51 Comp Cas 743.

44 The precedent relied on by the advocate for the inappropriate assertion was *Park v. Royalties Syndicate Ltd.* [1912] 1 KB 330: 81 LJ KB 313: 106 LT 184. The Court there suggested that there was no intermediate position between a private and public company.

45 For instance a private company deemed public may maintain certain characterstics of a private company from which a public company is prohibited. And again, the membership of a private company deemed public may retain less than seven members whereas a public company may not.

case of a public company, the other 49% of the capital would simply be held by the public. Perhaps, the company would have been solely public. Then a government entity could choose to purchase 51% of the capital outstanding, keeping the remainder in public hands. In the case of a foreign company, the Government of India could chose to invest in a company incorporated outside India with a place of business inside the country.

The court was required to determine the status of a government company which also had characterstics of a foreign company in *River Steam Navigation Co. Ltd. Re.*[46] Incorporated in England, the River Steam Navigation Co. Ltd. had a river transport business between Calcutta and Assam. Business had declined as a result of the Indo-Pak conflict. Since the Government of India considered the business as of strategic importance, it invested in the company. But despite government investment, a creditor applied for a winding up order. The Court had to address the threshold issue of whether the company was a foreign or government one. The Court conceded that the company did fit both descriptions. It stated that "it is possible to conceive a company which satisfied the test in both and therefore be at once both a government company and foreign company". The Court decided that as a result of procedural problems in applying certain conflicting provisions of the Act, the company shoud be deemed a government one. In addition, the Court found even more convincing the fact that the Act claims that "any company" fitting the relevant description is a government one.

But, it is critically important to note that the line between government and non government companies is not always clear. It can even be argued that they are hazy areas between not only the public and the private company, but also between the government and the public or the government and the foreign companies. Due to the Government's ability to incorporate companies under different provisions, several hybrids are possible. S. Krishnamurthi explains that "there are government companies which are private companies, deemed public companies, non profit companies, public companies, subsidiary and holding companies.[47]

The entire companies act applies to the government company as to any other, except for certain selective invoked exemption that the Government can invoke under Section 620(1) of the Act. The rationale for allowing certain exemption is that the government company already has certain controls over its affairs. Therefore the Government achieves accountability over some of its

[46] (1967) 2 Comp LJ 106 Cal.

[47] Krishnamurthi, S., Law and practice Relating to Government Companies, (1982) 47

affairs in a procedurally different manner, while achieving the same substantive goal. S. Krishnamurthi again asserts:

> "The obligations cast on the public limited companies in the private sector, that is, to safequard public interest, and the interest of the shareholders is already more than served by the various forms of control on the affairs of the government companies. Further the dichotomy between the corporate personality and the individual personalities of the shareholders which is markedly present in the case of private sector companies does call for a greater degree of vigilance on the part of shareholders and the government over the affairs of these companies. In the case of private sector companies proposals for the reduction of capital and amalgamation of two or more companies are subject to the examination of the courts. But in the case of government companies such decisions are taken by the administrative minstry, they are examined by the Central Government in the Department of Company Affaris instead of the court with a view to simplifying the procedures.[48]

As shown in the foregoing analysis, the law treats the two entities, the government company and the private corporation, largely the same. And the lines between the two are not always crystal clear. In fact several hybrids exist. Now we can consider Chief Justice Bhagwati's question about why the two should be treated differently when violating fundamental freedoms. A corporation that has 51% paid up capital is a government corporation, but suppose this ownership was totally in the form of preferred non-voting shares. Such a corporation for all intents and purposes is in the hand of private stockholders and private management, since the government cannot vote on any matter at any point. suppose further that this government corporation is a public utility with exclusive rights to a region. Despite the need for a shift from the agent and instrumentality test to a more expansive concept to include powerful private corporations, if the test is employed, this government campany could arguably be considered as State. A public utility would have heavy government regulations evidencing a "deep and pervasive State control." The corporation would have monopoly status. Moreover, it would be operating in a sphere "of public importance and closely related to government functions." Three out of the five criterion would thus be met. Such examples indicate the obscurity of the line that exists between the government and private corporation.

This obscurity is reminiscent of the issue at stake when the difference between the statutory and government companies were being considered by the

[48] Id. at 48.

Court in application of the concept of State for purpose of Article 12. In the *International Airport*[49] decision the Court propounded:

> "Where consititutional fundamentals, vital to the survival of human rights, are at stake, functional realism, not facial cosmetics, must be the diagnostic tool. Law, constitutional law, seeks the substance, not merely the form."

And again in *Managing Director, U.P. Warehousing Corporation* v. *Vijay Narain Bajpayee*[50] the Court's attempt "to confine the applicability of the equality clauses of the Constitution, in relation to matters of employment, strictly to direct employment under the government, is perhaps to mock at the Constitution and at the people."

The *M.C. Mehta* decision, makes clear that the court is struggling with the propriety of looking through the reality underlying the private corporate entity. We need to remember that the State has structurally changed the economy and its own position within it. But, initially, the State involved itself in these industries because of the high level of public interest at stake and the distrust of the private profit motive. Now across the political spectrum this distrust has to an extent subsided but the country's need to protect the public interest in certain industries has not. The State action doctrine will not fully protect individual rights due to the shift in the methods by which a State manages the economy. The application of the American doctrine is limited and hence permits the State to ensure that only some of the large players in the economy protect individual rights.

The Supreme Court in *M.C. Mehta* case appeared to agree with the view expressed in *R.D. Shetty* case in determining whether a corporation is engaged in a business activity in the public interst. The Court acknowledged that this determination should be based on current perception, rather than past. As mentioned in the Industries (Development and Regulations) Act of 1951, the Government had derived a comprehensive list of industries in which the State should progressively engage to protect the public interest. In the past, the State determined who would be the economic power brokers in the nation by planning which industries would develop and at what pace; by controlling the amount that industries would be able to sell on the market and hence how much they would contirbute to GDP, and as a derivative effect, by controlling how many employees an industry could employ. Now the market forces will take over the management of the economy. In 1951, the State assessed which industries were in the country's interest. The focus now should be on which industries the market sees as critical to the nation's development for the future.

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[49] See supra n.14

[50] (1980) 3 SCC 459

Very few would argue against the notion that the building of the country's infrastructure like roads, ports and electricity are still very much in the country's interest.[51] But those firms that will own the infrastructure will only be part of the list of private corporations that will grow large and powerful. The industries that should be added to this list are those that have demonstrated its comparative advantage in the Indian and international marketplace. Those industries and companies that are most competitive and efficient. These will turn out to be the industries and companies that will be the most powerful, influential and profitable.

If the Court does find the argument that to preserve certain fundmental rights of Indians, private corporations should be considered part of the State acceptable then following the Court's logic, it must determine which industries today are in the public interest and make them subject to these constitutional limitations. To return to the language of Justice Mathew in the *Sukhdev* case, it is important to understand who now wields the economic power that the founders intended the State to maintain. Therefore, in its economic regime of privatization, to convert the 1951 specified list of industries into a present day equivalent with adaptability to the future, some sort of criterion test-such as number of employees, company's gross sales as a percentage of industry sales, industry sales as a percentage of GDP- should be employed.

V: Right to Livelihood and Opportunity of Employment

Once the Court is willing to consider certain powerful private corporations as the State under Article 12, it is still necessary for it to deem that the fundamental right of equality of opportunity be specifically appled. In *M.C. Mehta* case the Apex Court does not seem to suggest that even if a private corporation is deemed to be State, all fundamental rights of Part III of the Constitution should be applied to it. The Court asserts :

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[51] In a speech presented by the former Prime Minister Mr. Deve Gowda at the Opening Plenary of the Asia Society's 8th Annual Corporate Conference- "Moving to the Market: Sustaining Reforms in India and Asia" on March 6. 1997 p. 9, he states:

> "Another major challenge of sustaining [economic] reforms lies in the area of infrastructure. the pace of economic growth depends crucially on the augmentation of infrastructural facilities—such as roads, ports, telecommunication and power in line with the needs of a growing economy. Obviously, these are non tradable. The infrastructure of India... is proving to be grossly inadequate for a rapidly transforming economy. Reform of the infrastructure sector is, thus, high on the agenda."

> "that it is not correct to say that in India once a corporation is deemed to be 'authority,' it would be subject to constitutional limitation of fundamental rights in the performance of all its functions and that the appellation of 'authority' would stick to such corporation, irrespective of the functional context."[52]

While it is immediately logical that one would consider the fundamental rights asserting opportunity for ordinary citizens in the economy to be dominant player of the economy, the Courts have already established the necessary connections. First, one should note that what was at stake in the *M.C. Mehta* case was the most critical of the fundamental rights, namely, the right to life. The Article in question was Article 21, which states that "No person shall be deprived of his life or personal liberty except according to procedure established by law." But the Supreme Court has found that the right to life and the right to livelihood are inextricably tied. And in the technologically advanced and service oriented global economy of the twenty-first century, which India plans to join, the right to livelihood will not be found in the government employment. Therefore, it will be necessary for the seeds of opportunity for all citizens to be grounded in the important industrial sectors of the future.

In a significant case, *Olga Tellis* v. *Bombay Municipal Corporation,*[53] the Supreme Court established that the right to life must include the right to livelihood. The Court claimed that if it did not, one could not sustain oneself and the loss of life would soon be followed by the loss of livelihood. More recently, the Supreme Court in *Narendra Kumar Chandla v. State of Haryana and others*[54] decided this matter. An employee of the State Electricity Board, being paid on the pay sclae between Rs. 1400-2300, had an operation whereby his right arm was removed. The court found that "Article21 protects the right to livelihood as an itergral facet of right to life."[55]

Article 21 is not, however, an absolute bar to removal of livelihood. Livelihood and hence life can be removed if done by "procedure established by law." The *Olga Tellis* case establishes the meaning of the phrase "procedure established by law" as follows: "[i]t is far too settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Art. 21 must be fair, just and reasonable."[56]

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52 See supra n.21, at 1097.

53 (1985) 3 SCC 545; AIR 1986 SC 180.

54 AIR1995 SC 519.

55 Id. at 520.

56 See. supra no. 53 at 196. In support of the proposition see *E.P. Royappa* v. *State of Tamil Nadu*, (1974) 2 SCR 348: (AIR 1974 SC 555); *Maneka Gandhi* v. *Union of India*, (1978) 2 SCR 621: (AIR 1978 SC 597); *M.H. Hoskot* v. *State of Maharashtra*, (1979) 1 SCR 192: (AIR 1978 SC 1548); *Sunil Batra v. Delhi Administration* (1979) 1 SCR 392: (AIR 1978 SC 1675); *Sita Ram v. State of U.P.*, (1979) 2 SCR 1085: (AIR 1979 SC 745); *Hussainara Khatoon I v. Home Secretary, State of Bihar, Patna*, (1979) 3 SCR 532, 537: (AIR 1979 SC 1369 at pp. 1372-73); *Hussainara Khatoon II v. Home Secretary, State of Bihar, Patna*, (1980) 1 SCC 81: (AIR 1979 SC 1360); *Sunil Batra II v. Delhi Administration* (1980) 2 SCR 557: (AIR 1980 SC 1579); *Jolly George Verghese v. Bank of Cochin*, (1980) 2 SCR 913, 921-922: (AIR 1980 SC 470 at p. 475); *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*, (1980) 3 SCR 1338, 1356: (AIR 1980 SC 1992 at p. 2000); and *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 2 SCR 516, 523-524 (AIR 1981 SC 746 at p. 750)

57 AIR 1978 SC 1675

58 Id. at 1689

59 B. Errabbi. *The Right to Personal Liberty in India: Gopalan Revisited with a Difference*, in M.P. Singh (ed.) Comparative Constitutional Law, 293 at pp. 294. see also *Mithu v. State of Punjab*, (1983) 2 SCC 277: AIR 1983 SC 473 and note that S. 303 of the Indian Penal Code dictated compulsory imposition of death penalty. The Court found it unconstitutional due to its unreasonable and arbitrary nature.

VI: Consideration of Public Policy

The phrase "procedure establised by law," with the importance placed on fairness, justice, and reasonableness is quite colosely related to notions of public policy. Therefore, the paper will address the limitation to a fair and just remoavl of livelihood and hence life as embedded in the public policy argument rooted in contract. Before addressing the public policy argument directly, we need to first trace clear the relationship between "procedure establised by law" and public policy. To trace this relationship it can be shown that "procedure establised by law" noted in Article 21 has been interpreted as akin to the 5th and 14th amendments Due Process clause in the United States Constitution. The American Due Process Clause in turn has it origins in the public policy doctrine.

The new relations between the Indian phrase and its American counterpart was established in the lankmark case of *Sunil Batra* v. *Delhi Administration,*[57] in which Justice Krishna Iyer asserted:[58]

> "True ... our constitution has no due process clause ... but, in this branch of law, after *Cooper* ... *Maneka Gandhi* ... the consequence is the same".

B. Errabi describes this relationship as follows:

> "[m]ost significantly, the court inducted the doctrine of "due process" of the American model into the content of Article 21 with all its far-reaching consequences to the validity of laws both in their procedural and substantive aspects."[59]

The due process clause is traced as having its meaning and base in the notion of public policy which refers to "*those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.*" [60]

It is these same principles of justice to which Article 21 refers. Therefore, the question is whether it is against public policy for the dominant companies or industries controlling most of the economy and hence the jobs and the livelihood of the population to be able to enter into contracts and engage in business which exludes at a minimum, one half of the Indian population.

In the context of the appalling present economic conditions in the country the relevent question is: how many Indian citizens will have the requisite skills and ability to be employed after these privatization and liberalization efforts and in the futuristic service oriented and technological 21st-century global economy? Surely, not those below the poverty line.[61] That cuts out about 310 million people or more than the entire population of the United States. The literacy rate of the nation is 52%.[62] Capitalists seek to have the most efficient workforce. Generally speaking, that will not include the illiterate. As a result it is necessary to deduct another 13% or 115 million. So far 425 million people will likely have little hope for about two generations in participating in this economic liberalization. Now to assess how many people can actually participate in a liberalized economy would be difficult. But if 425 million have no opportunity, logic would dictate that the number of those who probably will, is a very small porportion of the populace. But for the purposes of the argument, excluding 425 million people from the economy is sufficient.

Considering the condition of the people, an Indian judge would look to a different source in search of public policy guidance in uncharted territory to

60 Winfield, Percy H., *Public Policy in the English Common Law*, 42 Havard Law Review 76 at 101. (emphasis added)

61 According to the Expert Group to the Planning Commission 35% of the Indian population was below poverty line in 1993-94.

62 Matthew, K.M., Manorama Yearbook 1997, (1997) p. 458. The 1991 census polled only those above 6 years old for literacy. Therefore the illiteracy rate of 48% should only be applied to the population above 6 years of age. That would lower the 425 million excluded from participating in the economy. But also note that approximately 40% of the nation's population is under 15 years of age (approximately 355 million). Therefore some of these children while not in poverty are far from sufficiently educated to participate in technology and service driven economy. These children would be added to the 425 million excluded from the economy. As a result, both amounts have been excluded. The penetrating point is, however, not lost.

arrive at a just conclusion—the Indian Constitution. In the *Central Inland* case[63] the Supreme Court shares the following insight:

> "Above all, in deciding any case which may not be covered by authority, Courts have before them the beacon light of the preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in the Constitution."[64]

A quick brisk walk through the Preamble to the Constitution, Fundamental Rights and the Directive Principles is all that is necessary to bring the point home. The Preamble provides that

> "The People of India having solmnly resolved... to secure to all its citizens:
>
> JUSTICE, social, economic and political;...
>
> EQUALITY of status and of opportunity."

Several of the Articles in Part III (Fundamental Rights) and Part IV (Directive Principles) reinforce these ideas giving them life substance. Worthy of particular mention in this regard would be Article 15 clasue (4), Article 16 clauses (1), (4) and (4a), Article 21, Article 38 clauses (1) and (2), Article 39 clauses (a), (b) and (c), Article 41, Article 43-A, Article 46 and Article 47. They all speak in some way towards providing equality of opportunity or economic betterment of the entire populace.[65]

One reflexive counter-argument that must be discussed is that of freedom of contract. Freedom of contract in the United States context was for some time held in high regard. Article 1 section 10 of the United States Constitution prohibits states from making any law that impairs " the Obligation of Contracts." The view that reigned in the United States for quite some time is adequately represented by cases such as *Lochner v. New York.*[66] The *Lochner* holding was overruled only 12 years later in *Bunting v. Oregon.*[67] But the freedom of contract philosophy developed in the *Lochner* case lasted in the United States until the 1930's. It was then when the travail of the Great Depression, President Roosevelt's New Deal programs and Court Packing schemes togehter produced sufficient upheaval to lessen the importance of the

63 *Central Inland Water Transport Corporation* v. *Brojo NAth Ganguly*, AIR 1986 SC 1571

64 Id. at 1574

65 For the text of these provisions, see Constitution of India.

66 (1904) 198 United State 45

67 (1917) 243 United State 426

Lochner view of freedom of contract. Viewed from this socio-economic perspective, it is understandable why freedom of contract never gained the foothold in India that it enjoyed in the United States. The poverty referred to earlier in this analysis was actually worse at Indian independence. Therefore, as during the Great Depression in the United States, conventional wisdom dictated that the Government ought to come to the aid of the weaker sections of the nation. Early in Inidan legal history the Court system established that freedom of contract was to enjoy no special status in the nation. In 1953, the Madras High Court propounded:

> "The freedom of contract is not guaranteed by the Constitution. And in the absence of a guarantee, we do not think it unreasonable to presume that the freedom of contract can, to a certain extent, be curtailed if such curtailment is reasonable and in the general interest of the public."[68]

Therefore, despite western traditional freedom of contract concerns, an Indian judge would have appropirate grounds to find problematic, under public policy concerns, a liberalization effort that excluded at least half the population.

So far, it has been shown that there are sufficient grounds to find certain conditions present. firstly, that dominant private corporations can be deemed to be the State within the meaning of Article 12. Secondly, that once the most critical of fundamental rights is applied to a private corporation, namely, the right to life, that the right to livelihood is an integral facet thereof and thus cannot be denied within the constraints of fairness and justice. Lastly, on contract and public policy grounds, contracts and business transactions that exclude most of the population from any opportunity of participation in them are unfair and unjust and hence problematic.

VII: Equality of Opportunity: A Suggestion

How then should the Court affirmatively structure an equality of opportunity requirement in India under the conditions of poverty that exist and in view of its new capitalist leanings? The founders faced with the problem under a socialist type of economy turned to a Reservation system which would be more efficient and more reasonable to apply with modifications if necessary, than to create a system anew.

The Reservation system was developed due to the gross injustice heaped upon the former "untouchables" in the nation. They were primarily deemed so because of the unclean occupations in which they engaged. As a result, they

[68] *Dindigul Skin Merchants' Association v. The Industries Madurai* AIR 1953 Mad. 102 at 104

have been politically, socially, educationally, and economically ostracized for many generations. The Constitution sought to address the matter by two primary methods. First, in Article 17 the practice of untouchability was to be abolished. This riddance of untouchability is widely acknowledged as applicable to private as well as public persons.[69] And secondly, the Reservation system was established for the newly termed Schedule Tribes (ST's) and Schedule Castes (SC's). In order to address the lack of political power, the system provided that certain seats in the Lok Sabha (the Lower House) and the State legislatures should be reserved for those persons who are members of the ST's and/or SC's.[70] The Constitution provides for the social and educational needs of the ST's and SC's in several Articles, including Articles 15 and 46.[71] Economic redress was primarily addressed in Articles 16, 46 and 335.[72] In the governmental economic sphere, a certain percentage of jobs are predetermined or reserved for members of the SC's and ST's.

In determining what form of special treatment a class of the citizenry should receive, first, a word must be said about who should receive the benefit. In a nation where there are many degrees of misery, that proposition is no easy task. It has been the cause of much controversy. Despite the fact that an attempt must be made to go as low as possible on the scale to uplift the lowest among citizenry, the understandable problem is that many are suffering and hence clamouring for relief. Firstly, it has been argued that preferential treatment should be expanded beyond ST's and SC's members to all educationally and socially backward and the weaker sections of the nation. Secondly, although historically all membners of the SC's and ST's experienced discrimination, there has been a top layer of these members who are in fact quite educated and affluent. They perhaps may still experinece some level of social ostracism, but physically and economically they have done as well as and better than many in the forward castes.

Regarding the expansion of constitutional help to citizens in an undesirable state, Articles 15 and 46 have produced some controversy in this regard. Article 15 speaks about the advancement of all educationally and socially backward classes while Article 46 refers to aiding the weaker sections of the nation. The problem. of course, in a nation as poor as India, is that almost all of the

[69] Unfortunately the abandoning of such an entrenched social custom has proven to be more difficult than initially estimated

[70] See Articles 330 and 332, respectively

[71] For the text of these provisions see Constitution of India.

[72] Article 335 states "The claims of the members of the Schedule Castes and Schedule Tribes shall be taken into consideration, consistently with the maintenance of efficiency of adminstration, in the making of appointments to services and posts in connection with the affairs of the Union or of a state."

population would fit into the category of backward or weak. The term "Other Backward Classes" (OBC'S) has come to encapsulate this large group. Unfortunately, much more powerful than the SC's and ST's the OBC's tend to usurp the privileges intended to go to the poorest of the poor. In *Balaji v. State of Mysore*[73] the State had reserved 68% of the seats in engineering and medical colleges for the OBC's, ST's and SC's. The lion's share of 50% of the seats was to go to the OBC's. The uncertainty regarding what constitutional rights belong to this group has led to significant litigation, political power struggles and violence.[74] The Supreme Court has found a sole economic criterion problematic. In *Janki Prasad v. State of J&K,*[75] the Court found that an exclusive poverty test would include too large a proportion of the population making the situation untenable.[76] The Court had similar findings in *State of U.P. v. Pradeep Tandon.*[77]

In reference to those members of the ST's and SC's that are at the top of their caste financially, but who perhaps experience some residual form of social discrimination due to their caste, additional economic advancement in the form of job preferences will not be likely to assist them. They are already middle or upper classes economically. Therefore additional reserved posts would be of little use. The Supreme Court discussed this matter in *Chitralekha v. State of Mysore*[78] and asserted:

> "To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority may be far more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression "classes" as "castes," the object of the Constitution will be frustrated

73 AIR 1963 SC 649

74 See Singh P. "*Reservation, Reality and the Constitution-Current Crisis in India*" in P. Leelakrishnan, ed., New Horizons of Law, 62-69 (Cochin 1987) In this context see the report of Backward Classes Commission (popularly known as Mandal Commission).

75 AIR 1973 SC 930

76 While it is true that an exclusive poverty test would also include the forward castes in the persons to be favoured, even excluding the forward castes and only favoring all OBC's below poverty line, the situation would remain untenable

77 AIR 1975 SC 563. See the latest judgment of the Supreme Court in *Indra Sawhney* v. *Union of India*, AIR 1993 SC 477 which is the latest decision in the field.

78 AIR 1964 SC 1823

> and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve."[79]

Again in *State of Andhra Pradesh v. P. Sagar*[80] the court found basing reservation solely on caste problematic. It observed:

> [I]n determining whether a particular section forms a class, caste connot be excluded altogether. But in determination of a class, a test solely based upon the caste or community cannot also be accepted... The criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth; and the backwardness being social and educational, must be similar to the backwardness from which the Scheduled Castes and Schedule Tribes suffer."[81]

Who is due for preferential treatement under the Reservation system has been analysed using three approaches. The first approach is considering income only, which largely relates to the first proposition above. The second approach involves considering caste only, which is the second assertion shown above. The more appropriate model is a mixture of caste *cum* income. The poorer of the SC's and ST's should benefit from the reserved posts in the private sphere. In the Indian context where incomes are often artificially suppressed, a more holistic quanitification would be required to determine constructive income, considering such factors as education, housing etc.

Conceptually, in applying the Reservation system to private corporations the system would work largely the same, but with some notable differences. A certain percentage of the positions would be held for SC's and ST's that meet certain constructive income requirements. The entry level positions would be reserved based on minimum objective criteria. This minimum objective criteria would be similar to Article 335[82] requirement to maintain minimum efficiency in administration, despite reserving places. However, this minimum would not be relaxed even for a period to allow SC's and ST's to adjust as has been done with the State. Promotions would be earned in an open competitve field, therefore no postions beyond entry level posts would be reserved. This is again in contrast to application of the system to the State.[83]

79 Id. at 1834

80 AIR 1968 SC 1379

81 Id. at 1382, 1383. This view is no longer valid in view of the Supreme Court's decision in *Indra Sawhaney* case (See supra n. 77)

82 See supra n. 72.

83 However, for the latest position see *Indra Sawhaney* case (See supra n. 77)

Chief among the goals of private companies is to operate as efficiently and hence profitably as possible. Therefore, even the type of restraints imposed must be those that will allow them to maintain some level of efficiency and profitability. Companies must then be able to select the most efficient of the poorest SC's and ST's But still this chice will be out of a largely uneducated lot. As a result, there should be some provision to allow corporations to not fulfill their quota, but with a financial penalty. The non compliance penalty would grow more onerous over the years to encourage compliance. Some may consider the situation of the destitute hopeless. However, with properly motivated capitalist and willing students, and equilibrium is possible.[84]

The proceeds from the financial penalty would go to the establishment of a fund to train and educate the SC's and ST's that meet the constructive income requirements. The training and education would have to be at a level where at the end thereof the participants would be employable. As the corporations would have a strong interest in seeking competent graduates, they should have a strong hand over those selected to participate and the curriculum employed. Under this kind of structure, the private sector would logically select those persons requiring the least amount of training. By contrast, the government will have an interest in seeing those requiring the most help also advance. One way to reconcile this divergence of interest is to ensure that community service, in the form of aiding their less fortunate brethern to advance, is a part of the training of the selected participants. The community service should also continue after graduation. On a periodic basis, a representative of the court would report on the progress of those who are in the training program and those not selected to participate.

In short, the dominant private corporations would have to employ now or pay to prepare the SC's and ST's for later employment.

Indeed, a non conventional approach is not one without a precedent. In *M.C. Mehta v. State of Tamil Nadu,*[85] the Supreme Court analysed the problem of child labor in Inida. A very intractable problem much like the one discussed at length in this paper. There is a litany of constitutional provisions and statutes against the practice. The Court examines each and tells how the practice continues and by some accounts expands. The Court traces the sordid history of the practice and suggests reasons why perhaps everything tried to date has failed. At the end of the judgment the Court orders several matters, but two of which are worthy of mention. first, that those businesses employing children illegally are to stop and employ the parents of the children formerly employed.

[84] To further motivate capitalists, the Government should consider a reduction in other taxes due to the Government when certain quantifiable goals are reached.

[85] (1996) 6 SCC 756

And, secondly, as there will be more adults to employ than children formerly employed, for every child's parent not employed, the business who has employed child labour illegally must pay Rs. 20,000 per child. And the government must add an additional Rs. 5,000 per child. The payments are to be contributed to a Child labour Rehabilitation-cum-Walfare Fund. The returns from the Fund are to educate and provide for the health and welfare of the children. The Court, in effect, provides a very similar remedy to the one proposed in this paper.

CONCLUSION

In conclusion, as India looks westward to capitalism it must also look at its strengths as well as its weaknesses. When the United States was in the throws of the Great Depression, one weakness was squarely in the mind of President Franklin D. Roosevelt. He reminded the American people that:

> "Concentration of economic power in all-embracing corporations... [makes] private enterprise become a kind of private Government which is a power unto itself-a regimentation of other people's money and other people's lives."[86]

India has for a very long time found its economy in a state of depression. The former Prime Minister Deve Gowda too had planned on providing economic growth with justice. He asserted that to achieve the economic targets of the country's Ninth Plan (1997-2002), the nation's theme would be "growth with equity".[87] Achieving equity for the poorest of the citizenry which the founders intended and recent administrations have asserted as their goal must include some reasonable possibility of participation by most of the population in the nation's economy of the 21st century. This kind of global economy will be dominated not by the Government or statutory company, as in the past, but the private corporation would virtually become private Government. The current approach will not permit this inclusion. Imposing some form of equality of

[86] Franklin D. Roosevelt, Acceptance Speech, Democratic National Convention, June 27, 1936

[87] Speech of former Prime Minister Deve Gowda at the Opening Plenary of the Asia Society's 8th Annual Corporate Conference- Moving to the Market: Sustaining Reforms in India and Asia" on March 6, 1997 p. 7. He went on to say:

"We recognize that increased competition brings in greater efficiency, lower cost of production and provides more and better goods and services to consumers. However, the Government also appreciates that more market-oriented and less regulated regime does not imply an abdication by the State of its responsibility towards the poor and the disadvantaged. Our policies and programes in the coming years will adequately reflect both these crucial concerns."

opportunity requirement by expanding the notion of State within Article 12 combined with overall public policy concerns will contribute to this noble aspiration.

CONSTITUTIONAL PERSONIFICATION OF LEGISLATIVE SUPREMACY IN INDIA AND MALAYSIA: SOME REFLECTIONS

B. Errabbi[*]

I. INTRODUCTION

It is a matter of common knowledge for the scholars of comparative political and constitutional history that while the American War of Independence of 1776 inspired the liberation movements all the world over, the American Constitutionalism culminating in the adoption of the American Constitution in 1787 has left its indelible imprint on the constitutional developments in most of the Countries of Africa and Asia. The doctrines of Constitutional Supremacy and of Judicial Review, which are the prime pillars of the edifice of American Constitutionalism, have been its most valued and cherished gifts to the Asian constitutionalism. The constitutional developments both in India and in Malaysia have not escaped from the over-reaching impact of the American constitutionalism. It may be appreciated, in this context, that the influence of the American constitutionalism on the constitutional developments in India has been more direct, visible and pronounced than those in Malaysia.

The Constitutions of India and Malaysia, which are written, unlike the unwritten Constitution of England which personifies the concept of Parliamentary Sovereignty, have professed their commitment to the values of constitutional supremacy, guaranteed bill of rights and judicial review by providing for the embodiment of several constitutional provisions in this regard.[1] However, the main question in the context of the working of these Constitutions since their inauguration is: how strong and effective has this constitutional commitment been in these countries? Are there effective and meaningful constitutional strategies envisaged and designed for the enforcement of the doctrine of Constitutional Supremacy in these countries? To put it differently, is the concept of Constitutional Supremacy proclaimed so eloquently by the fundamental laws of these two countries a living and

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1 See Articles 4 to 13, 121 and 128 of the Malaysian Federal Constitution and Articles 13 to 32 and 245 of the Indian Constitution. Some of these provisions will be discussed in detail later.

dynamic core aspect of the Indian and Malaysian constitutional jurisprudence or is it a mere constitutional myth and a ceremonial constitutional slogan not taken seriously both by the founding-fathers of these Constitutions and the apex courts in these countries? It is humbly submitted that while in India the doctrine of constitutional supremacy has become a living and dynamic core aspect of the Indian constitutional jurisprudence, in Malaysia it has unfortunately been relegated to the position of a mere ceremonial constitutional slogan.

In this paper an attempt is made to substantiate this submission with the help of the constitutional experiences of these two countries in the context of certain specific areas of constitutional concern such as the right to personal liberty, the right to freedom of movement and the right to freedom of speech, association and assembly.

II. The Doctrine Of Constitutional Supremacy: Differing Perceptions

(a) Malaysian Constitutional Perception

At this stage it is necessary and appropriate to state that the Malaysia's professed commitment to the value of constitutional supremacy has been consciously intended and designed to be more of a constitutional myth than a vibrant constitutional reality. This constitutional intent and design, as will be seen presently, is amply reflected in, and pervades throughout the schematic setup of the fundamental liberties guaranteed by the Malaysian Federal Constitution. The Malaysian Constitution contains several provisions which have been designed to augment and strengthen the powers of the Federal Parliament to such an extent as to compel the conclusion that the Parliament's constitutionally sanctified legislative supremacy in certain areas of constitutional governance is no inferior to that of the British Parliament. Thus, in the areas of the right to personal liberty,[2] the right to freedom of speech and expression, [3] the

[2] Article 5(1) of the Malaysian Federal Constitution declares:

"No person shall be deprived of his life or personal liberty save in accordance with law".

[3] Article 10(1) of the Federal Constitution states:

(a) every citizen has the right to freedom of speech and expression;

(b) all citizens have the right to assemble peacably and without arms;

(c) all citizens have the right to form association."

right to association and assembly,[4] the right to property,[5] and the special and emergency legislative powers of Parliament, [6] there is a well pronounced constitutional personification of legislative supremacy giving the Federal Parliament the ultimate say in the enactment and validity of laws. [7] The Malaysian constitutional scheme of fundamental rights is bereft of an adequate judicial strategy for an effective enforcement of the fundamental liberties. This is evident not only from the absence, in its scheme, of constitutional principle of reasonableness[8] which makes the legislative transgression of fundamental rights justiciable but also from the presence of

The restrictive clauses 2,3 and 4 enable the Federal Parliament to impose restrictions on the enjoyment of these rights on several grounds mentioned therein. For the text of clause (2) of Article 10, See infra n. 8

[4] See supra note 3.

[5] Article 13(1) of the Malaysian Federal Constitution reads:

"No person shall be deprived of property save in accordance with law."

[6] See Articles 149 and 150 of the Malaysian Federal Constitution. While Article 149 enables Federal Parliament to enact laws against subversion and actions prejudecial to the public order which are exempt from the reach of the operation of the rights to life and personal liberty, freedom of movement, freedom of speech and expression, association and assembly and the right to property, Article 150 empowers the King (Yang di-Pertuan Agong) to Issue a Proclamation of Emergency to combat a grave emergency threatening the security or the economic life or pulic order in the Federation or any part thereof.

[7] The laws are made immune from judicial challange on the ground that they are unjust, unreasonable and oppressive.

[8] Clause 2 of article 10 States:

"Parliament may by law impose,

(a) on the rights conferred by paragraph (a) of clause (1), *such restrictions as it deems necessary or expedient* in the interests of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation , or incitement ot any offence;

(b) on the right conferred by paragraph (b) of clause (1), *such restrictions as it deems necessary or expedient* in the interest of the security of the Federation or any part thereof or public order;

(c) on the right conferred by paragraph (c) of clause (1), *such restrictions as it deems necessary or expedient* in the interest of the security of federation or any part thereof, public order or morality.

Emphasis added.

from the presence of constitutionally ordained ouster clauses[9] in the fundamental law. Consequently the Malaysian judiciary, as guardian of the Malaysian Federal Constitution, has been content to adopt a positivistic, conservative, literal and logical interpretation of constitutional provisions, thereby evincing its expected judicial empathy with, and deference to, this constitutional intendment of the founding-fathers of the Malaysian constitution.

(b) Indian Constitutional Perception

In contrast, the India's commitment to the notion of constitutional supremacy is more akin to that of United States of America. Although the Indian constitution, like its American counter-part, does not expressly proclaim its commitment to the value of constitutional supremacy, it embodies quite a few provisions[10] which implicitly endorse and confirm this commitment. The Indian constitutional scheme of fundamental rights envisages, unlike its Malaysian counter-part, the imposition of effective constitutional limitations on the legislative powers of the Indian legislatures[11] with an adequate judicial power conferred upon the higher courts for their enforcement.[12] Except in the area of

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9 See Article 4(2) of the Malaysian Federal Constitution. For its text see page 12 of this paper.

10 Article 245(1) of the Indian Constitution states:

Subject to the provision of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

Article 372(1) declares

Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein, until altered or amended by a competent legislature or other competent authority."

Article 13, a provison in Part III of the Constitution entitled as "Fundamental Rights", declares:

"(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part shall, to the extent of such inconsistency, be void.

(2) 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..."

11 See the restrictive clauses of Article 19 of the Indian Constitution which embody the cirterion of reasonableness.

12 See Articles 32 and 226 of the Indian Constitution.

the right to life and personal liberty,[13] the founding fathers of the Indian Constitution took care to provide an adequate constitutional framework to ensure an effective enforcement of the concept of constitutional supremacy. It may be appreciated that the Indian legislatures, unlike their Malaysian counter-parts, are not constitutionally intended to enjoy an unlimited and uncontrolled measure of legislative supremacy. In the Indian scheme of constitutionalism there is no scope for the constitutional personification of legislative supremacy of the Malaysian model. The Indian Constitution not only does respect and embody the principle of reasonableness[14] but also omits the "ouster clauses" of the Malaysian variety from its scheme of fundamental rights. The result is that the Indian apex court is constitutionally enjoined to adjudge the constitutionality of the legislative incursions on fundamental rights.[15] The Indian Supreme Court, inspired by the preambulary goals of liberty, justice, equality and fraternity enshrined in the India's basic law,[16] opted, unlike its Malaysian counter-part, to play a more active and creative role to ensure an effective enforcement of fundamental rights.[17]

III. THE CONSTITUTIONAL SPECTRUM OF LEGISLATIVE SUPREMACY: CONSTITUTIONAL INTENT

(a) Malaysian Position

The preparatory materials *(travaux preparatoires)* of Article 10[18] of the Malaysian Constitution throw enough light on the constitutional intent of its founding-fathers regarding their conception of judicial review.

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13 Artilce 21, which guarantees the right to personal liberty states:

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

14 See supra note 11. See also M.P. Singh, "*The Constitutional Principle of Reasonableness*", (1987) 3 SCC(J)31.

15 Article 32 of the Indian Constitution declares:

"(1) The right to move the Supreme Court by appropirate proceedings for the enforcement of the rights conferred by this part is guaranteed."

16 See the Preamble to the Constitution of India.

17 See infra ns. 73 and 74

18 See the Reid Commission's Report. An independent Commission headed by Lord Reid (known as Reid Commission) was appointed to devise a Constitution for the Federation of Malaya which later became Malaysia. This Commission, which consisted of constitutional experts from United Kingdom, Australia, India and Pakistan, duly submitted its report on 21 Feb. 1957. A Working Party was

The original Reid Commission's draft Constitution contemplated a constitutional scheme which, among other things, envisaged the inclusion of a guaranteed bill of fundamental liberties. This was premised on the constitutional fundamentals of "supremacy of the constitution" and "judicial power" of the courts to enforce these rights.[19] This scheme contained an effective constitutional framework of which the principle of reasonableness was an integral part.[20] The inclusion of the principle of reasonableness in the draft Article 10[21] was intended to confer on the Malaysian highest judicial organ the ultimate power to examine and decide on the reasonableness, expediency and necessity of legislative restrictions that could be imposed on the exercise and enjoyment of the fundamental right to freedom of speech and expression guaranteed by the provision. Unfortunately, this constitutional scheme was not destined to become the main constitutional fundamental of the Malaysia's "document of destiny".[22]

The revised draft proposals, as prepared by the "Working Group"[23] dropped the principle of reasonableness from the fabric of the constitutional scheme for the enforcement of fundamental rights. The deletion of the principle of reasonableness was intended to ensure legislative supremacy in mattes of social control.[24] It is these revised proposals that were approved and adopted by the Federal Legislative Council which evidently wanted to confer "a restrictive power of judicial review" on the courts in Malaysia. It may be of interest to note that one of the reasons advanced in this regard was that the courts were not suitable to decide on the wisdom of the imposition of legislative restrictions on fundamental liberties and that it was better to repose trust and confidence in the

appointed to examine the Reid Commission's Report in detail and to make its own recommendations. On the basis of the recommendations of the Working Party a new Federal Constitution of the Malaya (Later on Malaysia) was promulgated on 31 August 1957 which is known as Merdeka (Independence) day.

19 Ibid, para 161

20 Ibid.

21 Ibid.

22 Mr Justice Abdul Hamid of Pakistan who was a member of the Reid Commission disagreed with the majority view and appended a note of dissent. He argued for the deletion of the principle of reasonableness from the scheme. In his opinion reasonableness of legislative restrictions should be left to the legislature. See Reid Commission Report at pp. 95-105. His dissenting view came to be accepted later on.

23 The Working Party was appointed to revise the draft proposals and to make counter - recommendations.

24 See Legislative Council Debates (1957) speech of the Attorney-General at cols. 3162 to 3163.

legislature in this respect.[25] The supporters of the principle of legislative supremacy believed that "the true guardian of fundamental rights and liberties must remain with the people themselves and entrusted to the keeping of their representatives in the Parliament."[26] Commenting on the revised draft proposals which became part of the Malaysian Constitution, Lord Reid observed[27] that "a greater part of the changes have been in the direction of giving more freedom to the .... Parliament of Malaysia and correspondingly less extensive guarantees of fundamental rights than we have recommended."

As regards the scope of the constitutional protection of the rights to personal liberty, it is not possible to discern any constitutional intent either from the Report of the Constitution Commission or from the debates of the Federal Legislative Council as the draft provisions were adopted without any debate. Therefore, it will be impossible to know the mind of the constitution-makers regarding the import of the expression "save in accordance with law" which finds mention in clause (1) of the Article 5[28] of the Malaysian Federal Constitution.

(b) Indian Position

While the preparatory materials of the Malaysian Federal Constitution do not throw any light on the constitutional intent as to the scope of the constitutional protection of the right to personal liberty, the *travaux preparatoires* of the Indian Constitution provides valuable evidence of the intention of its architects as to the scope of the constitutional protection of the right. As will be seen presently, in the area of the fundamental right to personal liberty[29] the founding-fathers of the Indian Constitution intended to ensure legislative supremacy of the Indian Legislatures. They wanted to avoid the use of the "due process" clause of the American model because they thought that it would lend itself to judicial vagaries in respect of its import.

The draft Article 15, which later became Article 21 of the Constitution, in its original form, stated that "no person shall be deprived of his life or liberty without due process of law". But in its revised version the Drafting Committee[30] supplanted the expression "without due process of law" by the

25 Id. at 3168

26 Ibid

27 Quoted at col. 3139 of Legislative Council Debates.

28 See supra n. 2

29 See supra n. 13

30 Drafting Committee was entrusted with the task of drafting the Indian Constitution.

expression "except according to procedure established by law".[31] When the revised draft provision came up for discussion and adoption on the floor of the Constituent Assembly several members opposed it and argued for the restoration of the "due process" clause.[32] It was thought that the expression "except according to procedure established by law" would negate the jurisdiction of the courts to determine whether or not an impugned law was capricious, unjust, or unreasonable and that the expression would enable the courts only to see whether or not the procedure laid down by the law has been complied with and that when once "the procedure is complied with there will be an end to everything and the judges would be only spectators".[33]

Therefore, it was feared that the expression as embodied in the provision would augment the power of the legislature barring judicial review of detention laws. The supporters of the "due process" clause were, however, in a minority and all the amendments they moved were rejected. The result was that the draft provision as settled and recommended by the Drafting Committee was adopted by the Constituent Assembly without any change.

As regards the constitutional intent of the scope of the fundamental right to freedom of speech, association and assembly the founding-fathers of the Indian Constitution wanted to ensure judicial supremacy. The principle of reasonableness, which did not find any place in the original draft Article 13 (which corresponds to Article 19[34] of the Constitution) at the time of its introduction in the Constituent Assembly,[35] was inserted into the provision by way of an amendment[36] in the House. The induction of this principle in the Indian constitutional jurisprudence was intended to empower the courts to examine whether or not a particular legislative restriction was reasonable, proper and necessary in the circumstances of the case.

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31 See B. Shiva Rao, The Framing of India's Constitution, Vol. 3 at 328. The reason given for the change was that the new expression was more specific.

32 7 Constituent Assembly Debates, pp. 843-44

33 Ibid.

34 Article 19 guarantees several freedoms, such as freedom of speech, association, assembly and movement etc. The restrictive clause 2 of this provision which enables the Indian legislatures to impose restrictions did not, in its origin form, contain the principle of reasonableness. This was changed by the Constitution (first Amendment) Act, 1951.

35 7 Constituent Assembly Debates, pp. 711-789

36 Id. at 739

IV. Constitutional Supremacy And The Scheme Of Fundamental Rights: Differing Perspectives

(a) Malaysian Constitutional Perspective

The Malaysian Federal Constitution which proclaims itself to be the Supreme Law of the land declares that any post Merdeka (Constitution) law which is inconsistent with any provision of the Constitution shall, to the extent of the inconsistency be void.[37] An important implication of this declaration is that all the constitutional functionaries in the country including the Federal Parliament are constitutionally enjoined to function within the framework of the Constitution. This would necessary mean that the doctrine of Parliamentary Sovereignty which is an essential concomitant of the British constitutional jurisprudence is alien to the Malaysian constitutional culture. This aspect was emphasised by Lord President Suffian in *Ah Thian v. Government of Malaysia*,[38] when he observed:[39]

> "The doctrine of the Supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. The power of Parliament and the State Legislatures in Malaysia is limited by the Constitution and they cannot make any law they please".

As the Supreme Law of the land, the Malaysian Federal Constitution incorporates and guarantees several fundamental liberties in Part II of the Constitution which are sought to be enforced by the imposition of various limitations and restrictions upon the legislatures. Since there can be no absolutely guaranteed rights in an orderly society, the Constitution attempts to strike a balance between individual liberty on the one hand and social control on the other. Towards this end, the Constitution confers power of judicial review on the courts to keep the legislatures within the limits of their powers.[40] While this

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37 Article 4(1) of the Malaysian Federal Constitution declares:

"This Constitution is the Supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

38 (1976) 2 MLJ 112

39 Id. at 113.

40 See Articles 121 and 128 of the Malaysian Federal Constitution. Article 121, which deals with the judicial power of the Malaysian Federation, does not confer original jurisdiction on Malaysia Supreme Court for the enforcement of fundamental rights. Malaysian Supreme Court, unlike its Indian counter-part, does have only appellate jurisdiction with respect to the enforcement of fundamental rights. In Malaysian Constitution, there is no provision similar to Article 32 of the Indian constitution.

is the normal constitutional scheme for the enforcement of constitutional supremacy, the Constitution permits major departures from this scheme in certain crucial areas of constitutional rights such as the right to personal liberty,[41] the right to freedom of movement,[42] the right to freedom of speech, association and assembly.[43] In these areas, the Constitution confers wide and extensive powers on the Federal Parliament enabling it to impose even unreasonable, oppressive and arbitrary legislative restrictions on the enjoyment of these fundamental rights.[44]

(i) The Right to Personal Liberty: The Scheme of Constitutional Protection

A look at the scope of the right to personal liberty as guaranteed in the Malaysian Federal Constitution makes one feel that the right is not at all effective against the Federal Parliament. Article 5(1)[45] which guarantees the right to personal liberty declares that "no person shall be deprived of his life or personal liberty save in accordance with law." It may be appreciated that the right is guaranteed in negative form. If one converts it into positive form it would mean that a person can be deprived of his life or personal liberty in accordance with law. The question is: does this right envisage any limitation on the legislative power of the Federal Parliament? Answer to this question would depend upon the import of the expression *"save in accordance with law"*. A plain reading of this expression would convey the meaning that there should be a law before a person is deprived of his life or personal liberty. Articles 5(1) only insists on the enactment of a law before a person is deprived of his life or personal liberty. Obviously, this provision with this meaning is not intended to be a restriction on the legislative powers of the Federal Parliament. It is

Article 128 confers on the Malaysian apex court exclusive original jurisdiction to decide disputes between the State and the Federation and to decide issues relating to the legislative competency of either Federal Parliament or State Legislatures.

41 See supra n. 2

42 See Article 9 of the Malaysian Federal Constitution. Article 9(2), which is relevant for our purpose states:

> "Subject to clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughtout the Federation and to reside in any parth thereof."

43 See supra n. 3.

44 The restrictive clauses of Article 10 do not require the legislative restrictions to be reasonable.

45 Clauses 3 an 4 of Article 5 provides certain procedural safeguards.

submitted that this provision is intended to embody the Diceyan concept of "rule of law"[46] in the area of personal liberty.

The available scholastic opinion on the import of this expression is divided. While Professor Sheridan takes the view that the expression only means "save lawfully",[47] Prof. Jayakumar argues for a liberal interpretation of the expression so that its import would embrace the "procedural due process" of the American model.[48] It is humbly submitted that the view taken by Professor Sheridan is more logical and persuasive as it is in consonance with the constitutionally intended theme of ensuring legislative supremacy in matters of social control.

(ii) The Freedom of Movement, Speech, Association and Assembly: Scheme of Constitutional Protection

Again a closer look at the scope of the constitutional protection accorded to the right to freedom of movement, the right to freedom of speech and expression, the right to association and the right to assembly would give a clear impression that these rights are mere playthings in the hands of the Federal Parliament. Articles 9[49] and 10[50] of the Federal Constitution which guarantee all the fundamental liberties mentioned above appear to personify the constitutionally sanctified legislative supremacy of the Federal Parliament. These provisions, read with Article 4(2) of the same Constitution which expressly excludes any judicial review of all legislative restrictions that may be imposed on the rights to freedom of movement and of speech and expression, not only empower the Federal Parliament to impose a wide range of legislative restrictions on the exercise and enjoyment of these rights but also, in a way, immunise these restrictions from judicial scrutiny. Since the requirement of the criterion of reasonableness is alien to the scheme of fundamental liberties in Malaysia,[51] the legislative restrictions which the Federal Parliament is authorised to impose cannot be questioned on the ground that they are unreasonable, oppressive and arbitrary.

It may be of interest to note that Article 9(2) of the Malaysian Federal Constitution, which declares that all citizens shall have the right to move freely throughout the Federation and to reside in any part thereof, subjects the same

46 Diceyan rule of law only requires legality.

47 L.A. Sheridan and H.F. Groves, The Constitution of Malaysia, 44 (1987).

48 S. Jayakumar, Constitutional Limitations on Legislative power in Malaysia, 9 MLR 96.

49 See supra n. 42

50 See supra ns. 3 and 8

51 See supra n. 8

right to any law relating to the security of the Federation or any part thereof, public order and public health etc. In a similar vein, the rights to the freedom of speech and expression, freedom of association and freedom of assembly guaranteed to all Malaysian citizens in Article 10(1) are subject to the imposition of a wide range of legislative restrictions which are deemed necessary and expedient by the Federal Parliament in the interest of several specified grounds mentioned, in Article 10(2) of the Malaysian Federal Constitution.[52] In this context it will be of crucial significance to note that the word "restriction" in the provision has not been qualified by the expression "reasonable". Again, the "ouster clause" of Article 4(2) shuts out any scope for judicial review. This provision declares:

"The validity of any law shall not be questioned on the ground that -

(a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Article 10(2) but those restriction were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article."

This provision read in conjunction with Articles 9(2) and 10(2) would give a clear indication of the intendment of the founding-fathers of the Malaysian Federal Constitution. The clear intendment, it is submitted, is to ensure constitutionally sanctified legislative supremacy in matters of social control. This intendement was sought to be realised by reducing the scope of judicial review power of the courts to the minimum.

(b) The Indian Constitutional Perspective

The Indian Constitution, as a grund norm of the Indian legal system, incorporates and guarantees several fundamental rights in Part III of the Constitution. These rights have been modelled on the American Bill of Rights. The same fundamental law provides for their effective enforcement by the conferment of adequate power of judicial review on the higher courts of the land. The Apex Court of the country is constitutionally enjoined to play the role of a sentinal of the fundamental rights.[53] The architects of the Indian Constitution, guided by the experience of the working of the American Constitution, took care to harmonise the compelling claims of freedom and liberty on the one hand and those of the social control on the other. This is amply reflected in the scheme of fundamental rights, which permits regulatory

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52 Ibid.

53 See supra note 15. See also *State of Madras v. V.G. Rao*, AIR 1952 SC 196.

control over the exercise and enjoyment of these rights in the interest of social control.

(i) The Right to Personal Liberty: Constitutional Scheme of Protection

In India the right to personal liberty as guaranteed in Article 21[54] of the Indian Constitution, like its Malaysian counter-part, was not intended to be an effective limitation on the legislative powers of the Indian legislatures. Look at Article 21 which states that "no person shall be deprived of his life or personal liberty except according to procdure established by law." As its text indicates, the provision only requires the enactment of a law and the laying down of a certain procedure before the State may deprive any person of his life or personal liberty. The quality and content of either the law or the procedure embodied in the law was not intended to be amenable to judicial serutiny under this provision. This provision was intended to ensure legislative supremacy of Indian legislatures.

It may be of great interest to note that this view of the expression received judicial approval not only in the famous *Gopalan*[55] case in 1950 but also in the land-mark *Hebeas Corpus*[56] case in 1976 although it was rejected in the epoch-making *Maneka Gandhi*[57] case in 1978. This view has now been relegated to the domain of constitutional history in India.

Bhagwati, J., the main architect of the Indian judicial activism, in *Hebeas Corpus case* observed: [58]

> "The only safeguard enacted by Article 21, therefore is that a person cannot be deprived of his personal liberty except according to procedure prescribed by 'State made' law. If a law is made by the State prescribing the procedure for depriving a person of his personal liberty and the deprivation is effected strictly in accordance with such procedure, the terms of Article 21 would be satisfied and there would be no infringement of the right guaranteed under that Article.

(ii) Freedom of Speech, Association, Assembly and Movement: Scheme of Constitutional Protection

While the right to personal liberty was not intended to be an effective constitutional limitation on the legislative powers of the Indian legislatures, Article 19 freedoms are meant to impose real and effective limitations on them.

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54 See supra n. 13

55 See infra n. 71

56 *A.D.M. Jabalpur* v. *Shiva Kant Shukla*, AIR 1976 SC 1207.

57 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597

58 See supra n. 56 at 1361.

In the Indian constitutional scheme these rights are considered to be preferred rights calling forth a stricter judicial scrutiny of State encroachments of the rights.

While clause (1) of Article 19[59] guarantees the main freedoms, clauses 2 to 6[60] of the same provision enable the State to impose reasonable legislative restrictions on the exercise and enjoyment of these rights. The requirement of reasonableness of legislative restrictions brings in the element of "due process" of the American model subjecting them to judicial review.[61] Under the restrictive clauses of Article 19 the legislative restrictions which the State is authorised to impose will have to satisfy the three-fold criteria before they can validly restrict the enjoyment of Article 19 freedoms. First, the restrictions should have the statutory sanction which means that the executive cannot, without the backing of a law, impose any limitation on the right. Secondly, the restrictions will have to have a clear nexus to one of the purposes, enumerated in the restrictive clauses. Thirdly, the restriction imposed should pass the test of reasonableness.

V. Constitutionally Sanctified Legislative Supremacy and Judicial Enforcement: Contrasting Approaches

The concept of legislative supremacy is based upon the philosophy of legal positivism which is postulated on the fundamental premise that the positive or enacted law is the basis of any given legal system. It does not countenance any moral element in the definition of law. It does not therefore concern itself with the justice, morality and reasonableness of law. It forbids judges from examining and questioning the reasonableness, fairness and justice of the law. It promotes and encourages a literal, grammatical and conservative interpretation of laws. The idea of creative, purposive and innovative interpretation is alien to its scheme of thought. It is a moot question as to what extent the philosophy of legal positivism should be allowed to flourish in countries which have written Constitutions which proclaim to be the supreme laws of the land. This question becomes most relevant in the context of the differing Malaysian and Indian constitutional experiences.

(a) Malaysian Judicial Approach

It may be appreciated that while the theory of legal positivism has not only been inseparably engrained in the scheme of Malaysian constitutional

59 See Article 19 of the Indian Constitution

60 Ibid

61 The concept of reasonableness was explained by the Supreme Court in *State of Madras v. V.G. Rao*, AIR 1952 SC 196.

jurisprudence but also continues to have overwhelming influence on Malaysian judges, the Malaysian judges have shown remarkable degree of judicial deference to the constitutionally sanctified legislative judgement in matters of social control,. There is a catena of cases[62] in the area of the right to personal liberty to illustrate this point. In several cases[63] the Malaysian judges have interpreted the word "law" in the expression *"save in accordance with law"* used in Articles 5(1) and 13(1) of the Malaysian Federal Constitution in its literal, and plain grammatical sense. These judges have steadfastly stuck to the view that the word "law" would refer to "lex", i.e. any enacted law and not to "Jus", i.e. justice or right.

According to this view, the word, "law", as used in Articles 5(1) and 13(1), only embodies the legislative will and the function of the judges is only to give effect to that will no matter how harsh, unjust or oppressive the law may be.[64]

In *Loh koi Choon* v. *Government of Malaysia*[65] Raja Azlan Shah F.J. remarked: [66]

> "The question whether the impugned act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament and therefore not meant for judicial determination. Our courts ought not to enter this political thicket, even in such worthwhile cause as the fundamental rights guaranteed by the Constitution."

In a similar vein, in *Andrew S/o Thomboosamy* v. *Supt. of Pudu Prisons*,[67] Suffian L.P. observed: [68]

> "If the Government exercises a power conferred on it by Parliament and keeps within the law, the duty of the court is quite clear; *the court should simply apply the law, no matter how harsh its effect may be on*

62 *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri*, (1969) 2 MLJ 129; *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prison, Kuala Limpur*, (1976) 2 MLJ 156; *Loh Kooi Choon* v. *Government of Malaysia*, (1977) 2 MLJ 18; *P.P.* v. *Yee Kim Seng*, (1983) 1 MLJ 252; *A.G. of Malaysia* v. *Chon Than Guan*, (1983) 1 MLJ 51; and *Che Ani Bin Itam* v. *P.P.* (1984) 1 MLJ 113.

63 See supra n. 62. See also *Armugam Pillai* v. *Government of Malaysia*, (1975) 2 MLJ. 29 and *Kulaisingam* v. *Commissioner of Lands, Federal Territory* (1982) 1 MLJ 204.

64 In *Ong Chuan* v. *P.P.*, (1981) 1 MLJ 64. The Privy Council gave a slightly liberal interpretation of the word "law" used in these provisions

65 (1977) 2 MLJ 187

66 Id at 188-189

67 (1976) 2 MLJ 156

68 Id at 158. *Emphasis added.*

the individual effected. His remedy is then not judicial but political and adminstrative".

Therefore, not surprisngly, the Malaysian judiciary has refused to induct the American "due process" into "law" as envisaged in Articles 5(1)[69] and 13(1)[70] of the Malaysian Federal Constitution.

Although it is debatable whether this type of positivistic judicial interpretation is consistent with the doctrine of supremacy of the Constitution, one thing is very clear, and that is that the Malaysian higher judiciary has not only respected the constitutional intent of the founding fathers of the Malaysian Constitution as to its role in the enforcement of the fundamental postulate of the supremacy of the Constitution but also taken it seriously. It will be interesting to note that the *Gopalan*[71] ratio which was rejected in India in 1978 still holds its sway over Malaysian judges.

(b) The Indian Judicial Approach

In India until the advent of the *Maneka Gandhi case*[72] on the Indian constitutional scene, the philosophy of legal positivism with its hand maiden of narrow, literal and conservative judicial interpretation dominated the field of the right to personal liberty. In 1978 there was a judicial revolution in the country, ushering in a new era of judicial approach to the values of constitutional supremacy, guaranteed fundamental rights and judicial review. The decision in the *Maneka Gandhi* case transformed the whole constitutional scene in the country. It rejected the *Gopalan* ratio which held sway over the Indian constitutional jurisprudence for a period of 28 years. Rejecting the *Gopalan's* narrow, restrictive, literal and common law approach to the constitutional interpretation, the Indian Supreme Court prefered a creative, purposive and innovative approach to the interpretation of the right to personal liberty as guaranteed in Article 21 of the Indian Constitution.[73] In the process, the Court transformed the right to personal liberty into a new fundamental of all fundamental rights and elevated it to the position of "brooding omnipresence" in the scheme of

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69 See supra n. 65

70 *Armugam Pillai* v. *Government of Malaysia*, 1975 2 MLJ 29 (F.C.)

71 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27.

72 See supra n. 57

73 In *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597 at 622 Justice Bhagwati (as he then was) declared the Supreme Court's professed new judicial policy towards the interpretation of fundamental rights. He said:-

> "The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of contaction."

fundamental rights. One of the seminal apsects of the *Maneka Gandhi* ratio is the rejection of the *Gopalan's* positivistic interpretation of the word "law" in Article 21 of the Indian Constitution and induction of the American "due process" into the provision.[74] Justice Bhagwati (as he then was) who delivered the leading judgement of the case observed: [75]

> "The priciple of reasonableness which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Article 14 (right to equality) like a brooding omnipresence and the procedure contemplated by Article 21 must answer to the test of reasonableness in order to be in conformity with Article 14. It must be "right, just and fair" and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied."

Justice Bhagwati also rejected the doctrines of "exclusiveness" and "object of state action" which were the main stay of the *Gopalan* ratio and which reigned the relationship of Articles 21[76], 22[77] and 19[78] for a long time. His Lordship held that no fundamental right was a separate and exclusive constitutional island and that an impugned law satisfying the requirements of one right would not be immune from challenge and judical scrutiny under another right which was alleged to have been violated. It may be appreciated that the rejection of the *Gopalan* ratio meant that all preventive detention laws which were held to be immune from examination on the touchstone of reasonableness under Articles 19 and 21 would no longer be so immune from such examination. This was made crystal clear by Justice Bhagwati (as he then was) in *Francis Caroline Mullin v. Delhi Administration*[79] where he observed:[80]

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74 In *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675 at 1689, Justice Krishna Iyer observed:

> "True, ... our Constitution has no due process
> clause ... but, in this branch of law, after
> Cooper ... *Maneka Gandhi* .... the consequence is the same."

75 See supra n. 57 at 624

76 See supra n. 13

77 Article 22 of the Indian Constitution provides certain safeguards to persons who are arrested and to persons who are detained under prevntive detention laws.

78 Clause (1) of Article 19 guarantees several democratic freedoms such as freedom of speech, freedom of association, freedom of assembly and freedom of movement, etc. Clauses 2 to 6 of the same provision enable the State to impose *reasonable* legislative restrictions on the enjoyment of these rights.

79 AIR 1981 SC 746. In *A.K. Roy* v. *Union of India*, AIR 1983 SC 710, the Indian Supreme Court clarified its judicial approach towards the validity of preventive

> "The law of preventive detention has therefore now (after *Maneka Gandhi* case) to pass the test not only of Article 22 but also of 21 and if the constitutional validity of any such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just."

In India the principle of reasonableness has become an all pervasive constitutional principle to safeguard the Supremacy of the Constitution. This is evident from Justice Bhagwati's observation in *Bachan Singh v. State of Punjab*[81]. He declared[82]

> "The concept of reasonableness... runs through the entire fabric of the constitution ... the procedure for depriving a person of his personal liberty must be reasonable, fair and just. It is for the courts to *determine* whether in a particular case the procedure is reasonable, fair and just..."

In conclusion, it may be mentioned that in India the constitutional principle of reasonableness, fairness and justness has come to stay as an ever shinning star on the Indian constitutional horizon beaconing the Indian Apex

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detention laws by holding the view that these laws, to the extent of their protection under article 22(4) to (7), are valid and that the same cannot be declared invalid under Article 21 on the ground that these laws are inherently unreasonable, unjust and unfair. This is evident from the Chief Justice Chandrachud's observation:

> "The power to judge the fairness and justness of procedure establishe by a law for the purpose of Article 21 is one thing and... [t]he power to decide upon the justness of the law itself is quite another thing: that power springs from due process" provision such as to be found in the 5th and 14th Amendments of the American Constitution by which no person can be deprived of life, liberty or property "without due process of law" ... In so far as our Constitution is concerned an amendment was moved... substituting the words "without due process of law" for words "except according to procedure established by law" (which was negatived)... in view of this background and in view of the fact that the Constitution as originally conceived and enacted recognises preventive detention as a permissible means of abridging the liberties of the people, though subject to the limitations imposed by Port III, we must reject the contention that preventive detention is basically impermissible under the Indian constitution." (see pp. 726 and 727)

It will be intersting to note that Justice Bhagwati, whose opinion in *Francis Carolie Mullin* case was being considered in this case was content to concur with the judgement given by Chief Justice Chanderchud.

80 Id. at 750

81 AIR 1982 SC 1325.

82 Id at 1340

Court to be a jealous guardian of the Supremacy of the Constitution in the country. This is the most invaluable consequence of the enactment of the Constitution (Forty-Forth Amendment) Act, 1978[83] which, *inter-alia,* enjoins the President of India not to suspend the enforcement of Article 21 of the Indian Constitution even during the operation of national emergency proclaimed under Article 352[84] of the Indian Constitution.

VI. CONCLUSIONS

From the foregoing discussion, the following conclusions may be deduced.

(1) While the impact of the American constitutionalism on the Indian constitutional developments is more direct and pronounced, its impact on the Malaysian constitutional developments is more indirect and less pronounced.

(2) The concept of constitutional supremacy so eloquently proclaimed by the Malaysian Federal Constitution is constitutionally intended to be more in the nature of a constitutional myth than a constitutional reality. It is intended to be a mere ceremonial constitutional slogan.

(3) In contract, the concept of constitutional supremacy as envisaged in India is intended to be a living and dynamic core concept of the Indian constitutional jurisprudence. It has become a vibrant constitutional reality in India.

(4) Both the preparatory materials (*Travaux Preparatoires*) of the Malaysian Federal Constitution and of the Indian Constitution throw enough light on the constitutional intendment of the founding-fathers of the respective constitutions.

(5) In consonance with the constitutional intent of its founding-fathers, the Malaysian Constitution embodies several provisions in the areas of the right to personal liberty and the right to freedom of speech, etc. which personify a kind of constitutionally sanctified Parliamentary Sovereignty. This is evident not only from the absence of the principle of reasonableness from the Malaysian constitutional scheme but also from the presence of constitutionally ordained "ouster clauses" in its scheme.

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83 The amendment effected a change in Article 359 of the Indian Constitution, which authorises the President of India to suspend by order the enforcement of any of the fundamental rights named therin, to prohibit him from suspending the enforcement of Articles 20 and 21 of the Constitution.

84 Article 352 of the Indian Constitution authorises the President of India to proclaim emergency on certain grounds mention therein. See the amended Atricle 359 of the Indian Constitution.

(6) In contrast, except in the area of the right to personal liberty, the Indian Constitution does not countenance the idea of constitutional personification of legislative supremacy. This is ensured by a provision for the strong presence of the principle of reasonableness in the Indian constitutional scheme of fundamental rights.

(7) The Malaysian judges have preferred to show a remarkable degree of judicial defernce to the intendment of the Malaysian Constitution makers. They are also constitutionally obliged not to obstruct the growth of the philosophy of legal positivism in Malaysia. Their narrow, literal and conservative approach to their function of constitutional interpretation is in tune with the intended overall scheme of fundamental rights in the country.

(8) The Indian judges have ignored the intendment of the Constitution makers in the area of the right to personal liberty. They have rejected the idea of legislative supremacy as it is, in their opinion, utterly incompatible with the notion of constitutional supremacy. They, therefore, preferred a more activist, creative and innovative constitutional interpretation to safeguard the supremacy of the Indian Constitution.

VIOLENCE AGAINST WOMEN : SUBVERSION OF WOMEN'S HUMAN RIGHTS

*S.K. Verma**

On June 25, 1993, the World Conference on Human Rights at Vienna adopted the Vienna Declaration and Programme of Action (the Vienna Declaration)[1], which is a hallmark in the efforts to gain recognition of women's human rights in many ways. It, for the first time, recognised the violations of the women's human rights and integrated their rights in the mainstream of the United Nations human rights dialogue. The Declaration recognized human rights of women as "an inalienable, integral and indivisible part of universal human rights" and demanded that the "equal status of women and the human rights of women ... be integrated into the mainstream of the United Nations system-wide activity". It pressed for the "eradication of all forms of discrimination against women, both hidden and overt".[2] But the most important of all, the Vienna Conference, for the first time recognized the gender-based violence against women in public and private life as a human rights concern. The Declaration specifically condemned "gender-based violence and all forms of sexual harassment and exploitation"[3] and called upon the General Assembly "to adopt the draft declaration on violence against women".[4] It welcomed the decision of the Commission on Human Rights to consider the appointment of a special rapporteur on violence against women.[5] This, indeed, is a big achievement. It has brought the issue of violence against women to the centre-stage of all discussion of women's human rights, because violence negativates all the human rights conferred upon women through various human rights instruments of the United Nations and legislated in many countries.

Violence against women is all-pervasive in every society. It is reported that in the United States, a women is physically abused every eight seconds and one is raped every six minutes. In a survey in Papua-New Guinea, 67 percent of

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1 See the *Vienna Declaration and Programme of Action*, text in 32 I.L.M. 1661(1993).

2 *Ibid.*, paras. 18,37, 39.

3 *Ibid.*, para. 18.

4 *Ibid.*, para. 38.

5 *Ibid.*, para. 40.

women were found to be the victims of domestic violence.[6] In Columbia, until 1980, a husband could legally kill his wife for committing adultery.[7] In India, it is reported that a "woman is molested every 26 minutes, raped every 52 minutes and falls a victim to dowry death every 102 minutes".[8] It is further reported that between January-June 1994, in India, there were 3504 cases of rape, 3700 cases of kidnapping and abduction, 1226 cases of dowry death, 4322 cases of cruelty, 7037 cases of molestation and 3992 cases of eve-teasing.[9] These figures are mind-boggling. They point out to the fact that woman's identity is defined in terms of her sexuality or gender, who is systematically deprived of her human rights. Violence against women is a fact of life. It is also manifested in the form of trafficking in women, child prostitution, female foeticide and infanticide. These acts against women are committed over and above the discrimination and inequality they suffer in every walk of life. In a UN Report (1980), it is reported that:

> "women constitute half the world's population, perform nearly two-thirds of its work hours, receive one-tenth of the world's income and less than one-hundredth of the world's property."

They comprise 66 percent of the world's illiterates and 70 percent of the world's poor. Violence against women, clubbed with these inequalities, is the total denial of their human rights.

VIOLENCE AS A FOCAL POINT TO WOMEN'S HUMAN RIGHTS

In order to advance women's rights, it is necessary to tackle the problem of violence perpetuated against them. So far, across cultures and throughout time, violence against women in the private sphere is viewed as something apart from, and less egregious than violence that occurs in the public sphere. The traditional notions of human rights abuses have evolved with the distinction that abuses in the private sphere occur most frequently against women and those in the public sphere occur most frequently against men. Examples of the private sphere abuses against women include intimate violence, murders, rape,

6 See the *UN Newsletter*, Vol. 50, no. 33. p. 2 (19 Aug. 1995).

7 Magdala V. Toro, "Columbia: Legal Gains for Women" in Margaret Schuler (ed.), *Empowerment and the Law: Strategies of Third World Women* (1986) p. 71, at 71-73.

8 It is reported that in India, five women are burnt in dowry-related disputes every day, see *op.cit.* 6; also, Ranbir Singh, "Gender Justice and Human Rights in India" in J.L.Kaul (ed.) *Human Rights: Issues and Perspectives* (1995), p. 111 at 116.

9 See A.K.Jha,"Women: Saga of struggle", *Civil Services Chronicle* (April 1995), p. 16 at 18. For 1995, there were 357 reported cases of rape, 481 of molestation and 2639 of eve-teasing, see *The Times of India*, Feb. 1996, p. 3.

etc. Examples of public sphere abuses committed frequently against men are torture, arbitrary detention, disappearances, and summary executions. Whereas the public sphere abuses get more attention, the private sphere abuses have not previously aroused public outcry or state protection to the same degree, and they have been kept hidden from public scrutiny. But, it is important to note that those experiencing the abuses, the issue presents as an indivisible whole because it affects the entirety of the life of the person experiencing the abuse, and thus cannot and should not be fragmented into neat compartments of "private" or "public" abuses or cannot be ignored. Women particularly suffer from the effects of these abuses because of the fewer resources, and recourse or redress available to them.

However, to deal with the problem of violence against women, and to determine whether to define this problem as a human right issue, it is imperative to examine the issue in its whole perspective. A focus on the acts themselves - the beatings, the rape etc., would neglect the material circumstances which give rise to the acts as well as the consequences, leading toward further subordination of the survivor of the violence. A contextualization of the acts of abuse (i.e., events that occured before the act of violence that contributed to its commission, and events that happened after the act) is essesntial. Violence against women is systemic, and intersects with all other aspects of their lives. Mere emphasis on acts of physical violence against women as a priority in human rights protection concerns is not enough. It must also address human rights issues which warrant the full attention, resources, and commitment of the nation-states.

Women are subject to various forms of violence, which are manifested in their human rights violations. These violations include : acts invading women's bodily integrity manipulating their child-bearing decisions etc.; economic exploitation,viz., selling them as children or child brides, forced prostitution, near total exclusion from development programs; assaults, penalizing women for engaging in political activity in defense of themselves; so-called "domestic violence", i.e., husband's beating/rape/torture of women in "his house", torture by his family members; forced compliance with restrictive gender roles, often accompanied by persecution for refusing to accept them "appropriate" or "required" behaviour; poverty; lack of educational opportunities; inability of women or not allowing women to live apart from men,, or to master "men's work", or limiting their public appearance only with the presence of a male relative. All violations of this kind, including in particular murder, systematic rape, sexual slavery, forced pregnancy, etc., require a particularly effective response. This requires the exploration of the roots of such acts and their deeper consequences.

Violence against women is a part of general violence found within social structure, such as based on class, caste, religion, ethnicity, and state control, i.e.,

structural violence. Violence against women is also a manifestation of forms of control and coercion exercised through hierarchical and patriarchal gender relationships in the family and society.[10] Power is at the core of violence. It runs through all the human rights violations committed against women, through each of them at every stage and at every facet.[11]

Power is differently manifested and alternatively displayed, obscured, and trumpeted on women's bodies and in women's lives. Examining acts of violence alone fails to locate and explore these power plays. This requires a multi-facet approach towards these systematic acts of violence in order to evaluate them within the human rights framework. It also requires the examination of socio-economic and political circumstances from which this display of power emerges. Margaret Schuler, in her study, states that "understanding the phenomenon of gender violence requires an analysis of the patterns of violence directed toward women and the underlying mechanisms that permit the emergence and perpetuation of these patterns."[12] For this matter, it is necessary to scrutinize the role of poverty,[13] the militarization of the society,[14] culture, race, ethinicity, and religion in fostering, encouraging, justifying, or allowing violence against women. It is also necessary to closely examine the ways in which society reinforces violence against women through law, custom, and politics. State, by its policy of non-intervention in domestic violence perpetuates violence against women. The law-enforcement agencies, such as courts, by their non-action or wrong actions or decisions also give a filip to this situation.[15]

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10 See Govind Kelkar, "Stopping the Violence Against Women: Fifteen Years of Activism in India" in Margaret Schuler (ed.)., *Freedom from Violence : Women's Strategies from Around the World*, (1992) , p. 75 at 76.

11 "Power" here means not only the ability to get someone to do what you want, but also to gain political power and to operate in a society that values one's existence on this basis.

12 See Margaret Schuler, "Violence Against Women: An International Perspective" in *Freedom from Violence, op.cit.* 10, p. 1 at 10.

13 Studies show that violence against women increases during hard economic times, see J.Ann Tickner, *Gender in International Relations: Feminist Perspectives on Achieving Global Security* (1992), p. 56.

14 See Julie Mertus and Pamela Goldberg, "A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside / Outside Construct", *Journal of I.L. & Politics*, vol. 26, p. 201 at 226.

15 See the Supreme Court judgment in the case of a minor girl, whose rapists were acquitted by the lower court and the High Court, the girl was lebelled as of "loose morals". The Supreme Court was critical of these courts and awarded rapists 5 years' jail term and Rs. 5000 fine to each of them after over ten years when the incident occurred in June 1985, see *The Times of India*, Jan. 1, 1996, p. 5.

To have a full view of this problem, one must also look deeper into the aftermath of the acts to understand their impact on the individual woman victim of the violence, as well as on women as a group and on society as a whole. How did the woman respond? How has the violence affected her life? What social or community support was available to help her to overcome the trauma? The answers to these questions serve an important role in formulating the problem and its resolution. While examining this problem, it is also important to analyse the social conditions that produce men that violate women, and subjugate women to men. It is also necessary to examine how the state has responded to the act or attempted to prevent the act. This is a difficult task, but then difficult problems need radical solutions. It is now time to shun the approach by lebelling these abuses as solely women's issues which almost exclusively affect women, such as intimate violence, rape, and other acts that are carried out by the family members or by strangers, who are not state actors, and sometimes committed by the state actors also, like custodial rapes or violence against their body. Violence, when contextualised in this manner, will encompass many of the social, cultural, and economic disparities to which women are subjected to as well as the political abuses they confront. In fact, the close examination will reveal that violence is at the core of multitude of issues that affect women's lives, such as poverty, illiteracy, and lack of freedom to take vital decisions affecting her life, and thus making violence against women the central issue in the human rights of women. On the other hand, it can also be argued that,in the context of human rights, women's human rights violations are also a form of violence. Violence works as a catalyst to aggravate the human rights violations. Sometime women experience these human rights abuses without any tangible physical violence, and those cases must be raised as human rights violations. Thus, the challenge is to allow violence to remain a central issue, and use it as a vehicle to improve and highlight the women's human rights.

INTEGRATED APPROACH TO VIOLENCE

The full range of women's realities, in fact, represents a saga of inter-twined repressions which requires a well thought of approach. Though it is true that at times to tackle the problem squarely, gender must be singled out and women should be given a separate and favoured treatment. This is being done under Article 15(3) of the Constitution of India and the Government has adopted various laws favouring women and punishing the crimes committed against them. Yet, separating the gender aspect does not solve the problem, though such an approach may be politically advantageous. Thus, though the Government of India has passed different laws to deal with the problem of atrocities against women, such as the Dowry Prohibition Act, 1961 as amended by the 1986 Amendment Act, the Criminal Law (Amendment) Act,

1983. The latter Act has amended the Indian Penal Code and has introduced certain reforms concerning the punishment of rape, the procedure and rules of evidence. New provisions are added in the Indian Penal Code for the dowry death (Sec. 304 B) and domestic violence committed against women by her husband and his relatives (Sec. 498A). But these laws have not improved the situation in any significant manner. Furthermore these laws do not take into account every conceivable situation of violence against them, like the rape committed against a minor child by a family member, where she may not be in a position to comprehend and respond to the act in a legal sense. There also does not exist any meaningful societal support system to look after these victims.

This necessitates an integrated approach whose goal should be for the full recognition of the broad range of human rights violations that women encounter, while honouring the differences in their social position. Underlying the integrated approach is an assumption that women reject power imbalances that render their lives subordinate and invisible, and make them second class citizens in the society. It presupposes that patriarchal social relations have systematic social consequences and that mapping such consequences is valuable for corrective as well as constructive purposes. Such an approach may be reconstructive as well, which will help in designing new, gendered frameworks for thinking about the links between oppressions and path toward solutions. In such an approach, it is important to note that by merely adding women to traditional categories is not enough because they will take male experience as the norm and the women's issues will again take a back seat. They will be looked into from the point of view of men and not from the women's angle. Adding women should mean empowering women and to give the decisions a typical feminity approach. The underlying premise of this approach is that women view the world in diverse ways, which may be distinct from that of men. It also makes clear that women and conventional framework often cannot coexist. Thus, the Government's decision to have 30 percent seats in Gram panchayats or reservation of jobs for women is hardly a meaningful step, though politically most feasible and administratively most convenient to do, but it is hardly a meaningful step to eradicate the instances of violence against women. On the contrary, the integrated approach seeks to challenge the current, traditional frameworks and attempts to create new, gendered framework, constructed to fit the way in which women in all their diversity view the world, rather than adding the women to existing epistemological frameworks.[16] Such a structure will reject efforts by the existing formalised human rights structure to keep women isolated in a separate, segregated realm.

[16] See *op. cit.* 14, at p. 231.

The Fourth World Conference on Women, held between 4-15 September, 1995 at Beijing in China, in its Platform for Action has also identified violence as one of the critical areas of concern for women. It has suggested a multi-pronged, integrated approach to deal with this problem. The actions proposed by the Platform of Action are addressed to Governments, employers, non-governmental organisations (NGOs) and others. The governments are required not to use any custom, tradition or religious consideration to avoid their obligations to the elimination of violence; adopt measures to modify the social and cultural patterns of men and women; provide well-funded shelters and relief support for victims of violence; and assist female victims of violence due to prostitution and trafficking. The actions suggested to be taken by the governments, employers, NGOs and others are: to develop programmes and procedures to eliminate sexual harassment and other forms of violence in all educational institutions, workplace and elsewhere; promote research on violence against women; encourage the media to examine the gender stereotypes and take measures to eliminate them. However, in order to evolve an integrated approach and to introduce measures outlined in the Platform for Action require a strong political will of the governments which is not easy to come-by in the male-dominated decision-making process.

However, to deal effectively with this problem, the United Nations should keep a check on the member nations. Efforts should be made to enable the Commission on Status of Women to comment on the many reports of the Special Rapporteurs and Working Groups of the Commission. Similarly, the High Commissioner for Human Rights should review the work done by States towards the implementation of the Human rights conventions. The General Assembly, in 1993, adopted the Declaration on the Elimination of Violence, describing violence against women as "one of the crucial mechanisms by which women are forced into a subordinate position compared with men". It also appointed a Special Rapporteur on Violence Against Women, asking her to collect the most comprehensive data, and to recommend measures at the "national, regional and international level" to eliminate violence against women and its causes. The UN Commission on Human Rights in its 51st session (1995) adopted resolutions on the elimination of violence against women (Res. 1995/85), and on the question of integrating the human rights of women into the human rights mechanisms of the United Nations (Res. 1995/86)[17].

India is a party to many UN conventions related to women and it has also ratified the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. The Government of India has appointed a National Commission for Women and the National Human Rights Commission which are

[17] See the International Commission of Jurists, *The Review*, June 1995, p. 65.

operative since 1992 and 1993 respectively. Their main function is to prepare situation reports, which are recommendatory in nature. But one of the important functions of the National Human Rights Commission is to see that all treaties to which India is a party, should be implemented. In the light of the 1979 Convention on Women, the Commission's task is gigantic. The Convention enjoins the states to eliminate all forms of discrimination against women *in effect*.

CONCLUSION

The 1948 Universal Declaration of Human Rights declared that everyone "has the right of life, liberty and security of person" (Art. 3) and "no one shall be subjected to torture or to cruel, inhuman or degrading treatment" (Art. 5). Violence against any individual is a denial of human rights of the individual. Violence against women is practised in every society systematically which is systemic. It does not get the required attention and treatment from the governments because of its falling in the private sphere of the society. The Vienna Conference has brought the issue of violence against women to the forefront, and to treat the issue of violence as human rights violation. The Declaration stresses acts of physical violence against women as a priority in human rights protection concerns. There are ever-widening array of stories of gender-based violence. But our future actions should not stop at the physical manifestations of these acts and formulating ad-hoc and piecemeal solutions to them. Rather, the attempt should be to evolve an integrated approach, by taking into account the whole gamut of social relations, political and cultural realities of the country. Nevertheless, the attempt should not stop at the issue of violence but it should be integrated with the concept of human rights. In fact, those working to expand the concept of human rights must integrate and include violence against women and continue to address issues beyond violence and treat it as. a fundamental human right issue which warrants full attention, resources and commitment of a community.

In organising a strategy, it is to be kept in mind that purely gender-specific solutions would be short term with their negative results in the long-term. They would focus on creating a gendered framework for thinking about oppressions and may not get the required community support. The better approach would be to integrate the gender-specific framework to deal with the acts of violence in the human rights dialogue, drawing connections between oppressions and social conditions, and emphasising their inter-relationship. In such an approach, it should not be lost sight that any given issue should be examined in its whole complexity, contextuality and with a view towards both the issue itself and the circumstances that give rise to it or allow it to occur.

A NOTE ON THE LEGAL BASIS OF "SHOOT TO KILL ORDER"

Parmanand Singh[*]

I. INTRODUCTION TO THE PROBLEM

'Shoot to kill order' is sometimes issued by Magistrates and senior departmental officers to policemen or para-military personnel dealing with violent mobs or for combating widespread lawlessness. Such order can be sustained under various provisions contained in Code of Criminal Procedure and the Indian Penal Code. However, the exact legal basis of 'shoot to kill' order has so far not been conclusively decided by the courts.

Section 129 (1) of the Code of Criminal Procedure authorises the executive magistrates and the other police officers to use *civil* force to disperse an unlawful assembly. Clause (2) expressly authorizes the use of such force for such dispersal. Section 130 authorizes the executive to call armed forces to disperse an unlawful assembly. Under section 132 a soldier receives absolute exemption from criminal liability for any act done in the compliance of the order of the superior. Such exemption is also available under sections 129 to 131 to executive magistrates for any act done by them in good faith. Section 23 of (The) Police Act 1861 imposes a duty on-every police officer "promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority". Clause (3) of Section 46 of Cr. P.C. forbids police officer to cause death of a person if the person to be arrested is not accused of an offence punishable with death or life imprisonment . This means that a person accused of an offene punishable with death or life imprisonment can be killed by a police officer in police encounter. Section 46(2) authorizes a police officer to "use all means *necessary* to effect the arrest of an accused".

Besides the aforesaid provisions, Exception 3 to section 300 of the Indian Penal Code protects a public servant acting for the advancement of public justice who exceeds the power given to him by law and causes death. Sections 76 to 79 of I.P.C. also excuses a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was commanded by law to do it. Illustration (a) to Section 76 reads :

> A Soldier fires on a mob by the order of his superior officer in conformity with the commands of law. A has committed no offence.

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'Shoot to kill order' may also be sustained as a measure of "private defence" under section 96 to 106 of I.P.C. and as an act of "necessity" under section 81 of I.P.C. Section 100 authorises a man who is under a reasonable apprehension that his life is in danger or his body is in risk of grievous hurt, to inflict death upon his assailant. Section 106 provides that the right of private defence extends even to causing harm to innocent citizens, including a right to fire on the mob in the exercise of the right of private defence as has been exemplified in the illustration to this section. Under section 81 of the Penal Code, there must be a situation in which a person is confronted with a grave danger and he has no choice but to commit the lesser harm, may be to an innocent person, in order to avoid a greater harm. Thus a shoot to kill order can be sustained by the necessity for protecting person or property against various forms of violent crimes or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed. But the subordinate officer ordered to 'shoot to kill' is required to exercise his own judgement as to the necessity.

For illegal orders of the superior the plea of *respondent superior* would be inapplicable. If the order of the superior is not in conformity with the commands of the law or is manifestly illegal, such as an order to kill innocent people who have assembled for a lawful purpose, affords no protection to a subordinate officer[1].

From the foregoing it is clear that 'shoot to kill order' is sustainable in law as an act of private defence or necesity or in obedience to the order of the superior or under sovereign powers. There is no specific provision in any statute to authorise the executive to issue such an order but such order is often justified under wide powers, to arrest, to maintain 'law and order', to advance public justice or to save the life of innocent citizens from mob or terrorist violence. Such orders are often justified as based on the appreciation of the difficulties and dangers to the police officer confronted by the excited mob or violent mob or repugnant acts of violence and hostage-taking.

II. Legal Infirmities of 'Shoot to Kill Order'

The plea of private defence, necessity or even of superior's order is objectionable because every act of state repression, lawlessness or sadistic uses of power can be defended on these grounds.At times, the subordinate officer may act without any order of the superior. The National Police Commission in its First Report in 1979 at pp. 61-62 has very rightly recommended mandatory judicial inquiry in cases of misconduct by police when death is caused in police custody in police firing in the dispersal of unlawful assembly.

[1] *Jayantilal* vs. *Eric Renison* (1975) Criminal Law Journal, 661

The common view is that 'shoot to kill' order is *prima facie* illegal and may be justified only in exceptional situations of terrorist or mob violence which leaves no option for the executive but to resort to firing to save the lives of innocent citizens or of the companion policemen or soldiers.

Moral wickedness of police killing of innocent individuals is self evident. Apparently 'shoot to kill'innocent citizens is violative of right to life and personal liberty. There are various instances where judicial inquiries have been ordered in police firing of innocent individuals. There are some Supreme Court decisions where compensation has been awarded to the victims of police firing[2]

The guiding principal embodied in various international documents on Human Rights is that "no one shall be subjected to torture or to inhuman or degrading treatment."

Everyone would agree that power should not be abused in the way the tyrants and bullies abuse it. But if an offical acting in good faith believes that if he does not issue 'shoot to kill order' more lives may be taken or threatened by mob violence, his act of firing order may be upheld as protecting the life, liberty and dignity of innocent citizens. In such situations killing under the executive order need to be balanced against the gains which such order is trying to achieve in terms of saving the life of others. Hence official calculation of utility cannot altogether be brushed aside. In this back-ground a comprehensive legal ban on ''shoot to kill''order might not be desirable if the State and society is interested to avoid suffering to innocent citizens who are the targets of dramatic escalation of terrorist violence and lawlessness.

III. Judicial Responses to the Problem

Unfortunately the legal basis of 'shoot to kill' order has not been judicially examined so far but such order has been justified on the plea of superior's order. In *State of West Bengal v. Shew Mangal Singh*[3] the Supreme Court as well as Calcutta High Court justified "shoot to kill" order on a finding that the particular situation warranted the police to open fire. In this case Ranjit and Samir, two political extremists were killed by police control party under the orders of the Deputy Commissioner of Police after the party had been attacked in a dark night and an Assistant Commissioner of Police had been injured as a result of such attack. The trial court convicted the accused under section 302 read with section 34 of I.P.C. and sentenced them to life imprisonment. On appeal the High Court of Calcutta acquitted the accused. The Supreme court did not think it to be a fit case for special leave to appeal.

[2] See *P.U.DR v. Union of India* A.I.R. 1987. S.C.355. *P.V.Kapoor v. Union of India* (1992) Criminal Law Journal, 128 (Delhi).

[3] (1981) 4. S.C.C. 1

The Supreme Court agreed that the situation warranted the firing order when policemen received injuries as a result of mob voilence. Since the orders of the Deputy Commissioner of Police to open fire was justified, the subordinate offices were bound to obey the lawful orders of their superior officer. The Supreme Court observed:[4]

> We are of the view that the High Court was justified in coming to the conclusion that the particular situation warranted and justified the order issued by the Deputy Commissioner of Police to open fire.

Surprisingly neither the High Court nor the Supreme Court discussed the legal basis of "Shoot to Kill Order". Apparently the police killing was justified as an act of private defence and on the ground of obedience to the lawful superior's orders. No question arose for the application of section 76 of I.P.C. as the firing order was viewed by the Court both as just and legal.

There are however enough indications in *Shew Mangal Singh* and section 76 to 79, I.P.C., that if the subordinate officer due to mistake of fact and not due to mistake of law honestly believes that he was bound or justified by law to carry out "shoot to kill order" of the superior which though not manifestly illegal was nevertheless illegal, perhaps he would still get the benefit of superior order.

The practice in other countries is not immediately available in the existing legal literature. Mention may, however, be made to the observations of House of Lords in *Attorney General For Northern Ireland Reference*[5] on this issue. In this case a British soldier on duty was put on murder charge for having shot at and killed an unarmed person who had run away on being challenged. The soldier had acted under honest, though mistaken belief that the victim was a terrorist. A single Judge commission acquitted the soldier of the murder charge on the ground that killing was justified. Attorney General preferred a *Reference* for determination of the extent of criminal liability of soldiers for the killings in the discharge of their law and order duties.

Lord Diplock observed :

> "My lord, to kill or seriously wound another person by shooting is *prima facie* unlawful. There may be circumstances, however, which render the act of shooting or killing which results from it lawful; and an honest and reasonable belief by the accused in the existence of facts which if true would have rendered his act lawful is a defence to any charge based on the shooting"[6].

4 Supra note 3

5 (1977) A.C. 105

6 Id. at 136

Lord Diplock also referred to Section 3 of Criminal Law Act (Northern Ireland) 1967 which permits the use of force in the prevention of crime or in effecting the lawful arrest of suspected offenders. Section 3 reads as follows:

> A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

In the instant case the force was used by the accused in the prevention of crime and the use of force involved here was the act of shooting to kill. His lordship held that:

> What amount of force is "reasonable in the circumstances" for the purpose of preventing crime is, in my view, always a question for the jury in a jury trial, never a "point of law", for the judge.[7]

The facts in the instant case were not "capable in law of giving rise to a possible defence of "self-defence". The deceased was in fact, and appeared to the accused to be unarmed. He was not attacking the accused: he was running away. So if the act of the accused in shooting the deceased was lawful it must have been on the ground that it was done in the performance of his duty to prevent crime.

It is thus clear that under English law too the "shoot to kill" order can be justified as an act of self-defence or for the prevention of crime or for effecting a lawful arrest. In the *Reference* the force used by the accused was held to be not "reasonable in the circumstances in the prevention of crime".

In England a committee on Featherstone Riots (Parliamentary Papers 1893-94 C. 7234) took the view that taking the life by the security forces could only be justified by the necessity for protecting persons or property against various forms of violent crimes. There is no set of rules governing every instance. The question whether on any occasion the moment has come for a firing on a mob depends on the necessities of the case.[8]

In *Reg* v. *Browne*[9] the defence of self-defence was in issue. It was pointed out that what one does in warding off an attack must go no further than what is necessary for the purpose. In some circumstances it may be necessary to do grievous injury but not to kill and then if, in lawfully attempting to injure, one kills incidentally, that is justifiable.

7 *Ibid*

8 See Brownile, 'LAW RELATING TO PUBLIC ORDER' 211-12 (1968)

9 (1973) N. I. 96, 102, 103.

IV. CONCLUSION

The forgoing discussion leads to the following conclusions. If the defendant shoots someone intending to kill or seriously injure and death results, that is murder. To raise a defence of justifiable killing there must be a combination of three factors:

(a) Some mischief must be threatened to which the defendant may lawfully use some force to repel.

(b) To prevent the particular mischief it must be *necessary* to shoot either to kill or to inflict serious injury" "*necessary*" in the context meaning that the threatened mischief cannot be prevented except by so doing.

(c) The harm likely to result from shooting to kill or seriously injure is fairly proportionate to the harm likely to result from the threatened mischief.

Hence only in the rarest circumstances it will be possible to justify shooting with intent to kill or seriously injure. The rarest circumstances will be those where threatened mischief involves imminent danger to life or grave physical harm or possibly very serious damage to property. 'Shoot to Kill' order against civilians militates aganst the norms of civil society and should be subjected to strict judicial and social scrutiny.

WORLD COURT ON THE LEGALITY OF NUCLEAR WEAPONS : A CASE OF MISSED OPPORTUNITY

*Gurdip Singh**

"—— We appeal, as human beings, to human beings: remember your humanity, and forget the rest. If you can do so, the way lies open to a new paradise. If you cannot, there lies before you the risk of universal death."

-----Christopher Gregory Weeramantry[1]

The question of existing international law concerning nuclear weapons has been begging for an answer ever since the United States exploded the atomic bomb to end the war with Japan in August 1945. International Jurisprudence on the issue of threat or use of nuclear weapons witnesses titanic tension between the State practice and legal principle. Sooner or later, the principal judicial organ of the United Nations was bound to get involved. International Court of Justice found itself in dilemma when faced with the tough task of relaxing the cancerous tension between State practice and international law by giving advisory opinion on an issue of tremendous historical, political, sociological, legal and humanitarian importance. The difficulty lies in reconciling the fifty year old practice of deterrence through nuclear weapons, on the one hand, with principles of humanitarian law and the law relating to the threat or use of force and the inherent right of self-defence, on the other. The evident struggle of International Court of Justice with International jurisprudential concepts emerges from the vague and controversial advisory opinion of the Court.

I. REQUEST OF WORLD HEALTH ORGANISATION

The World Health Organisation (WHO) and United Nations General Assembly made request to the International Court of Justice for the advisory opinion of the Court on the legality of the threat or use of nuclear weapons. These requests were stimulated by the efforts of the group of antinuclear non governmental organisations that created the "World Court Project" for the purpose of securing an opinion of the International Court of Justice declaring a

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1 Christopher G. Weeramantry, Dissenting Opinion, Advisory Opinion of International Court of Justice on Legality of the Threat or Use of Nuclear Weapons, 35 International Legal Material 809 at 922 (1996).

threat or use of nuclear weapons to be unlawful. In 1993, WHO requested the Court to give an advisory opinion on the following question:

"In view of the health and environmental effects, would the use of nuclear weapons by the state in war or the other armed conflict be a breach of its obligations under international law including the WHO Constitution."

On July 8, 1996, International Court of Justice ruled that it was unable to comply with a request by the World Health Assembly to give an advisory opinion. The Court ruled that although WHO is duly authorised under U.N. Charter to request advisory opinion of ICJ and the opinion requested concerned a legal question, the request submitted by the WHO did not relate to a question arising within the scope of the activities of that organisation.[2]

The jurisdiction of the International Court of Justice, under Article 96(2) of the U.N Charter, to give an advisory opinion to a Specialised Agency of the United Nations is subject to three requirements namely: firstly the Specialised Agency requesting the opinion must be duly authorised under the U.N. Charter to request advisory opinion; secondly the opinion requested must relate to a legal question; and thirdly the opinion requested must relate to a question that arises within the scope of the activities of the Specialised Agency.

The Court ruled that the first requirement for the advisory opinion has been complied with inasmuch as WHO was duly authorised to request advisory opinion of the Court through Article 76 of the WHO Constitution of July 22, 1946, and Article X, paragraph 2 of the Agreement between the United Nations and the WHO of July 10, 1948 which give effect to Article 96 paragraph 2, of the U.N. Charter. The Court found that the second requirement was also complied with as the request related to a legal question within the meaning of ICJ Statute and the U.N. Charter. However, the Court held that the third requirement was not complied with because the advisory opinion requested by WHO did not relate to question arising within the scope of the activities of WHO as required by Article 96, paragraph 2 of the U.N. Charter.

The refusal of International Court of Justice to give the advisory opinion is based on the close scrutiny by the Court of WHO Constitution, the U.N. Charter and the U.N. - WHO Agreement. The refusal by the Court makes it clear that the Court will subject future request from Specialised Agency to strict scrutiny and will take a hard look at the purposes and functions of Specialised Agency to satisfy itself that there is sufficient connection between the request and those purposes and functions.[3]

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2 Peter H.F. Bekker *et al*, Dismissal of Request by WHO for Advisory Opinion on Legality of Nuclear Weapons, in Judith H. Bello (Ed.), International Decisions, 91 American Journal of International Law 121 at 134 (1997).

3 Ibid., at 134.

II. Request of the United Nations General Assembly: World Court's Response

On December 20, 1994, the International Court of Justice received a request from the U.N. Secretary General, made by the U.N. General Assembly through Resolution of December 15, 1994 for an advisory opinion on the question:

"Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

International Court of Justice gave advisory opinion on 8 July 1996 and held:[4]

(A) unanimously, that neither customary nor conventional international law specifically authorises the threat or use of nuclear weapons;

(B) by eleven votes to three, that neither customary nor conventional international law comprehensively and universally prohibits the threat or use of nuclear weapons;

(C) unanimously, that a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4 of U.N. Charter and that fails to meet all the requirements of Article 51 is unlawful;

(D) unanimously, that a threat or use of nuclear weapons should be compatible with requirements of international law applicable in armed conflict (including international humanitarian law) and specific obligations under treaties and other undertakings expressly dealing with nuclear weapons;

(E) by seven votes to seven, by the President's casting vote, that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict and in particular the principles and rules of humanitarian law but that in view of current state of international law and the facts before the Court, it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which very survival of a State would be at stake; and

(F) unanimously, that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under international control.

International Court of Justice upheld the power of the General Assembly to seek the advisory opinion. The Court also established its competence to give the advisory opinion and found no merits in the objection of several States

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4 Advisory Opinion of International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 35 International Legal Material 809 (1996).

especially United States. While reaffirming that in theory it has discretion to decline such a request, the Court reiterated its traditional position that it should decline only if compelling reasons for the decline of its discretion exist. The Court did not find any such reasons in current case.

1. Human Rights in Armed Conflicts

The substantive issue to focus the attention of the International Court of Justice was whether the use of nuclear weapons violated the "right to life" guaranteed by Article 6 of the International Covenant on Civil and Political Rights. Some States especially United States, U.K, France, Netherlands and Russia argued that the "right to life" did apply in wartime as well as peacetime but was only a protection against arbitrary depriviation of life which obviously could not be absolute in time of armed conflict. Rather, it was further argued that it was law of armed conflict with its rule on legitimate targets and proportionality that must determine what would constitute an "arbitrary" deprivation. International Court of Justice agreed with the above argument and held:

> "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicble *lex specialis,* namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether the particular loss of life, through the use of certain weapons of warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of Covenant can only be decided by reference to law applicable in armed conflict and not deduced from the terms of the Covenant itself."

2. Environmental Law in Armed Conflict

The Court's attention was then drawn to the issue of applicability of environmental law in armed conflict. The Court responded to the question whether the use of nuclear weapons would violate the principles of environmental law. United States and France argued that the principles of environmental law were not suspended in wartime but that the legality of methods of warfare causing environmental damage could only be assessed under the rules of armed conflict relevant to such damage, including the rule of proportionality. They, then, argued that there was no absolute prohibition of weapons causing serious environmental damage and maintained that environmental damage needed to be balanced against the military advantage served by the use of such weapons.

International Court of Justice ruled that the States must take into account environmental considerations during armed conflict while assessing what is necessary and proportionate in pursuit of legitimate military objectives. The

Court clarified that respect for environment would be one of the elements to assess the conformity of the belligerent action with the principles of necessity and proportionality.

The advisory opinion of the Court makes it clear that environmental law developed during peacetime is applicable to armed conflict along with the law of armed conflict.[5] In fact, principles of environmental law must be read as an integral part of the law of armed conflict and need to be reconciled with the cardinal principlples of the humanitarian law namely target and proportionality. It is wrong to postulate that a different calculus for environmental and human rights considerations applies during armed conflict. In fact, Article 35(2) and 55 of the 1977 Additional Protocol I to the 1949 Geneva Conventions impose powerful constraints concerning means and methods of warfare affecting the environment.

3. Prohibition of Armed Force and Nuclear Weapons

Some States argued that in view of the "profound risks" associated with nuclear weapons, the use of nuclear weapons would inevitably be inconsistent with the limits on the exercise of the right of self-defence. It is pointed out that no use of nuclear weapons could comply with the requirement that the exercise of self-defence be proportionate to the armed attack against which it is directed because of widespread and severe effects of nuclear weapons and risk of escalation to a full-scale nuclear exchange which would devastate life on earth.[6]

International Court of Justice did not make any observation on the size, effects or the quantification of the risks carried by nuclear weapons. However, the Court held:

"—the very nature of nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self defence in accordance with the requirements of proportionality."

The opinion of the Court clarifies that risks associated with nuclear weapons must be borne in mind to determine the requirement of proportionality and weighed against the magnitude and consequences of the armed attack that the use of nuclear weapons is designed to defeat.

(a) Customary International Law

The Court could not find the prohibition on the use of nuclear weapons in conventional international law. The Court then turned to customary

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5 Michael J. Matheson, The Opinion of the International Court of Justice on the Threat or Use of Nuclear Weapons, 91 American Journal of International Law 417 at 423 (1997).

6 Egypt, Mexico, Sweden, Written Statements (June 1995), Supra, note 4.

international law which can only be created by a general practice of the States with the belief that they are compelled by law (*opino juris*). The nuclear weapon States and their allies have relied heavily on nuclear deterrence for their national security which, according to nuclear weapon States, indicates a presumption that at least some uses of nuclear weapons would be lawful. These States point out that the fact that nuclear weapons have not actually been used since World War II results not from an *opino juris* that their use is totally prohibited but from other military, political and humanitarian considerations.[7] The Court held that there was no such *opino juris* and therefore no such prohibition in customary law.

(b) General Assembly Resolutions

The illegality of the use of nuclear weapons has been argued to be established on the basis of a series of resolutions adopted by United Nations General Assembly beginning from 1961 and declaring that the use of nuclear weapons would be contrary to international law. On the issue of binding force of General Assembly resolutions, the Court held:

"The General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opino juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of adoption."

The Court, however, pointed out that several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions. The Court admitted that the resolutions indicated a sign of deep concern regarding the problem of nuclear weapons. However, the Court held that the resolutions still fell short of establishing the existence of an *opino juris* on the illegality of the use of nuclear weapons.

(c) Neutrality

The issue of neutrality *vis a vis* nuclear explosions has been debatable one. International law does not provide clear and unequivocal answer to the following questions: Does neutrality impose an absolute duty on States to refrain during armed conflict from conduct that would cause damage in neutral state? Does neutrality merely impose a duty on State not to invade a neutral territory? Does neutrality permit collateral damage to neutral territory proportionate to requirements of military necessity to defeat or prevent an armed attack? Does the principles of neutrality permit the lawful exercise of self-defence under Article 51 of Charter that meets the requirements of

[7] U.S.A., Russia, France, Written Statements (June 1995), Ibid.

necessity and proportionality despite the resulting damage or injury in the neutral territory?

The Court did not put the above controversy to rest and stated that the principle of neutrality, whatever its content, would be applicable to all international armed conflicts, whatever type of weapons (including nuclear weapons) might be used, subject, however, to the relevant provisions of U.N. Charter. The Court did not comment upon the content of the principle of the neutrality.

4. Law of Armed Conflict and Nuclear Weapons

The issue is whether the use of nuclear weapons violates two cardinal principles of armed conflict which are as follows: firstly, protection of the civilian population and civilian objects and the prohibition of use of weapons incapable of distinguishing between civilians and combatants; secondly, the prohibition on causing unnecessary suffering to combatants by using certain weapons. According to the Court, the fundamental rules of humanitarian law applicable in armed conflict must be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principes of international customary law. The Court found that this applicability was compatible with the intrinsically humanitarian character of legal principles in question which permeate the entire law of armed conflict and apply to all forms of warfare and all kinds of weapons.

On the issue of compliance with the first cardinal principle of international humanitarian law, India, Maxico and Egypt argued that all uses of nuclear weapons would necessarily involve the destruction of population centres and the infliction of hundreds of thousands of civilian casualties.[8] It is argued that the use of nuclear weapons would violate the first cardinal principle of humanitarian law because of inability of nuclear weapons to distingquish between civilian and military targets and the consequences of the use of nuclear weapons resulting in inevitable injuries to civilians as well as combatants. The use of nuclear weapons would result in killing and destruction in indiscriminate manner on account of the blast, heat and radiation occasioned by nuclear explosions. On the other hand, the United States and United Kingdom argued that the first cardinal principle of humanitarian law merely prohibited the directing of attack against non-military targets and therefore and the use of only such nuclear weapons would be prohibited which could not be accurately directed against these targets.[9] It is argued that nuclear weapons that could be accurately directed at targets (for example, guided nuclear missiles) would not be prohibited. It is further argued that the collateral damage and injury to

[8] India, Mexico, Egypt, Written Statements (June 1995), Ibid.

[9] U.S.A., U.K., Written Statements (June 1995), Ibid.

civilians as a result of the use of guided nuclear weapons would be dealt with by the rule of proportionality which prohibited any attack that might reasonably be expected to cause damage or injury to civilians that would be excessive in relation to anticipated military advantage.

On the issue of compliance with the second cardinal principle of international humanitarian law, India, Mexico, Egypt and Sweden argued that the use of nuclear weapons would result in unnecessary suffering to combatants because of extreme thermal and radiation effects of nuclear weapons.[10] On the other hand, United States, U.K., Russia, Netherlands argued that the second principle prohibited the use of weapons designed to result in extreme suffering beyond that necessary to achieve that military objective and accordingly, the principle must be applied by weighing the degree of suffering against military advantage obtained.[11] It was pointed out that the use of low yield tactical nuclear weapons which do not cause widespread destruction or the use of nuclear depth charge to destroy a submarine that is about to fire nuclear armed missiles would meet the requirements of both cardinal principles of humanitarian law structured on the foundation of proportionality criterion.[12] It was asserted that there existed "tactical", "battlefield", "theatre" or "clean" nuclear weapons which would be no more destructive than certain conventional weapons and, accordingly, the use of such mild nuclear weapons in self defence would be lawful as the use of conventional weapons.

The hypothesis of United States and others suffers of various shortcomings. The use of nuclear weapons even if directed against a lone nuclear submarine at sea or against an isolated military target in the desert, results in the emission of radiation and nuclear fallout and carries the risk of triggering a chain of events which could lead to the annihilation of the human species. Apart from heat and blast, the radiation effects of nuclear weapons over time are devastating. They cause unspeakable sickness followed by painful death, affect genetic code, damage the unborn, and can render the earth uninhabitable. Nuclear fallout may exert an impact on people long after the explosion, causing fresh injury to them in the course of time, including injury to future generations. The weapon continues to strike for years after the initial blow, thus presenting the disturbing and unique portrait of war being waged by a present generation on future ones. The scenario looks horrifying in view of the fact that nuclear technology has enormously advanced since the first and the only military use of nuclear weapons which took place at Hiroshima on 6 August 1945 and at Nagasaki on 9 August 1945. The entire devastation of Second World War was caused by

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10 India, Mexico, Egypt, Sweden, Written Statements (June 1995), Ibid.

11 U.S.A., U.K., Russia, Netherlands, Written Statements (June 1995), Ibid.

12 Judge Schwebel, Dissenting Opinion, Judge Higgins, Dissenting Opinion, Supra, note 4.

expenditure of no more than 3 million tons of munitions. As against this, the world stockpile of nuclear weapons today is 16 billion tons of TNT. In other words, we possess a destructive capacity of more than 5,000 (five thousand) times what caused 40 to 50 million deaths not too long ago. It should suffice to kill every man, woman and child 10 times over.

International Court of Justice noted with approval that international humanitarian law prohibited the recourse to methods and means of warfare which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants. However, the Court did not reach a conclusion as to whether all use of nuclear weapons would be prohibited by these principles. In view of the unique characteristics of nuclear weapons, the Court opined that the use of such weapons in fact seemed scarcely reconcilable with respect for such requirements. Nevertheless the Court considered that it did not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflicts in any circumstance. Finally the Court found that the threat or use of the nuclear weapons would generally be contrary to rules of international law applicable in armed conflict.

The meaning of term "generally" remains nuclear. However, it gives rise to an inference that all uses of nuclear weapons may be prohibited. The Court did not spell out the type of uses that would not be prohibited.

5. Survival of State

International Court of Justice comprehensively dealt with the right of States to use armed force in self-defence when extreme circumstances exist threatening the very survival of the States. In fact, during World Wars I and II; Korean War and Persian Gulf War, the survival of some States was threatened. NATO nuclear doctrine was evolved with a view to deter the invasion by WARSAW Pact States threatening the survival of NATO States. It is, therefore, necessary to determine whether a State is permitted to use nuclear weapons in such situations wherein its own survival or the survival of its ally is at stake.

The Court stated that it could not lose sight of fundamental right of every state to survival, and thus its right to self defence, in accordance with Article 51 of the Charter when its survival would be at stake. The Court also stated that it could not ignore "policy of deterrence" to which an appreciable section of international community adhered for many years. Finally, the Court held that in view of present state of international law, the Court could not reach a definitive conclusion as to the legality and illegality of the use of nuclear weapons by a State in an extreme circumstance in which its very survival would be at stake. Thus the Court expressly declined to pronounce on the legality of the use of

nuclear weapons in a case of extreme self-defence where the survival of the user or its ally is threatened.

III. Missed Opportunity

The advisory opinion of the Court gives rise to emergence of a number of issues: whether threat to survival of a State justifies the violation of international humanitarian law by way of the use of nuclear weapons; whether a State that is losing a war has a right to disregard the rules of armed conflict to avoid defeat; whether the refusal of the Court to pronounce on the legality of the use of nuclear weapons in a case of extreme self-defence threatening the survival of the user imply a *non-liquet*. Yet another baffling question is: what does the term "survival" mean? The opinion of the Court does not provide any guidance to interpret the term "survival". It is not clear whether survival refers to political survival of the government of a state, the survival of a state as an independent entity, or the physical survival of the population.

International humanitarian law endeavours to limit the infliction of damage and suffering and permits suffering only to the extent required to accomplish legitimate military objectives. Unlimited suffering is not permitted even in the exercise of right of self-defence. The suffering caused by the use of force in exercise of the right of self-defence must be proportionate to attack which the user intends to defeat. It is incorrect to postulate that the use of nuclear weapons would be justified in the case of extreme self-defence threatening survival of the user or its ally. In view of its most destructive thermal and radiation effects of nuclear explosion, the use of nuclear weapons grossly violates the condition of proportionality underlying Article 51 of the Charter and principles of humanitarian law. No legitimate military objective can justify the use of nuclear weapons which cause indiscriminate devastation and reduce to ashes the dictates of humanity and public conscience. Severest of the severe and lamentable human suffering cannot be permitted in the garb of exercise of the extreme self-defence. How can the exercise of the right of self defence be taken to a point of endangering the survival of mankind? The denial by the Court to pronounce on the illegality of the use of nuclear weapons in case of extreme self-defence ignores the basic principles of humanity and public conscience. The Court has missed an opportunity to develop the international jurisprudence on the most fundamental and historic issue of illegality of the use of nuclear weapons.

The issue of *non-liquet* emerging from the advisory opinion of the Court also captures the attention of the jurists. Judge Higgins, in her dissenting opinion, termed the Court's response as implying *non-liquet* i.e., a non-excusable failure to render judgement.[13] In a doctrinal debate on *non-liquet;*

[13] Judge Higgins, Ibid.

Judge Vereshchetin made a distinction between contentious procedure and the advisory procedure and observed:

> "In the advisory procedure, if Court finds a lacuna in the law or finds the law to be imperfect, it ought merely to state this without trying to fill the lacuna or improve the law by way of judicial legislation. The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called upon to pronounce, is itself inconclusive."[14]

What concerns us here is not the doctrinal debate on *non-liquet* but the refusal of the Court to answer the substantive question of General Assembly. Initially the Court decided to comply with the request of General Assembly for an advisory opinion but in the end, the Court took the position that it could not answer the substance of the question. The promise by the Court to give an advisory opinion and thereafter the denial by the Court to answer the substantive question amounts to contradiction between promise and performance which can not really be concealed.[15] The current state of international law and the elements of fact at the disposal of Court were sufficient to enable it to answer the substance of the question. No issue could be fraught with deeper implications for the human future, and the pulse of the future beats strong in body of international law. After having assumed jurisdiction, the Court could have answered the question convincingly, clearly and categorically.

Despite the missed opportunity by the Court of developing international law in an area of immense importance, the opinion of the Court offered a great deal of law. The Court gave an authoritative summary of law applicable in armed conflict, including humanitarian law. It offered its opinion on the role of environmental considerations in the law governing military action and made it clear that notwithstanding the absence of specific mention of proportionality in Article 51 of the U.N. Charter, this requirement applies equally to the exercise of the self-defence under the Charter.

IV. India's Nuclear Posture

On May 11, 1998, India flexed its nuclear muscle and successfully carried out three underground nuclear tests followed by two more nuclear tests on May 13, 1998 in the Pokhran Range in Rajasthan, twenty four years after India carried out the Pokhran test on May 18, 1974. What interests everyone is the fact that the people of India celebrated Buddha Purnima on May 11- the day of Gautama, the apostle of peace who attained Nirvana on this day. India's nuclear

[14] Judge Vereshechetin, Ibid.

[15] Judge Shahabuddeen, Dissenting Opinion, Ibid

tests conducted on the day of Buddha Purnima should not be seen as a contradiction in terms of the technological nature of this development.

The triple test carried out on May 11, 1998 include a simple fission device, a low yield device and a thermonuclear device. The simple fission device (15 kiloton), like its 1974 procedure, will be basis for free-fall, aircraft delivered nuclear bombs. These are fairly unsophisticated and easily assembled. In common parlance these are akin to first generation device using the fission route to a nuclear reaction. This is simple technology to be deployed against cities and large military installations. The second kind, termed the low-yield device (0.2 kiloton), is a reflection of India's ability to control and fine tune the fission process in a calibrated manner. The low yield device is a boosted fission device and has a much wider military utility. With low yield device, India could be making nuclear weapons in as wide spectrum as artillery shells, specialised demolition devices for military engineers and special forces, submarine launched ballistic missiles, and significantly for precision guided munitions for use in combat aircraft. These are small enough to be put into a shell casing or to be carried by an infantryman and are intended for tactical objectives - dams, bridges, military targets- where mass destruction is not desirable. Traditionally, a low yield device is called a tactical nuclear weapon. It is with the third category thermonuclear device (45 kiloton), that India is really in the big league of nuclear weapons technology. The thermonuclear device is based on a fusion nuclear chain, and is popularly known as hydrogen bomb. The testing of thermonuclear weapon is a route to be taken for any country wanting to deliver intermediate range or intercontinental ballistic missiles. In nutshell, thermonuclear weapon is the basis of warhead on Agni missile. The tests provide the valuable database which is useful in design of nuclear weapons of different yields for different applications and for different delivery systems. The tests are also significant contributions towards acquisition of a sound computer simulation capability. The two tests carried out on May 13, 1998 (0.5 and 0.3 kiloton) mainly aim at acquisition of sound simulation computer capability. The tests have made room for India in the global nuclear hierarchy and have laid off the policy of nuclear ambiguity adopted by India for twenty four years since the 1974 Pokhran test. India's policy of nuclear ambiguity has been translated into nuclear realism and finds justification on basis of nuclear deterrence theory. India today possesses a credible nuclear deterrent and reaffirms its earlier stand of speedy nuclear disarmament.

International Court of Justice stated that it could not ignore the "policy of deterrence" to which an appreciable section of international community adhered for many years. However the Court did not comment upon the legality of the "policy of deterrence". The policy of deterrence involves the maintenance of stock of nuclear weapons by State and their stated readiness to use them if necessary to defend themselves and their allies from armed attack including a massive non-nuclear attack. The policy of deterrence which has maintained the

strategic balance in the world since World War II has not been termed unlawful by International Court of Justice. The fact that International Court of Justice did not term the "policy of deterrence" as unlawful coupled with the adoption of policy by States during the last more than fifty years are strong factors in clearing the legal clouds surrounding the "policy of deterrence".

Nuclear capability is an effective military deterrent. This has been proved since last fifty years. What prevented the use of nuclear weapons during the last fifty years is the fact that mere possession of nuclear weapons by both the warring groups assures mutual destruction. What has made strategic balance during the past fifty years is the fear of the States that there would be no winners in an armed conflict involving the use of nuclear weapons and the costs would be the same for both the sides. The main purpose of nuclear weapons is not the use of such weapons but merely to deter enemy attack. The actual use by a State of nuclear weapons would be a fundamental failure of that State's policy. The stage of mutual deterrence has now arrived between India, China and Pakistan.

The armed weaponry of China and Pakistan has witnessed enormous sophistication and expansion. To maintain peace in the region, India is left with no choice but to adopt the "policy of deterrence" which successfully averted yet another nuclear war. In the process, India had to make huge investment- politically and economically - for conducting underground nuclear tests. In view of the nuclear and missile capabilities of China and Pakistan, it was necessary for India to demonstrate and reassert her missile and nuclear potential. The mutual deterrence presupposes nuclear bombs as well as missiles including those which are capable of carrying nuclear warheads.

Indian nuclear posture is structured on the pillars of peace and attempts to maintain the strategic equilibrium in the region. It is designed to meet the requirements of military necessity and proportionality which underlie the exercise of right of self defence and the law relating to armed conflict. The underground nuclear tests carried out by India at Pokhran do not violate either international customary law or specific international treaties entailing legally binding obligations for India. On the contrary, the wavelength of India's nuclear posture is in tune with the advisory opinion of the International Court of Justice. India's reaffirmation of its earlier stand of nuclear disarmament amounts to unequivocal acceptance and compliance with the World Court's opinion that there exists a duty on States to negotiate with a view to reaching an agreement on nuclear disarmament. India's nuclear posture, although based on "policy of deterrence," is linked with India's commitment to complete disarmament and India's desire to reconsider the issue of becoming party to Comprehensive Test Ban Treaty - a treaty which India has consistently opposed in the past by terming it as discriminatory.

WORKING OF THE CONSUMER PROTECTION ACT, 1986 IN THE FIELD OF SERVICES

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OBJECT

The object of this article is to critically analyse the adjudication by various Consumer Disputes Redressal Agencies, Forums, the Commission, the High Courts and the Supreme Court in the field of various services and to suggest suitable solutions to the controversial areas faced therein.

MEDICAL AID SERVICES

In a significant ruling in *Smt. Vasantha P. Nair* v *M/s. Cosmopolitian Hospital (P) Ltd.*[1] Kerala State Commission held that a patient is a "Consumer" and the medical assistance was a 'service' and that therefore, in the event of any deficiency in the performance of medical services the consumer redressal agencies can have the jurisdiction. It was upheld by National Commission in *M/s Cosmopolitan Hospital and another vs. Smt. Vasantha P. Nair and Ors.*[2] It was further observed that medical officer's Service was not a personal service so as to constitute an exemption to the definition of 'Service' under the Consumer Protection Act, 1986. However, the Madras High Court in *Dr. C.S. Subramaniam v. Kumaraswamy*[3] held that the Medical practitioners do not come within the purview of Consumer Protection Act. *In Indian Medical Association vs. V.P. Shantha & Others*[4], the Supreme Court has set aside the judgment of Madras High Court and affirmed ruling of National Commission. It was held that :

1. The fact that medical practitioners belong to the Medical profession and are subject to disciplinary control of the Medical Council of India and or

[1] 1991(II) CPR 155 (Ker. S.C.)

[2] 1992(1) CPR 820 (N.C.)

[3] 1994(1) CPJ 509 (Mad. H.C.D.B.)

[4] AIR 1996 S.C. 550

State Medical Councils would not exclude the services rendered by them from the ambit of Consumer Protection Act. They are liable under the Act to pay damages for negligence in the performance of medical services to their patients;

2. The composition of consumer redressal agencies and the summary procedure adjudication is not unsuitable to decide complaints against medical practitioners. There is a safeguard of appeal under the Act and in a complaint against medical practitioner involving complicated issues the complainant can be asked to approach Civil Court;
3. The services rendered by a medical practitioner to his patient is a service of personal nature as based on mutual confidence and trust but it is under a contract for personal service rather than a contract of service. In the later, there is master and servant relationship which is absent in the former. As relationship between doctor and patient is not of employer - employee the services rendered by doctor are not under contract of service and thus not excluded by the exclusionary part of S. 2(1)(0);
4. If a doctor renders services free of charge to *every patient* then it would not be 'Services' defined in S.2(1)(0) of the Act;
5. The Hospitals, Nursing homes and Doctors cannot claim it to be a 'free service' if the expenses have been borne by insurance Co. under medical course or by one's employer under the service condition. But where Doctors/Hospitals are rendering fee of charge services to some patients and services rendered on payment to others. Both types of services rendered fall within ambit of service u/s 2(1)(0) of the Act;
6. Thus services rendered to a patient by a medical practitioner (except where doctor renders free of charge to every patient or under a contract of personal service e.g. employment of medical officer for rendering medical services to the employer) by way of consultation, diagnosis and treatments, both medical and surgical would fall within the ambit of "service" as defined in S.2(1)(0) of the Act.
7. Free of Charge Services rendered in Govt. Hospitals/ Health Centres/ Dispensaries would not cease to be so on the grounds that medical officers are receiving salaries from hospital administration or that such hospital administration or that such hospitals are run by appropriation from the Consolidated Fund which is raised from the taxes paid by the tax payers and the patient is a tax payer.

In *M/s Spring Meadows Hospital, Noida v. Harjol Ahluwalia and Another*[5] Supreme Court has held that when a minor child is admitted into the hospital as a patient, the parent of the child can be held to be consumers of Medical Services u/s 2(1)(d)(ii) r/w s. 2(1)(0) of COPRA (Consumer Protection Act) as

[5] 1998(3) Supreme 183 = 1998 (1) CPR 1 (S.C.) = AIR 1998 S.C. 1801

to claim compensation for medical negligence under s. 14(1)(d) of the Act. The Redressal Agency under the Act is entitled to award compensation to the parents for mental agony caused by medical negligence in child patient's treatment in view of their powers u/s 14(1)(d) of the Act. Further, this compensation can be awarded not only to the beneficiary of the medical services rendered but also to his parents. It was clarified that compensation for mental agony cannot be denied on the ground that after medical negligence, hospital authorities followed humanitarian approach to tackle the situation.

It is submitted that the Act should be suitably amended to settle the above controversies viz., Can patients sue private doctors and Govt. Hospitals under COPRA? It is submitted that there is an urgent need for clarity as there is strong pressure and agitation from Medical Profession to exclude Medical Services from COPRA.[6]

LEGAL ASSISTANCE

The position is not very clear in this field of professional service. It has been held by the Karnataka State Commission that a litigant availing the facility of an advocate is under a contract of personal service with the advocate and hence he is not availing services within the meaning of section 2(1)(0) of the Act. But according to analytical observations of the Kerala State Commission in *Smt. Vasantha P. Nair v. M/s. Cosmopolitan Hospitals (P) Ltd.*[7] and that of the National Commission in *A.C. Modagi v. Cross Well Tailor*[8] services rendered by a lawyer to his client are not under a contract of personal service as there is to be a kind of master and servant relationship to constitute a contract of personal service which is not there in lawyer - client services. The position can be settled either by a direct pronouncement by the National Commission in an appropriate case or by Legislaature by including legal services specifically in the inclusive part of the definition of service in S.2(1)(0) of the Act.

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6 *The Hindustan Times* (New Delhi) Thursday, April 8, 1993, p. 5 'Consumer Protection Act -Exemption to Govt. doctors resented'.

7 1991(II) CPR 155 (Kerala SC)

8 1991(II) CPR 432 (NC). In this the National Commission has hold that the service rendered by a tailor to his customer is not under the contract of personal service and if he deficiently stiches a garment he is liable for the loss arising thereby under the Act. It is submitted that in view of this judgment, Karnataka State Commission's judgment *K. Rangaswamy v. Jaya Vittal & Ors. 1991* (I) CPJ 685 is not correct.

EDUCATION

The position is not clear in this area also. Imparting education and holding of the examination has been held to be 'service' under the Act.[9] But Calcutta High Court has held to the contrary.[10] Clarification in this field will help the student community considerably.

HOUSING

In *U.P. Avas Evam Vikas Parishad v. Garima Shukla & ors.*[11] the National Commission had held that Housing Board and Development Authorities etc. fall within the purview of Consumer Protection Redressal Agencies. Appeal against it was preferred by special leave to the Supreme Court and the Court passed an order staying the operation of the National Commission's judgment. Because of this, many Appeals, Revision Petitions and even the Original Petitions had to be kept in abayance by the National Commission. The Legislature amended the definition of service by including facilities in relation to housing construction in S. 2(1)(0) of the Act by Consumer Protection (Amendment) Act, 1993 w.e.f. 18th June, 1993. Now the said Appeal has been dismissed by the Supreme Court upholding the view taken by the National Commission. In view of this, all the pending cases pertaining to Housing Boards, Development Authorities and Builders can be speedily disposed of by the Natinal Commission.[12]

TELEPHONE FACILITIES

Telephone faciliteis are provided in many States by public sector body like Telecommunication Department and in Metropolitan towns by MTNL (Mahanagar Telephone Nigam Ltd,). Recently MTNL (Delhi Unit) has increased telephone tarrifs. The Nigam is sending the telephone Bills bi-monthly but they do not indicate tarrif rates. The consumers are put to great

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9 *Tilak Raj of Chandigarh* v. *Haryana Schools Education Board, Bhiwani,* 1991 (II) CPR 309 (Haryana SC) *Appejay School and ors.* v. *M.K. Sangal and ors* 1993 (II) CPR 62 (Delhi SC)

10 *Smt. N. Taneja* v. *Calcutta District Forum,* A.I.R. 1982 Cal.95.

11 1991(I) CPR 387(NC)

12 See address of Hon'ble Justice v. Balakrishna Eradi, President of National Commission on the occasion of the National Convention of the Presidents and Members of the State Consumer Disputes Redressal Commission on 24th January, 1994 published in 1994 (I) CPR 239 at 245, See also *Lucknow Development Authority* v. *M.K. Gupta* 1994 (I) CPR (Supreme Court) C.A. 6227 of 1990 etc. dicided on 11-11-93, Kuldeep Singh & R.M. Sahai, JJ.

inconveniences in checking the accuracy of the Bills. The MTNL (Delhi Unit) should print rates of local calls, free calls p.m., restriction on duration of call, if any and the rental charge p.m. etc. on the back of the Bill for the benefit of the subscribers of telephones. This matter can be taken up in Delhi State Consumer Council for recommendation to the concerned authorities to promote and protect the right of the consumers to know the price charged for telephone services supplied.

Telephone is a public utility service. It has been held that if a telephone complaint remains unattended for a long time (in that case for over six months) that amounts to a deficiency in service.[13] It is submitted that in the modern times telephone has become a necessity. If it remains faulty for a few days it causes hyper tension to the subscribers. Consumer Councils in various States and at the Centre can look into this aspect for a suitable recommendation to meet the grievances of the subscibers on unattended complaints to rectify the faulty telephone for even short periods.

Even if the subscriber sufferd loss in business due to non-shifting of the external extension of his telephone due to the negligence of the Telecommunication Department, he was awarded compensation for the same.[14] Where large number of telephones were out of order during strike, subscribers were held entitled to rebate.[15] Disobeying ad-interim order passed by the District Forum amounted to contempt.[16] The author of this paper was awarded compensation for disconnection of his telephone on ground of non payment when it was found that payment in fact was made before due date.[17] Recently National Commission has held that a subscriber is not entitled to interest on the security deposits as it is a provision to enable adjustment towards bill if the bill is not paid.[18] National commission has also held that the non-mention of telephone facility in the inclusive portion of the definition of service u/s. 2(1)(0)

13 *Mahanagar Telephone Nigam* v. *Dr. Vinod V. KarKare*, 1991 (II) CPR 12 (New Bombay SC).

14 *Mahaveer Electricals* v. *The District Managar, Telecommunications*. 1991 (I) CPR 85 (A.P. SC)

15 *Consumer Action Group* v. *Madras Metropolitan Telecom Board*, 1991 (II) CPJ 48 (Tamilnadu SC). See aslo *Mahanagar Telephone Nigam* v. *Dr. N.N. Joshi* 1991 (II) CPJ 635 (Maharashtra SC).

16 *C.R. Kataria* v. *Consumer Disputes Redressal District Forum*, 1991 (II)CPJ 682 (Punjab SC).

17 *Mahanagar Telephone Nigam Ltd.* v. *Narender Kumar Rohatgi*, Appeal No. 17/1993 decided on 21.7.93 by Delhi state Commission.

18 *Union of India* v. *Hardev Singh*, 1994 (I) CPR 19 (NC)

of the Act is of no consequence in view of the very wide language used in the main part of the definition which takes in every form of service.[19]

TRANSPORT

In transport facilities, Railways are occupying a prominent position as a public sector body. But under Indian Railways Act, 1890 (Now 1989) it has been specifically laid down that Railway Administration shall not be made liable to pay any compensation in the event of delay in delivery or even loss of any goods consigned by rail. The existence of this statutory bar against the award of compensation is resulting in gross injustice to consumers. It is highly necessary that urgent steps should be taken for repeal of this imperialist and obnoxious provision.[20]

Where complainant booked two IInd class A.C. berths, but no reservation was available to him for the date for which the berths were booked, it was held to be a deficiency in service and compensation was awarded to him.[21] It has also been hald that Railway Adminstration is not entitled to claim exemption u/s. 67 of the Indian Railways Act or under Rule 306 of the Railways Tarrif Rules, which were meant for situations where seats are not available for the reason beyond the control of Railway Authorities.[22] The National Commission has held that carriage of passengers by Railway is a service within the meaning of COPRA irrespective of the purpose of travel whether for business or otherwise.[23]

> Air Line is also providing transport facilities. In air travel, the provision for food is one of the facilities provided to the passangers in return for payment of the fare for the journey and it forms an essential part of the service rendered by the Air Line for the consideration received by it in the form of price charged for the ticket. Any defect in the food supplied must, therefore, be regarded as a

19 *Union of India* v. *Nitesh Aggarwal*, 1991 (I) CPR 348 (NC).See also *District Manager, Telephones Patna & anr. v. Dr. Tarun Bharuthar & anr.* 1991(I) CPR 171 (NC) for holding that s. 7B of Indian Telegraph Act does not oust jurisdiction of Consumer Disputes Redressal Agencies to give releif on bills based on defective metre.

20 See address of the President of National Commission *supra* note 12 in 1994 (I) CPR 239 at 242.

21 *Anil Gupta v. General Manager, Northern Railways*, 1991 (II) CPJ 308 (H.P. SC)

22 *M.Meenakshi Sundaram* v. *the General Manager, Southern Railways*, 1991 (II) CPJ 137 (Mad. SC). In this case the seats were available but they were wrongly allocated to V.I.P's.

23 *G.M. N.E. Railway* v. *A.P. Sinha* 1991 (I) CPJ 10(NC).

deficiency in the service rendered by the Air Line.[24] It is submitted that this would be equally applicable to Railways where food is served in journey and its price is included in the ticket.

MUNICIPAL FACILITIES

Municipalties are supplying water for consideration to the consumers. A municipality has been ordered to pay damages for shortage of drinking water.[25] The author of this paper has been awarded compensation on his complaint agaisnt MCD for supply of dirty water in municipal tap.[26] In case of municipal body attaching bank accounts of house-tax assessee despite full payment of house-tax, compensation was granted under the Act.[27]

ELECTRICITY

The supply of electricity is a public utility service rendered by public sector boides like Electricity Boards. The author of this paper was awarded interest on belated refund arising out of replacement of defective electricity metre.[28] Civil Courts are also granting relief to the consumers under the Inidan Electricity Act whcih cannot be given under COPRA. Recently in a writ petition, the Delhi High Court directed Delhi Electric Supply Undertaking to give a new electric connection to the tenant though an old connection was disconnected by DESU for non-payment by another tenant who was not traceable.[29] Recovery of minimum charges of electricity after permanent disconnection is without rendering any service and a complaint for its recovery lies under the Act.[30]

24 *Indian Airlines* v. *S.N. Sinha*, 1991 (I) CPR 213 (NC)

25 *Wangdi Tshering* v. *Chairman, Kurseong Municipality & ors.*, 1993(II) CPR 476 (W. Bengal SC).

26 *M.C.D.* v. *N.K. Rohatgi*, 1993(I) CPR 654 (Delhi SC)=1993 (II) CPJ 811 (Delhi SC)

27 *H.P. Gupta & anr.* v. *M.C.D. & ors.*, 1993(II) CPJ 708 (Delhi SC).

28 *N.K. Rohatgi* v. *DESU (MCD)*, 1993 (II) CPR 481 (Delhi SC)

29 *Naidu A. Kannan* v. *Suresh Gupta*, W.P. No. 5025/93 decided on 18.1.94 by P.K. Bahri and V.K. Jain, JJ.

30 *The Karnataka State Electricity Board & anr.* v. *Escon (P) Ltd. & anr.*, 1991(I) CPR 194 (NC).

BANKING AND FINANCE FACILITIES

Failure to provide financial assistance by a Bank is not a deficiency in service.[31] To refund amount of deposit at the time of booking of a scooter, as per agreement, is 'service' under the Act.[32] If a depositor of a fixed deposit in a Bank applied for a pre-mature encashment and the same was delayed, the depositor was a consumer entitled to file a complaint under the Act.[33]

INSURANCE

Delay in settlement of insurance claims is no doubt a deficiency in imparting insurance services by the Insurance companies. The nominee of the insured is a consumer of insurance service. The very fact that Insurance Act, 1938 provides for a machinery to repudiate a claim on allegation that there was suppression of facts by the insured cannot bar consumer disputes redressal aganecies from investigating whether such repudiation was justified.[34] When a claim has been repudiated by Insurance Company by a speaking order and the reasons given are not irrelevant or extraneous then it is not a case of deficiency in insurance service and complaint before Consumer Forum or Commission is liable to be dismissed.[35] Similarly when the Insurance Company settled sustantially the claim of complaint without avoidable delay then there is no consumer dispute and the complainant if unsatisfied can approach civil court.[36] Criminal negligence of an agent and misappropriation of premium by him cannot make the Insurance Company liable.[37]

31 *Mukesh Jain* v. *V.K. Gupta and anr.*, 1991(I) CPR364 (NC). See also *M/s. Essex Farms (P) Ltd. & anr.* v. *Punjab National Bank & anr.*, 1992(I) CPR 68 (NC); *M/s. Laxmi Fabricators & ors.* v. *Union Bank of India & ors.* 1994(I) CPR 68 (NC).

32 *Mumbai Grahak Panchayat* v. *M/s. Lohia Machines Ltd.*, 1991(I) CPR 184 (NC)

33 *P. Nagabhushan Rao* v. *Union Bank of India*, 1991 (I) CPJ 352.

34 *The Divisional Manager, LIC* v. *Uma Devi* 1991 (II) CPR 662(NC).

35 *Diovisional Manager, LIC of India & Ors* v. *Smt Sunita Sharma*, 1994(I) CPR 31 (NC). See also *Jewellers Narandas & sons* v. *The Oriental Insurance co. Ltd.* 1994 (I) CPR 108 (NC).

36 *Chelur Settelite Communication System Ltd.* v. *United India Insurance Co. Ltd.*, 1994 (I) CPR 34 (NC).

37 *LIC & anr* v. *Consumer Education & Research society & ors.*, 1994 (I) CPR 106 (N.C)

NEWS PAPER SERVICE

The printing of wrong or false information in the news paper does not consititute supply of defective goods or a deficiency in serviee to the buyer.[38] The buyer can complain about quality of parer and printing in tune with consideration paid.

POST AND TELEGRAPH SERVICES

It is expressly laid down in section 6 of the Indian Post Office Act, 1898 that the postal authority shall not be liable to pay compensation in the event of delay in delivery or even loss of any letter or other article sent through post. This statutory bar is causing gross injsutice to consumers. Urgent steps should be taken for its repeal by the Legislature.[39]

Inordinate delay in delivery of telegraphic money order made postal authories liable for compensation for mental agony to the complainant.[40] A post office changing its working hours does not violate any of the requirements of the standard or quality of service.[41] If there is gross negligence on the part of postal authority e.g. negligent handling of parcel which obliterated address because of which it could not be transmitted from Bombay to Japan, resulting loss to the consumer, it was not protected by any of the four acts specified in section 6 of the Post Office Act.[42]

SUPLY OF LPG GAS

Whether non regularisation of an unauthorised LPG gas connection is a deficiency in service? The consumer disputes redressal agencies held it in the affirmative. But Supreme Court reversed this concurrent holding and held that

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38 *Devanand Gehlot* v. *M/s. Rajasthan Patrika & ors.*, 1991 (I) CPR 526 (N.C.). It is submitted that a defective head note of a judgment in a law journal cannot be complained for relief in COPRA.

39 See address of the President of the National Commission *Supra* note 12 in 1994 (I) CPR 239 at 242. State Commissions are trying to distinguish application of section 6 of the Indian Post office Act, 1898 in exceptional circumstances. distinguishing National Commission's judgment *The Presidency Post Master & anr.* v. *D.U. Shankar Rao*, 1993 (II) CPJ 141 (NC).

40 *Surinder Singh* v. *Post Master General, Panaji*, 1991 (I) CPR 507 (Goa SC).

41 *Supdt of post office* v. *Grahak Parishad*, 1991 (II) CPJ 490 (Gujarat SC)

42 *The post Master General Ahmedabad & ors* v. *Vannch Inppon Pillar Scale Pvt. Ltd.* 1994 (I) CPR 327 (Guj. SC) in which National Commission's Judgment in *Presidency Post master & anr., Supra* note 39 is distinguished.

where a Gas Agency gave an unauthorised connection and the relationship between Indian Oil Corporation and the Gas Agency as distributor of the Corporation was on principal to principal basis, there was no privity of contract between the Corporation and the customer having unauthorised connection. The authorities below have not given due importance to the subscription voucher and merely relied on possession of LPG Gas cylinder by the complainant. Thus, no deficiency in service arose by not regularising said connection by the Corporation and hence the complaint was not maintainable before the consumer authorities under the Act.[43]

It may be noted that LPG Gas, Water, Electricity and Steam power fall in the category of 'goods' as well as 'services'. So special care in making complaint either of defect in goods or deficiency in services would enable the consumer to get proper releif from the Consumer Dispute Redressal Agencies under the Act.[44]

VARIOUS PROBLEMS REGARDING PROTECTION UNDER THE ACT TO CONSUMERS

NATURE OF PROTECTION

The field of supply of facilities in connection with electricity, telephone, treatment in hospital, Water, housing, transport and many other services mentioned above is largely occupied by the public sector bodies and Local Authorities like Electricity Boards, Telecommunication Department, Government Hospitals, Municipalities, Housing Boards, Development Authorities, Railways, Banks, Post Offices, Insurance Companies etc. on a monopoly basis and as they are engaged in public utility services they were free from controls envisaged under Monopolistic and Restrictive Trade Practices Act, 1969 thus the consumers of these public utility services became more vulnerable to exploitation. No doubt the Courts had been active to give reliefs against exploitation under various Laws but it involved complicated procedure, heavy expenses and what is more it was very delayed. Since delayed and expensive justice is practically a denial of justice to the consumers, the legislature enacted Consumer Protection Act, 1986. The Act established two types of consumer forums. Consumer Protection councils in Centre as well as in all States which recommend solution to various problems of consumers to the Government. Government may accept the resolutions of Consumer Councils and

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43 *Indian Oil Corporation* v. *Consumer Protection Council, Kerala & anr.* 1994 (I) CPR 255 (Supreme Court).

44 In this regard see 'Complaints under Consumer Protection Act, 1986' by author of this paper in 1991 (I) CPR 585 (Article).

enforce them through appropriate legislative amendment or administrative or financial control. The second set of consumer forum is the establishment of three tier Consumer Disputes Redressal Agencies[45] for quasi judicial adjudication of consumer disputes, *inter alia*, about complaints for any deficiency in the services hired or availed by the consumer for consideration or of which the consumer was a beneficiary with the approval of such hirer or availer.[46]

The adjudication of consumer disputes by quasi judicial Consumer Disputes Redressal Agencies under the Act is cheap,[47] simple,[48] speedy and effective.[49]

The Act, thus, aims to provide better protection of the intersts of the Consumers.[50] All this is in addition to and not in derogation of any other law for the time being in force.[51] Thus the Act provides a new remedy to the consumers which is cheap, speedy and efficacious,[52] leaving the substantive rights to be the same as they were before.

EXCEPTIONS AND HARDSHIPS

No complaint can be filed alleging a deficiency in service and claiming releif under the Act in following exceptional situations:

(i) If services are supplied free of charge or under a contract of personal service.[53]

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45 District Forum, haivng original jursidiction, with specified pecuniary and territorial limits, to hear complaints of consumers. A State Commission in every State and the National commission in the Centre having Original, Appellate and Revisional Jurisdictions apart from Administrative and Supervisory powers.

46 See definition of 'Complaint' 'consumer of services', 'deficiency' and 'service' in Section 2(1)(c), (d) (ii), (g) and (o) of the Act respectively.

47 No court fee is payable on complaints, appeals and revisoons undet the Act. No process fee is payable for service on opposite parties and respondents. Copy of final order is supplied free.

48 Complaints can be filed through post. Presence of lawyers is not necessary as simple procedure is followed for evidence.

49 Hearing is done by a quasi judicial Bench and there is 3 to 5 months limit for disposal of cases.

50 See Preamble to the Act.

51 See Section 3 of the Act.

52 *Parbati Rani Kalita* v. *Life Insurance Corporation of India*, 1993(I) CPR 16 (Assam SC).

53 See S. 2(1)(0) of the Act defining 'Service' which excludes them from its purview.

(ii) When complaint is time barred.[54]

(iii) When jurisdiction of the Consumer Disputes Redressal Agencies is completely barred by any other law.[55]

(iv) When subject matter of the complaint is subjudice.[56]

The Consumer Disputes redressal Agencies also suffer from following handicaps:

(a) They have no power to issue interim order of stay or injunction etc. till the disposal of the case.[57]

(b) They follow summary procedure under the Act and hence cannot decide those complaints which involve volumnous evidence and comlpicated questions of law and fact.[58]

(c) The State Commission and the National Commission have no power to transfer cases.[59]

(d) The power of punishment u/s. 27 of the Act is facing serious difficulties in its enforcement by Police Authorities due to lack of mandate to them in the Act.[60]

OTHER PROBLEMS

Apart from the above, the Consumer Dispute Redressal Agencies are evolving their own norms for filing of complaints, hearing and adjounments.

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54 *Oswal Fine Arts* v. *M/s H.M.T., Madras*, 1991(I) CPR 1(NC). Now see section 24A of the Act providing limitation of two years from the date from which the cause of action has arisen.

55 Section 6 of the Indian Post Office Act, 1898 and a similar provision in Indian Railways Act, 1890 (Now 1989). See also Section 15 of the Railway Claims Tribunals Act competely ousting the jurisdiction of any court or other authority in relation to the matters referred to in S. 13(1) of that Act. See *Union of India and anr.* v *M. Adaikalam*, 1993(II) CPR 94 (NC).

56 *Agarwal Dying Industries* v. *Rajasthan Financial Corporation*, 1991(II) CPJ 341; *Modern Mechanical and Electricals* v. *Chairmen cum MD Rajasthan Financial Corporation*, 1991(II) CPJ 13; *A.J. Ahmed* v. *The Manager, Indian Bank*, 1991(I) CPJ 157; *M/s. Oswal Fine Arts* v. *M/s. HMT Madras*, 1991(I) CPR 1 (NC).

57 *District Manager, Telephones & ors.* v. *Muni Lal Brij Mohan*, 1993(I) CPJ 41 (NC). *New India Assurance Co. Ltd.* v. *Dr. R. Venkateswara Rao*, 1993(I) CPR 105 (NC).

58 *M/s. Special Machines* v. *Punjab National Bank*, 1991(I) CPR 52(NC). For a clarificaion of this case see also *S.K. Abdul Sukur* v. *State of Orissa & ans.*, 1991(II) CPR 135 (NC).

59 *In the matter of Transfer of Complaint*, 1993(II) CPR 521 (Raj. SC). See also Address of the Predent of National Commission, supra note 12 in 1994 (I) CPR 239 at 242.

60 *Supra* note 12, 1994 (I) CPR 239 at 242.

The filing is made cumbursome, hearing starts late and the adjourments are granted frequently with long dates as a result of which the protection under the Act is becoming slowly and slowly expensive and dilatory leading to accumulation of pending cases. This can be checked by effective exercise of the power of administrative and supervisory control conferred on State Commission and the National Commission u/s. 24B of the Act.

Besides, the Consumer Disputes Redressal Agencies in many States are not provided with adequate accommodation, trained staff, modern equipment and sufficient funds to cope with the increasing number of complaints, appeals and revisions under the Act. This also hinders speedy disposal of cases. The concerned Government must pay proper attention to these problems. In case any State Government or the Central Government, as the case may be, fails to remove these infrastructure problems in the working of consumer disputes redressal agencies, Consumer Associations can approach Supreme Court through appropirate writ or public interest case for necessary directions to the concerned Government.

Last but not the least, as the volume of work has increased before the Consumer Disputes Redressal Agencies, there is need to replace part time appointment of Members with full time and constitution of Benches or Camps of State Commissions and National Commission for the convenience of Consumers.

CONCLUSION

1. The Legislature should make its intention clear by suitably amending defintion of 'service' in section 2(1)(0) of the Act - whether professional service of Medical Aid, be that private for consideration or Government free of charge and that of lawyers are coverd in it or not and also whether education is within the purview of the Act or not.
2. Section 6 of the Indian Post Office Act, 1898 and a similar provision in the Indian Railway Act, 1989 should be repealed.
3. Consumer Councils should be vitalised to lessen the burdens of Consumer Disputes Redressal Agencies on general deficiencies in the public utility services.
4. To make the remedy under the Act efficacious, the Redressal Agencies should be given express power under the Act to issue interim stay or injunction etc. till disposal of complaint.
5. Suitable amendment has to be made in the Act conferring on the National Commission and the State Commissions, the power of transfer of cases on lines contained in section 24 of the Civil procedure Code, 1908.
6. An express provision should be made in the Act that an order of fine or warrant of arrest issued by Consumer Disputes Redressal Agencies u/s. 27 of the Act is to be deemed to be an order or warrant issued by competent criminal court and should be executed as such by the Police Authorities.
7. The National commission and the State Commssions should exercise powers of administrative and supervisory control u/s. 24B of the Act. Uniform guidelines should be laid down with proper publicity, in particular for short adjournments, their limits and such formalities which make the protection technical, costly or dilatory be avoided. Maximum discretion should be excercised at admission stage. The time limits of 90 and 120 days for disposal of complaints requires serious implimentation by the Redressal Agencies.
8. The Government concerned should provide the Redressal Agencies with proper accommodation, trained staff, modern equipments and sufficient funds. The establishment of additional District Forums and Additional Be nches or Camps of State Commission have to be made in tune with number of complaints, appeals and revisions filed or pending and for the convenience of the consumers.
9. The system of part time appointment of members to Redressal Agencies should be replaced by full time appointment.

RHETORIC AND REALITY OF WOMEN'S DEVELOPMENT : CONTEMPORARY PERSPECTIVE

*Alka Chawla**

STATUS OF WOMEN—A GLANCE

The original sin in the Garden of Eden was of woman's. In the Genesis the Lord said, "I will greatly multiply thy sorrow and they conceptions; in sorrow thy shall bring forth children and thy desire shall be to thy husband, and he shall rule over thee."[1]

The Supreme Court of United States in the year 1873 affirmed this 'Divine Ordinance' in *Bradwell vs. Illinois*[2] where Myra Bradwell's application for license to practice law was denied solely because she was a woman. Bradley J. said, "The civil law as well as nature herself, has always recognised a wide difference in the respective spheres and destinies of man and woman. The paramount destiny and mission of a woman is to fulfill the noble and benign office of wife and mother, this being the law of the Creator". So firmly was this sentiment affixed in the hearts and minds of the founders of common law that it became a maxim of that system. A woman was considered as not having any legal existence separate from her husband, who was regarded as her head and representative in the society. The same sentiment is prevalent amongst Hindus where a woman is called 'Ardhangini' (half part of the husband). Roop Kanwar in 1989 carried this sentiment of traditions to its logical extreme by re-enacting sati, a thousand year old barbaric social institution which required a wife to burn herself alive on the pyre of her deceased husband.[3]

WOMAN, GENETICALLY OR SOCIALLY CONSTRUCTED?

In primitive and in most complex of industrial societies, there are men's jobs and women's jobs. Women bear and rear children; women are daughters and wives doing household work like cooking, cleaning, mending, sewing and

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1 Haralombus, *Sociology* Chapter 9, p. 369.

2 417 u.s. (1873).

3 Despite Sati Abolition Act, 1987 this shameful incident took place in Rajasthan with State officials and media as silent spectators.

washing; women take care of family members but are subordinated to male authority. The debate on the reasons for a sexually based division of labour and inequality between male and female roles brings up two main arguments. One, that it is determined to some degree by biologically or genetically based differences (sex) between male and female human species. The woman's biological function of child bearing and nursing leads her to the division of labour which is generally restricted to indoor activities[4]. On the other side are those who argue that gender roles are culturally determined and inequality between the sexes result from socially constructed power relationships[5]. This second position is the basic assumption of radical feminists. The logical extention of their argument in the context of legal system is that law is informed by and serves to reinforce patriarchal social relationships that are based on male norms, male experience and male dominance; that women's experience is excluded from the law and that the law has contributed to women's oppression[6].

This brief survey tries to identify some areas where law making, interpretation and execution has discriminated against women.

WOMEN'S DEVELOPMENT AND CONSTITUTIONAL EQUALITY:

The first wave of feminist movement started in the West at Senecca Falls in New York in 1848, where demands for women's right to vote (political right), to divorce (right of self determination), to alimony (as women were economically dependent) and to enter legal profession and such other female equality rights were made. The second wave started just about three decades ago where feminist lawyers, legal academics and activists started resorting to legal rights to advance women's struggle for social, economic and political equality.

In India, in the fiftieth year of Independence, we first need to reconceptualise and redefine 'nationalism' in order to achieve equality for women. In the pre-independence era nationalism meant freedom from foreign rule and equality of Indians qua other nationals. In the post-independent era the focus has to shift to intra-national equality whereby independence of exploited from exploiters have to be achieved. Half of the population of the country, the women, are subordinated to and oppressed by the other half, the men. Surely, the Indian nationalists never aimed at achieving this kind of equality.

4 Anthropologist Lionel Tiger and Robin Fox's Theory of the Human Programmar as referred in Haralombus, note p. 370.

5 *Ibid.* p. 373, Read Ann Oakley's theory of the cultural division of labour.

6 Mac Kinnon. "Feminism, Marxism, Method and the State : An Agenda for theory", 7 *Signs* 515 (1982).

The institution of equality is guided by the Constitution of India, 1950 which has two sets of provisions : one , general in nature like Article 14, 15 (1) and 16 (1) and two, the special provisions like Article 15 (3), 15 (4) and 16 (4). Development Planning in India has, however, always taken a special note of special provisions like Article 15 (3)[7]. The planning process normally focusses its attention on condition of women taking into consideration the practical gender needs or survival/material needs of women. In this pursuit the State has consciously or unconsciously ignored the position needs or the strategic gender needs, which are very closely related to the power-equation between women and men in the society.

The aim of the State should not only be to act as guardian or protector of the weaker/fairer sex but also to involve them as full-fledged self-determining humans in its power structure. The Indian woman can tread on the path towards equality only if the state recognises that there is an inextricable link between the condition and position needs of a human. Women are not only to be perceived as focus of Duty-Discourse construct[8] but as part of the 'Rights-Discourse construct also[9]. They are not to be perceived only as recepients of the welfare programmes but also as members of the power-structure apparatus of the state machinery. Alas ! the latter appears to be a far-fetched goal with Women-Reservations Bill, 1995 having been reserved for an appropriate time to arrive.

The myth of Constitutional equality reinforced by some scattered pro-woman laws clouding the reality of discrimination needs to be explained in detail.

Women and Criminal Laws

Radical feminists locate women's oppression in patriarchy, a systemic expression of male domination and control over women which permeates all social, political and economic institutions. The motivating forces working behind patriarchy according to them are the psychological pleasure of power, desire for supremacy and male fear of sexual and reproduction capacity. Laws governing reproduction, sexual assault, pornography are viewed by them as

7 Article 15 (3) reads, Nothing in this Article shall prevent the State from making any special provision for women and children.

8 This refers to 1) Directive Principles of State Policy (Part IV specially Articles 42, 43 and 47); 2) Fundamental Duties of the Citizens (Part IV A—Article 51A(e); 3) Article 15(3) which is read as an enabling provision by judiciary and not one creating a Hohfeldian claim in the women with corresponding duty on the State.

9 A fundamental right to equality in all spheres of life to be given to woman.

patriarchal control over female sexuality with violence against women reinforcing this control.[10]

The increasing violence can be illustrated through following indicators. There is a dramatic increase in number of crimes being reported against women. Rape, kidnapping, sexual assault, domestic violence against women are on the increase, eg. every one hour and forty-two minutes, a dowry death takes place in India[11]. The number of cases that are reported has no doubt increased but not much is known about convictions in these reported cases. At this juncture the feminist legal perspective becomes glaringly different from that of a man's as an offence may be treated as a crime against property by a male whereas a female may view it as a crime against human body; again an act may be viewed as offensive by women whereas man may find nothing offensive about it.[12]

Rape is an area where feminists fear that law fails to take into account the experiences and values that are most typical of women than that of men. *Mathura Rape* case[13] is one such unfortunate illustration where the Supreme Court overruled Bombay High Court's order convicting two police officers for rape of Mathura, a young tribal girl in their custody in Police Station. The court held that even if there was sexual intercourse there was no rape because there was no proof to indicate (injury marks etc.) that Mathura had resisted (physically). It overruled the excellent distinction made by the Bombay High Court between 'consent' and "passive submission" induced by fear. The Supreme Court's view that lack of 'physical resistance' constituted consent implies that only evidence of physical violence is considered sufficient to corroborate a woman's allegation that she was raped, and that she did not consent. According to feminists this measure of consent is purely male-point of view. Court fails to appreciate that 'consent' and 'coercion' are complicated issues from women's perspective. It ignores the possibility that non-resistance may be a strategy for self respect in situation that permits no escape and it may be necessary for self-preservation[14]. The Evidence Act, 1872, after this decision,

10 Boyd and Sheehy, "Canadian Feminist Perspective on Law" (1986), 13 *Journal of Law and Society.*

11 See, National Crime Records Bureau, Home Ministry, Government of India. (1996)

12 For example, sexual intercourse by husband with wife by force may be 'normal' for a man but 'offensive' according to a woman.

13 *Tukaram* vs. *State of Maharashtra* AIR 1979 SC 185. See, Section 375, Indian Penal Code, 1860.

14 Brenda Cossman, "The Legal Regulation of female sexuality : The Myth of Rape" 1990, *The Thatched Patio,* Vol. 3, No. 4.

was partially amended whereby onus of proof was shifted to the accused to show that he had not committed rape[15].

The courts have also adopted various patriarchal arguments to reduce the sentence in case of rape convictions. A very common argument often given is that victim was of a questionable character and easy virtue; she had lewd and lascivious behaviour[16]. The Court tried to reject this view in State of *Maharashtra* vs. *Madhukar*[17] where it was held that factors regarding character and reputation of the victim are wholly alien to the scope and object of Section 376 of the Indian Penal Code 1860 and thus the evidence of the victim cannot be thrown overboard. Despite such decision Section 155(4) of the Evidence Act still remains on the statute book which states that when a man is prosecuted for rape it may be shown that the prosecturix was of generally immoral character. Another plea taken by the court is that the rapist is not a 'habitual offender' and had no vicious antecedents[18]. Taking the plea of non habitual offender in most heinous crime against women is unjust, imprudent and irrational as one rape in a life-time of a woman is sufficient to destroy her psyche and ultimately 'herself'[19].

Matrimonial rape is not an offence under the Indian Penal Code as it is assumed that it is the pious duty of the wife to submit herself to her husband[20]. Also rape of a separated wife by husband is punished merely with a sentence of two years [21], in contrast to ten years.

Section 494 of the Indian Penal Code, 1860 declares 'bigamy' as an offence warranting equality in sexual relationship. It makes no distinction on the basis of religion and thus applies to Hindus, Christians, Parsis and Muslims alike. Though the law is neutral but instances of husbands deserting their wives and

15 S. 114A of the Indian Evidence Act 1872 shifts the onus of proof on the accused only in Custodial Rapes i.e., rape by policeman, public servants, managers of hospitals and remand homes and wardens of jail who can conveniently take advantage of their position and rape the helpless woman who are under their protection.

16 *Prem Chand* v *State of Haryana,* AIR 1989 SC.

17 AIR 1990 SC 169.

18 *Phul Singh* v *State of Haryana* AIR 1980 SC —A 22 year old boy had raped his 24 year old cousin in broad day light. The Supreme Court reduced the sentence from four to two years.

19 See, Aruna Shabug's story in Sunday Times, Times of India, 7-9-1997, p.1.

20 Marital rape is an offence in Russia, Sweden, Denmark, Australia, America : As quoted in Shobha Saksena, *Crimes against women and Protective laws.* 1995, Chapter 3, p. 8.

21 See S. 376A, Indian Penal Code, 1860.

marrying again has become an uncontrollable crime. Social pressures and economic compulsions force the first wife to keep quiet and suffer the indignities faced due to 'public gaze' focussed on them. Further, it is not an easy task for the wife to prove 'solemnisation' of the second marriage, which is the greatest lacuna for the wife in proving the offence of bigamy[22].

The Constitutional validity of S. 497 of Indian Penal Code was impugned under Article 14 on the ground that the law with regard to adultery operates unequally as between a man and a woman. It was held in *Yusuf's case*[23] that special laws were required to protect them and S. 497 was one such law. The issue was re-agitated in 1985 before the Supreme Court of India[24]. The contentions before the Court were : (1) that S. 497 confers on the husband the right to prosecute the adulterer but it does not confer any right on the wife to prosecute the woman with whom adultery is committed. (2) it does not confer any right upon the wife to prosecute her husband who has committed adultery with another woman. (3) It does not take note of the cases where husband, has sexual relations with an unmarried woman. The Supreme Court held the provision to be constitutionally valid and further observed that it could not strike down a section on the ground that it was desirable to delete it.

WOMEN AND FAMILY LAWS

India is a country which abounds in religious communities and each community being governed by its own personal laws. Social position of women in all the communities is uniformly inferior to men which is reflected in their personal laws.

Women are viewed as reproducers of children in the family but not as producers of productive force in the society. The household work performed by them, does have a 'useful value' but not 'exchange value' in terms of money, therefore, it falls outside the formal economic sector. Women are thus not viewed as direct-positive contributors to the society or economy thereby, giving them a subordinate position to men in economy and society.

The concept of matrimonial property i.e. woman's right as joint owner to property acquired during subsistence of marriage is missing in the Indian Legal System. Labour of wives in helping male earners in looking after children, doing domestic chores and therefore, freeing men from those chores to earn is neither recognised nor apprised in any legal or economic sense[25].

22 Usha Tandon *Conversion and Polygamy* : A case comment on Sarla Mudgal, 1997, *Cr. L. J.*, Journal p. 65.

23 *Yusuf* v. *State AIR* 1954 SC 321.

24 *Sowmrithi Vishnu* v. AIR 1985 SC 1618.

25 Lotika Sarkar *Law and the Status of Women in India.* 1977.

'Inheritance rights' is another area where rights of women are uniformly inferior to that of men. Under Hindu Law the concept of 'coparcenery'[26] is patriarchal in nature. Hindu Succession Act, 1956 gives partial equality to widows and daughters by treating them as class I heirs as it is applicable only to the succession of Hindu male's self-acquired property.

Marriage and Divorce : In India, muslims are permitted to practise polygamy, limited to four wives. However, the Hindu, Christian, Parsi and Jewish laws are neutral as they do not allow bigamy in any form.

Restitution of conjugal rights, a remedy provided by section 9 of the Hindu Marriage Act 1955 is apparently neutral in nature. Any spouse can file a suit under this Act. The foundation of such a law is the fundamental rule of matrimonial law that one spouse is entitled to the society and consortium of other spouse and where either spouse has abandoned or withdrawn from the society of the other without reasonable excuse or just cause the court could grant a decree for restitution. The High Court in *Sareetha's*[27] case made an observation that this matrimonial remedy was found used almost exclusively by the husband and was rarely resorted to by the wife. Thus, practically speaking, it becomes a remedy for males, whereas, blatantly violating the right to self determination, a basic human right of females. The Andhra Pradesh High Court had rightly held it to be a savage and barbarous remedy violating the right to privacy & human dignity guaranted by Article 21 of the Constitution. But our Supreme Court unfortunately declared it to be constitutionally valid and not violative of Article 14 nd 21 of the Constitution of India, 1950.

Further, traditionally all over the world the spousal duties are deterrmined by the sole factor that the husband is the bread winner. It is thus the duty of the wife to live with her husband wherever he may choose to reside[28]. This has been the decision in most of the cases decided under section 9 of Hindu Marriage Act 1955. However, in some cases the other view, viz. the matrimonial home should be set up by mutual agreement between the parties is also taken. On this formulation, working wife's refusal to resign her job does not amount to desertion or withdrawal from society of husband[29]

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26 Now in A.P., Maharashtra, Gujrat, daughters are treated as equal coparceners with brothers.

27 *T. Sareetha* v. *Venkata Subaiah* AIR 1983 AP 356.

28 *Tirath Kaur* v. *Kirpal Singh* AIR 1964 Punj. 28. *Surinder v Gurdeep* AIR 1973 P & H 134, *Gaya* v. *Bhagwati* AIR 1980 MP 212.

29 *Shanti Ramesh* (1971) ALJ 63, *Parvinder* v. *Suresh* Bai AIR 1975 Guj. 69, N.R. *Radha Krishnan* v. *Dhana Lakshmi* AIR Mad. 333 *Mirchunai Devi* AIR 1977 Raj. 114.

With regard to Divorce, the provisions under Hindu Marriage Act 1955 and Parsi Marriage and Divorce Act, 1936 are neutral but the Muslim and Christian law is, prima facie, discriminatory. A Christian husband has to prove adultery simpliciter in order to take divorce whereas a wife is to prove an additional ground such as incestuous adultery, bigamy with adultery or cruelty with adultery[30]. The muslim man has been given a unilateral right to divorce in various forms of Talaq[31].

Pre-marriage pregnancy is a ground of viodable marriage under Hindu Marriage Act[32], Special Marriage Act 1955[33] and of divorce under Parsi marriage and Divorce Act 1936[34]. The ground is, therefore, available against women only as they alone can be pregnant. Pre-marriage chastity, however, is not a ground for voidable marriage, thereby keeping pre-marital life of husband outside the matrimonial causes of divorce, unlike that of women.

Guardianship : Hindu Minority and Guardianship Act 1956, recognises father's superior right of being natural guardian of his minor legitimate children and mother only the natural guardian of her minor illegitimate children even if the father is alive. However, the proviso to Section 6(a) vests the custody of minor children who have not completed the age of five years "ordinarily" with mother.

Section 19 of the Guardians and Wards Act, 1890, lays down that a father cannot be deprived of natural guardianship of his minor children unless he has been found unfit. The effect of this provision is considerably whittled down by judicial decisions. These decisions place welfare of the child as of paramount consideration and father's right of guardianship as subordinate to it[35].

In all schools of muslim law, the father is recognised as natural guardian and mother is not recognised as guardian, natural or otherwise, even after the death of the father[36]. Further, mother is not a natural guardian even of her minor illegitimate children but she is entitled to their custody[37]

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30 Section 10, Indian Divorce Act.

31 Husband has unilaterial power of pronouncing divorce on wife without assigning any reason, without any cause, literally at his whim.

32 Section 25 (ii).

33 Section 12(1) (d).

34 Section 32 (j).

35 *Tiwari* v. *Tiwari* AIR 1990 SC ; *Jija Bhai* v. *Pathan Khan* AIR 1971 SC 315; Baddi Reddi v Kadam Sunya 1959 AIR A.P. 670.

36 *Imambandi* v *Mutsaddi* (1918) 45 Cal. 887.

37 *Gohar Begum* v *Suggi* (1960) 1 SCR 397.

WOMEN AND EMPLOYMENT

The last few decades have witnessed the entry of women into the world of media, medicine, engineering, space, architecture, legal and accountancy professions, commercial and non commercial sector etc. A big question raised by one and all is; is it possible to combine family and work without having to compromise on either? The Supreme court of India showed a silver lining to the cloud engulfing the myth that work and married women cannot go side by side in *Air-India vs. Nargesh Mirza*[38]. The court held that one of the solutions to our social problem is that women become economically independent. For this the state must encourage working women. The Court realised that pregnancy was a real and significant gender difference, which must be recognised and not treated as a hinderance to work. The court held that pregnant air-hostesses and women with children cannot be denied the right to employment. Treating bearing of children as equivalent to incapacity to work is devaluing the experiences of pregnancy and going against the laws of nature. Again, Supreme Court in Maya Devi vs. State[39] reinforced the argument that all branches of law: legislature, executive and judiciary must act according to constitutional mandate of equality of sexes. The court observed that cases are not unknown where necessity arises for a married woman to serve only because of adverse attitude of husband. A valuable right to employment cannot, therefore, be denied to them.

Inspite of the increasing number of women entering occupations formerly reserved for men, studies reveal that women are often considered intellectually inferior, emotionally unstable and less assertive than men, especially in the corporate world asserts Anjali Hazarika[40]. She feels that only lip service to gender equality is paid but there are unconscious attempts to sabotage the very principle of equality. This can be observed from the fact that women are almost never given important assignments, good postings or overseas training that will advance their career. A lot needs to be done to remove gender inequality. It can be done if all the sectors, the government, industry, non-government organisations and women themselves join hands together in achieving this objective.

CONCLUSIONS

Indian woman is emerging out of the shadows of the past. Today, she personifies stree-shakti in all spheres : exploring unchartered waters at work,

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38 AIR 1981 Sc 1829.

39 1986 (1) SLR 743.

40 Anjali Hazarika. 'In the Seat of Power', Times of India, 9-8-95, p. 1.

rewriting equations at home and discovering a sense of self within. The new woman has not entirely shed the burdens of the past but has acquired new responsibilities. Women are also exposed to multidimensional exploitative forces, all aiming to sieve them out from political, economic, religious and all possible variants of social order. Law and State, the protector and guardian of people, should provide such women a conducive atmosphere by invalidating blatantly discriminatory laws. The 'Rights' theories must strive to include the right to 'value' household work, the right to control land, right to inheritance, matrimonial property and above all the right to recognition as a human.

For achieving equality for women, educational, welfare and awareness programmes will have to be initiated at the grassroot level and thereafter implemented honestly and sincerely with a new vigour. Women would have to be inducted in Parliament for legislation, in judiciary for adjudication and bureaucracy for implementing the laws. Proportional representation of women alongwith men will provide some solution against the prevalent male-bias. Pandit Nehru once rightly observed, "Status and social position of women indicate country's character more than anything else".

There is enough evidence to show that women have benefited even if only occasionally from granting and upholding of legal rights, social welfare laws regulating employment conditions of women and so on. The aim of this paper has not been to generate heat by exposing discriminatory laws and judgments but to show light to the path leading towards the goal of gender equality.

EVIDENTIARY DEFICIENCIES IN RAPE LAW: A PLEA FOR GENDER JUSTICE

*Usha Tandon**

I. INTRODUCTION

The heinous offence of rape is an acute form of gender based violence against women. The expression "gender based violence" means a violence which is directed against a woman because she is a woman. It is a kind of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men.

The collective conscience of the world as reflected in Article 25(2) of the Universal Declaration of Human Rights, prescribes that:

> "Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same protection."

Article 51A (e) of the Constitution of India enjoins every citizen, "to renounce practices derogatory to the dignity of women".

Sections 354, 375, 376, 376A-D, 377 and 509 of the Indian Penal Code 1860 contain the law regarding sexual assault against women and children. The offence of rape is made punishable under section 376 IPC.

Unfortunately, however inspite of all these punitive provisions and the prescribed duties the incidence of rape has shown an alarming increase year after year.[1]

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1 During 1994, a total of 13,208 cases were reported, as compared to 12,218 cases in 1993. As in the past, Madhya Pradesh reported the highest incidence (2,929) in this year also accounting for 22.2% of all India total. This was followed by Uttar Pradesh (2,078 cases) with a share of 15.7%, Maharashtra (1,304 cases) sharing 9.9%, Bihar (1,130 cases) sharing 8.6% and Rajasthan (1,002 cases) with a share of 7.6%. Other states which recorded more than 500 rape cases during the year were Andhra Pradesh (873), West Bengal (743), and Assam (530). Among Union Territories Delhi reported the highest incidence (309) accounting for 94.8% of the Union Territories total and contributing 2.3% towards all India. *Crime in India*, 1994, p. 215.

Article 21 of the Indian Constitution guarantees to every person right to life and personal liberty. A woman's sanctity is her supreme honour. She has a fundamental right to her bodily integrity and privacy which falls within the ambit of protection given by Article 21 of the Constitution. The offence of rape is a physical and mental violation of a woman's self-esteem. It shatters the very foundation of the victim's life. It makes the woman not only offensive, disgusted but also humiliated, powerless, depressed and repulsive.

Apart from despair and trauma of rape, the victims undergo further agony during the legal proceedings. The law of evidence in content and in practice further adds fuel to the fire.

The purpose of this paper is to analyse the law relating to burden of proof and related evidentiary issues in rape law and find out the suitable suggestions to provide gender justice to the shattered victim of the offence.

II. BURDEN OF PROOF AND CORROBORATION

In a criminal trial it is for the prosecution to prove every part of its case affirmatively by sufficient legal evidence and it is not possible to convict an accused on the ground of any weakness in his defence. Where the prosecution evidence falls short of proving the guilt of the accused with reasonable certainty it is the duty of the court to acquit the accused straight away. It cannot convict an accused on a finding of mere probability.[2]

Similarly in rape cases prosecution must prove that sexual intercourse was without the consent of the woman or against her will. It is for the prosecution to prove that the victim was below the statutory age at the time the crime was committed or that consent was obtained by force or fraud.

Further, courts generally insist on the corroboration of the evidence of the victim. Previously a ravished woman was equated with an accomplice and accordingly, courts refused to convict the accused unless and until her testimony was corroborated.[3] Happily however, now the victim is treated as a competent witness, rather than an accomplice. Their Lordship of the Supreme Court in *Bhoginbhai Hirijibhai v. State of Gujarat*[4] observed:

> "On principle the evidence of the victim of sexual assault stands on part with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted)

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2 *Rishikesh Singh* v. *State*, 1970 CrLJ 132 (All. FB) see also Indian Evidence Act, 1872, Section 101.

3 See *Emproor* v. *Nur Ahmed*, (1935) 36 CrLJ 769 (Cal.); *Shikandar V. R.* (1938) 39 CrLJ 371 (Cal.)

4 1983 CrLJ 1096 (SC)

is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex-offence is entitled to great weight, absence of corroboration notwithstanding. In the Indian setting refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracised by the society."

A recent commendable judgment is by (Dr) Anand, J. in the *State of Punjab* v. *Gurmit Singh and ors,*[5] wherein it was observed.

"The testimony of the victim in such cases (of rape) is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable."

The test as to whether corroboration is necessary lies in the naturalness of the story deposed to by the prosecutrix. If there is any doubt as regards its genuiness, there is need for caution, and therefore corroboration.

Even though a victim of rape cannot be treated as an accomplice on account of long line of judicial pronouncements, her testimony is treated, almost like that of an accomplice requiring corroboration. The judge trying the cases has to indicate in the course of the judgment that he had the rule of corroboration in his mind and if in a given case the judge finds that there is no need of such corroboration he should give reasons for dispensing with the necessity for such corroboration.

Further even though the Supreme Court has repeatedly been emphasising that the evidence of the prosecutrix does not need to be corroborated, it is unfortunate that High Courts and Lower Courts are not adhering to this principle of law and are insisting on the corroboration of the victim's testimony in rape cases.[6] The emphasis is not on the testimony of the victim of rape but on the medical evidence or injuries on her body and other circumstantial evidence. If the prosecurtrix case is not proved beyond reasonable doubt, then the accused is given a benefit of doubt and hence acquitted, even though forcible intercourse

5 1996 (1) Scale p. 309. Even before the above mentioned judgment it has been held by the Supreme Court that corroboration is not necessary for conviction in a rape case. See *Rameshwar* v. *State of Rajasthan* AIR 1952 SC 143; *Gurbachan Singh* v. *State of Haryana,* AIR 1972 SC 2661.

6 See *Kana* v. *State* 1990 CLR P 762; *Ram Baksh* v. *State*, 1994 CLR 566.

with the prosecutrix is proved. The judgment in the *Mathura Case*[7] had highlighted the fact that in a rape trial it is extremely difficult for a woman to prove that she did not consent beyond all reasonable doubt as was required under the criminal law. *Bhanwari case*[8] is a recent glaring example of the needless corroboration of the testimony of the prosecutrix.

Even though Criminal Law Amendment Act of 1983 has inserted a new section viz 114A in the Indian Evidence Act, 1872, complete reform in this area of law has not been brought so far. Sec. 114A of the Evidence Act raises a presumption as to the absence of consent in cases only of custodial rape, rape of a pregnant woman and gang rape, as prescribed under section 376(2) of the Indian Penal code. The scope of this provision is extremely limited. First, it is available only in certain kinds of aggravated forms of rape. It is not extended to all cases of rape generally. Secondly, the presumption is only with respect to the want of consent. Before the presumption as to the want of consent is applied, it is the statutory requirement that not only sexual intercourse simpliciter must have been proved, but further it is also necessary that it must be by the accused person. The Law commission of India[9] considering the want of consent being a cardinal element of rape under section 375 IPC has recommended that it should be obligatory for the courts to draw *prima facie* inference of want of consent once the woman who is alleged to be the victim states in the witness box before the court in her evidence that she did not consent.

The Criminal Laws (Amendment) Ordinance 1996, prepared by National Commission for Women has proposed the addition of Section 114B to the Evidence Act, so as to raise the presumptions as to the commission of sexual intercourse.

The rule that the burden rests on the person who makes the affirmative allegation is a heavy burden to discharge. There are many exceptions to the propositions.[10] Due to the peculiarity of the crime of rape, there are generally no witnesses excepting the victim herself. When lawful coition between the spouses is performed in privacy, it is absurd to think that accused will commit the crime in the presence of the persons who would provide corroboration evidence to strengthen the testimony of the victim.

7 *Tukaram* v. *State of Maharashtra,* AIR 1979 SC 185.

8 *State* v. *Ramkaran and ors.* The judgment of the District and Session Judge, Jaipur given by J. Jagpal Singh on 15.11.1995. Now it is under appeal to the High Court.

9 *Law commission of India* 84th Report on Rape and Indecent Assault 1980 p. 34.

10 See, *Sarkar on Evidence* vol. 2, 14th ed. 1993 p. 1334.

As far as corroboration evidence in the form of medical evidence is concerned it should not be over weighed. An eminent writer on legal medicine[11] has observed that the situations in which the practising Clinician may find himself involved in the examination of either the alleged victim or the alleged assailant in sexual offences are unique in regard to the degree of emotional tension that may be generated in all the persons involved in the situation. He has pointed out that many of the examinations required in such cases will take place late at night, or in early hours of the morning when the doctor himself is likely to be tired.

In India, the victims and their relatives are not very keen to bring the culprit to book, because of the danger of being looked down by the society. There may be delays in reporting the cases, because of which medical evidence may not be much reliable.

It is submitted that considering the seriousness of the offence against woman, in no case, benefit of doubt be available to the accused. For this, it is necessary that the offence of rape should be made an exception to the general rule of burden of proof. In a case where a woman deposes in a court that sexual act has been forcibly committed upon her against her consent, the burden of proof should be shifted to the alleged accused. It should be for the alleged accused to prove in the court either that no sexual intercourse upon the girl has been committed or that it was not committed by him or it was with the consent of the woman or she was below the statutory age. etc.

III. PREVIOUS SEXUAL CONDUCT

The general provisions relating to cross examination of the witness are also applicable to the victim of rape. The law prescribed in section 146 and 155(4) of the Indian Evidence Act, permitting the court to rake up the past of the rape victim contain a rule discriminating against woman.

Under section 155(4) of the Evidence Act in a prosecution for rape or attempt to rape evidence can be given of the "general immoral character" of the prosecutrix. In rape cases the general immoral character of the prosecutrix must be shown. Evidence may be led to show that the reputation of the prosecutrix was that of a prostitute or that she had the general reputation of going about and committing immoral acts with a number of men.

[11] David M. Paul, "The Medical Examinaition in Sexual Offences", (1978 July), Vol. 15, N. 3, *Medicine Science and the Law*, pp. 154-162, quoted in *Law Commission of India*, 84th Report p. 22.

It is to be noted that even a prostitute in law, is entitled to protection against the crime of rape. Then what is the sense of retaining this provision? Further this provision is useless in cases where evidence does not relate to the issue of consent and is produced merely to impeach the credit of the woman victim. The fact that the prosecutrix has previous immoral connections can't have any significance whatsoever where the charge is one of sexual intercourse with a girl below the statutory age.

Apart from the issue of consent, if this provision is viewed as regards the credibility of the woman as a witness, it contains a gender based law, as the general immoral character is not regarded as impeaching the character of a male witness. In *Bhanwari* case[12] the aspersions cast by Jagpal Singh, District and Session judge Jaipur, on Bhanwari's character and the doubt expressed about her and her husband's reliability as witnesses are reflection of the attitude of a patriarchal society which is predisposed to doubt a woman's character and conclude that she is not equal before the law.[13]

Further there is S. 146 of the Evidence Act, which is a general provision as to impeaching the credit of witnesses by "injuring their character." Under this section, questions are often asked relating to the past character of the prosecutrix in sexual offence. However, as far as the past sexual life of the male accused in a rape case is concerned, he occupies a higher and better position in comparison to the female victim. Under sections 53 and 54 of the Evidence Act the previous immoral or bad character of the accused can not be agitated before the court to prove his bad character.

The issue of character assassination of the woman victim was considered by the Law Commission[14] which suggested for the amendment of sections 146 and 155(4) so as to permit only evidence of cross-examination to show that the prosecutrix had previous sexual relations with the accused in question.

The National Commission for Women in a draft bill titled "Sexual Violence against Women and Children Bill 1993", proposes for the deletion of sub-section (4) of Section 155. Under Section 146 the Bill proposes to forbid any question regarding the women's character, conduct or previous sexual experience. Through the proposed amendment in section 54 of the Evidence Act, the character of the accused is made relevant in a rape trial.

[12] *Supra* n. 8

[13] "The True Heroes of Bandit Queen," The *Hindu* dated 17.3.1996.

[14] *Supra* n.9 pp. 35-38.

It is submitted that it is high time that the proposals contained in the Draft Bill 1993 be accepted in order to ensure equal treatment to women in rape trial.

IV. Indecent And Scandalous Questions

Section 151 and 152 of Evidence Act empower a Court to forbid indecent and scandalous questions intended to cause insult or annoy or are needlessly offensive in form. A witness is not to have his whole past life dragged into publicity merely because he/she comes forward in obedience to the law to give evidence in court. Under section 150 of the Evidence Act the Presiding Officer of the Court is under a duty to report the matter to the appropriate authority for action, if the question was asked without reasonable grounds.

Nevertheless, such questions are asked indiscriminately in rape cases particularly in Lower Courts. The woman victim is made to narrate in detail how and in what manner she had undergone the demeaning experience of traumatic rape. It is often stated that the woman who is raped undergoes two crises: one the rape and second the subsequent trial. She has to re-live her hateful experience over and over again in full public gaze.

Extremely indecent questions may be asked from the prosecutrix by the defense council. In the case of unnatural offences against young boys on the beaches of Goa (Peats case), the boys were asked questions like "who purchase the vaselene," how much vaselene was applied", "how did it feel when the penetration took place", "was it a pleasurable experience". Such questions tend to shake the confidence of the deposing witness but are otherwise without merit.

Under the provisions of section 145 of the Indian Evidence Act, a witness may be cross-examined as to a previous statement made by him in writting or reduced to writing and relevant to matters in question without such writing being shown to him, or being proved but if it is intended to contradict him by writing, his attention must, before the writing can be proved, be called to those parts of it which are used for the purpose of contradicting him.

In rape cases the prosecutrix is required to make a number of statements during the course of investigation. Under section 154 Criminal Procedure Court (CrPC) a statement has to be made for recording an F.I.R., under section 161 CrPC such statement has to be made to the investigation officer, under section 164 CrPC to the Magistrate and to the doctor conducting the medical examination. Each of these statements may be used to contradict the prosecutrix. Generally in other offences at least the statement under section 164 CrPC is not required. By having a statement recorded under section 164 CrPC an additional opportunity is provided to the defense counsel to contradict the prosecutrix. It is submitted that the provisions of section 151 and 152 of the

Evidence Act could be meaningfully utilized, once onus is shifted to the accused to disprove his alleged crime of rape.

V. Conclusions

Rape is the most abhorrent and foul experience which a woman can suffer. It is probably the most shocking sexual offence. By this form of violence a woman is deprived of that thing which is dearest to her i.e. her virtue, dignity, or privacy. She becomes the victim not only of the heinous offence but also of social stigma for no fault of her own. An endless fear is generated in her.

The real plight of such victim is often neglected in the realm of law. The victim of this offence not only requires that the accused be convicted and punished, but she also deserves the justice to be administered to her in a dignified manner. The injured honour of sexually victimised woman must be protected in legal proceedings, particularly at the evidentiary stage.

In this regard the submissions made in this article are summarised as follows:

1. If sexual intercourse is proved, and the woman deposes in the court that it was without her consent, then the court must presume that she did not consent. The onus of proving that the sexual act was not by the accused or that she had consented should be on the alleged accused.
2. Since, the victim of rape is not regarded as accomplice, her testimony does not need any corroboration from disinterested person. under section 134 read with section 118 of the Evidence Act, even a single witness is competent to prove the fact.
3. If there is no inconsistency in the testimony of the victim, then even though the medical evidence does not fully substantiate the alleged offence, the testimony of the victim should be believed. The reason for this is that, rape is not based upon the medical evidence, but upon the attack of the sexual assault.
4. The victim's previous sexual history and general immoral character should not be admissible in evidence.
5. The character of the accused should be made relevant in rape trial.
6. Indecent and scandalous questions should not be allowed to be put to the prosecutrix.

As stated in the beginning, the offence of rape is gender based violence against woman. The offence of rape essentially involves two persons of opposite sex. The woman being the weaker sex, her resistance is overpowered by the stronger sex i.e. the man. This is the first natural gender bias against her. The law has to compensate this natural bias against her. If justice has to be ensured to her in a dignified manner, it is absolutely necessary that the provisions of law particularly of the Evidence should be suitably amended as suggested above so that in the course of trial she does not suffer further humiliation and depression.

Last, but not least, gender sensitive training of judicial and law enforcement officers, and other public officers is essential for the effective and proper gender justice to the victim of sexual assault.

THE INSTITUTION OF LOKAYUKT IN MADHYA PRADESH

*Gitanjali Nain Gill**

Lokayukta symbolizes one of the ideals of a welfare state. It is a forum available to the public to effectively ventilate their grievances, allegation and ensure independent and impartial justice against the administrative excesses.[1] This institution is preferred to all other grievances setting mechanism due to :

a) Informal procedure adopted by it,

b) Methodology is unobtrusive,

c) Investigation is conducted by its agencies,

d) It is an independent and impartial body,

e) People have a confidence that they have a watchdog, and

f) Help the administration to keep its image.

At present, the office of Lokayukta exists in ten states, namely, Maharashtra (1971), Bihar (1973), Rajasthan(1973), Uttar Pradesh(1975), Madhya Pradesh (1981), Andhra Pradesh (1983), Himachal Pradesh (1983), Karnataka (1985), Assam (1986), Gujarat (1986). Some states like Delhi, Punjab are also planning to have Lokayukta institution.

In Madhya Pradesh,[2] attempts to establish the institution of Lokayukta/Up-Lokayukta started in mid '70's after the State Administrative Reforms Commission (ARC) recommended that the then vigilance Commission should be replaced by an independent organisation on the lines of "ombudsmen" having statutory base. Accordingly a bill was moved in 1975 in the Madhya Pradesh Legislative Assembly, which was passed by the Assembly. It was sent for President's assent but due to certain rethinking at the level of Union Government, the bill was returned to the State Government for reconsideration and the same was passed in April 1981. The bill became an Act known as the Madhya Pradesh Lokayukta Evam Up-Lokayukta Adhinyam 1981 (hereinafter

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1 Shukla, K.S. and Singh, S.S., "*Lokayukt (Ombudsman in India) : A Socio - legal study*".

2 *Lokayukt Organisation, Madhya Pradesh Current Scenario.* Paper presented in Colloquium on Ombudsman : India and the World Community (1995) organised by Indian Institute of Public Administration.

called the Act) after it received Presidential assent in September 1981. With the coming into force of the Act the Vigilance Commission cease to exist and cases pending with this organisation stood automatically transferred with the Lokayukta Organisation.[3]

The legislative frame work of the Lokayukta/Up-Lokayukta in the state of Madhya Pradesh is described in detail as under :

APPOINTMENT

The appointment[4] of Lokayukta and Up-Lokayukta is made by the executive head of the state ie. the Governor. He shall appoint Lokayukta after consultation with the Chief Justice of the High Court of Madhya Pradesh and Leader of the opposition in the Legislative Assembly, or if there be no such leader a person selected in this behalf by the members of the opposition in that House in such manner as the Speaker may direct. The appointment of Up-Lokayukta is made in consultation with Lokayukta.

The Act, however, stipulates judicial as well as administrative qualification for Lokayukta and Up-Lokayukta. Only a person who has served either as judge of the Supreme Court of India or a Chief Justice of a High Court can be appointed as the Lokayukt. For Up-Lokayukt only such person is qualified who has either served as judge of High Court or Secretary of Government to India or on an equal post.

To maintain independence and impartiality, on entering upon office the Lokayukt/Up-Lokayukt shall not be a member of Parliament or State Legislature; neither shall hold any office of trust or profit. In addition, they shall not be connected with any political party or carry on any business or practice any profession[5].

TERMS AND CONDITION OF OFFICE

The Lokayukt and Up-Lokayukt shall hold office[6] for a term of five years and are not eligible for reappointment thereafter. On ceasing to hold office, the Lokayukt shall be ineligible for further employment under the Government of Madhya Pradesh.

The Lokayukt shall draw a salary of Rs 9000/- per month, while Up-Lokayukt shall be paid Rs. 8000/- per month[7].

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3 The First Annual Report of Madhya Pradesh Lokayukt and Up-Lokayukt, 1983.

4 Section 3 of the Act.

5 Section 4

6 Section 5

7 Second Schedule of the Act

REMOVAL

The Lokayukt can be removed[8] from his office on the ground of proved misbehaviour or incapacity by the Governor. The Act, provides that the Governor shall remove the Lokayukt only after an address by the Madhya Pradesh Legislative Assembly supported by a majority not less then two third of the members present and in accordance with an investigation provided under Judges (Inquiry) Act 1968. However, it is surprising that there is no provision for removal of Up-Lokayukt under the Act.

JURISDICTION

The condition precedent for an effective institution is the provisions relating to jurisdictional limits[9]. The Madhya Pradesh Lokayukt Evam Up-Lokayukt Adhinyam prescribes the respective jurisdiction.

The Lokayukt may enquire into an allegation made against a public servant which means :-

a) Chief Minister;

b) Deputy Chief Minister;

c) Minister of State;

d) Deputy Minister;

e) Leader of Opposition and ;

f) Officers of the rank of Secretary and above.

However Speaker and Deputy Speaker are excluded from the purview of the Act.

The Up-Lokayukt has the jurisdiction in all other cases except those which are within the powers of Lokayukt. This includes -

a) Officer of Apex Cooperative society or a District Cooperative Society;

b) Any person holding any office in a Government Company;

c) A Corporation or a local authority established by the State Government;

d) Vice Chancellor or Registrar of the University;

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8 Section 6

9 Section 7

e) Any person appointed to a public service or post in connection with the affairs of the State of Madhya Pradesh.

The jurisdiction is only confined to *"allegation"* of corrupt practices in relation to public servant, which means that he —

1. has abused his position as such to obtain any gain or favour to himself or to any person or to cause undue harm to any person;
2. was actuated in the discharge of his functions by improper corrupt motives;
3. is guilty of corruption;
4. is in possession of pecuniary resources or property disproportionate to his known source of income and such pecuniary resources or property held by public servant personally or by any member of his family.

The term "allegation" covers cases of corruption only. It must be pointed out that the original image of an effective and impartial machinery was to redress administrative wrongs and excesses and in order to achieve this objective cases of maladministration must also be included within the jurisdiction of Lokayukt/Up-Lokayukt.

Maladministration[10] implies :

a) transgression of law by administrative authority;

b) maladministration of law, though not necessary illegal, such as :

delay, discourtsey, rudeness, bias, unfairness, incompetence, ignorance, high-handedness, mistakes, failure to answer letters, misconduct, negligence etc.

This is of great importance otherwise Lokayukt/Up-Lokayukt would not be effective in resolving many justifiable complaints.

However, Lokayukt/Up-Lokayukt cannot enquire into a complaint the subject matter of which is more than five years old. They cannot also enquire into any case which is the subject matter of an enquiry under the Public Services Inquiries Act 1950 or which has been referred for enquiry under the Commission of inquiry Act 1952.[11]

[10] Wheare, *Maladministration and its Remedies*, 3 (1973)

[11] Section 8

PROCEDURE

The Act provides a procedure that is clear, simple, flexible and is guided by uncomplicated simple rules. It is in three stages :

i) *Filing of Complaint*[12]—A complaint involving allegation against public servant is to be made on a prescribed form accompanied by an affidavit and a fee of Rs. 25/-. The Lokayukt/Up-Lokayukt can also take up any matter for enquiry on information without any formal complaint.

ii) *Detailed and indepth enquiry*[13]—The Lokayukt/Up-Lokayukt, upon receiving the complaint would then freely decide the procedure to be followed for making an enquiry and while doing so ensure that principles of natural justice are not violated. Not only this the Lokayukt/Up-Lokayukt shall have for the purposes of holding an enquiry the same power as vested in Evidence Act and Code of Criminal Procedure 1908.

In important cases the enquiries are done directly by Lokayukt/Up-Lokayukt. In other cases, enquiries are entrusted either to the officers (Technical or legal) Lokayukt Organisation, or officers of the State Government. Cases in which criminal prosecution is thought desirable are entrusted to the Special Police Establishment (SPE) which has developed into an independent investigating agency free from the influence of the executive. Any information obtained by Lokayukt/Up-Lokayukt during the investigations shall be treated as confidential.

However, it is important that a stipulated time must be provided within which investigation must be completed in the interest of justice. The Act nowhere provides a time limit for completing investigations.

iii) Report[14]—Submission of reports concludes the proceedings. If after investigations into allegations, the Lokayukt/Up-Lokayukt is satisfied that such allegation is established, he shall send a report along with evidence to the *competent authority*[15]

Competent Authority in relation to :

a) Chief Minister means the Governor of the State;

[12] Section 9(1)

[13] Section 10

[14] Section 12

[15] Section 2 (h)

b) Minister or Secretary means the Chief Minister or during proclamation under Article 356 of the Constitution of India, the Governor;

c) Any other public servant means such authority as may be prescribed.

On receipt of the report, the competent authority is required to take action within three months. A separate provision is made under the Act for reports in respects of complaints against Chief Minister. The Lokayukt shall send his report to the Governor and the order passed by the Governor along with the report shall be laid on the tables of the Legislative Assembly[16].

If the Lokayukt/Up-Lokayukt is satisfied with the action, then he shall close the case, otherwise he can send a special report to the Governor in such cases. Further, the Lokayukt/Up-Lokayukt shall present annually a consolidated report on the performance of their function to the Governor.

The Lokayukt can also make suggestion to the State Government in respect of any practice or procedure coming to his notice which in his opinion affords an opportunity of corruption.

STATISTICAL DATA

The institution of Lokayukt/Up-Lokayukt has performed its functions very effectively. The below mentioned Table A reveals the number of complaints received and disposed of annually between 1990 - 1994 and Table B reveals the complaints received against Chief Minister/Ministers between 1990 - 1994.

Table A :

S. No.	Year	Complaints Received During the Year	Complaints Disposed off During the Year
1.	1990-91	3347	622
2.	1991-92	3766	817
3.	1992-93	4082	1269
4.	1993-94	3810	786

[16] Section 12 (A)

Table B :

S.No.	Year	Number of Complaints Received	Number of Complaints Registered for Enquiry	Cases in which Report Sent to the Competent Authority
1.	1990-91	10	2	1
2.	1991-92	8	4	2
3.	1992-93	10	3	2
4.	1993-94	2	-	-

Thus, the institution of Lokayukt/Up-Lokayukt has become quite effective in Madhya Pradesh. Efforts must be made to strengthen this institution by keeping it free from the influence of the executive whereby faith and confidence of the people is maintained in the administration.

IS EDUCATION AN INDUSTRY AND ARE TEACHERS WORKMEN?

*Anupam Singh**

The judgement of the Supreme Court in *Haryana Unrecognised Schools Association* v. *State of Haryana*[1] has once again brought into focus the question whether teachers can get benefit of the labour laws in India. The Honourable Court held that teachers are not covered under the definition of 'employee' under the Minimum Wages Act, 1948. and hence State Government in exercise of its power under the Act is not entitled to fix the minimum wages of teachers of the educational institution concerned. The judgment seems to be the culmination of lengthy debate over the above issue starting fron *University of Delhi* v. *Ram Nath*[2].

Before we deal with the issue, let us pause and see the real issue involved. We find that the above judgment, with respect to the Honourable Court, is a sad reflection of state of the Nation and sadder still of the judicial apathy in not even granting right of minimum wages to the builders of the Nation. Are we ignorant of exploitation of teachers? Are we ignorant of the insecurity of job faced by majority of teachers especially in private institutions who have really made education an 'industry'? Then, why are we trying to help unscruplous employers and administrators? On the one hand we say that teachers hold a high place of honour in society and on the other hand we are not even ready to grant them right of minimum wages. Are teachers not human beings, do they not have families to look after?

This anomaly has not gone completely unnoticed by the Supreme Court. In *University of Delhi* v. *Ram Nath*,[3] Gajendragadkar, J. observed:

> "Under the sense of values recognised both by the traditional and conservative as well as the modern and progressive social outlook, teaching and teachers are, no doubt; assigned a high place of honour and it is obviously necessary and desirable that teaching and teachers should receive the respect that is due to them. A proper sense of value would naturally hold teaching and teachers in high esteem, though

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1 1996 (3) SCALE 685.

2 1963 II LLJ 335

3 ibid

> power or wealth may not be associated with them. It cannot be denied that the concept of social justice is wide enough to include teaching and teachers, and the requirement that teachers should receive proper emoluments and other amenities which is essentially based on social justice cannot be disputed."

It is interesting to note that in this case one of the reasons given by the learned judge in holding that education is not an 'industry' was that teachers were not 'workmen', whereas in the Report of National Commision on Labour, 1969 of which he was the Chairman teachers were held not to be 'workmen' because education was not an 'industry'. To quote :

> "the present position is that all workmen are employees but all employees are not workmen within the meaning of the definition. Unless a person concerned is employed in an industry, he will not be a workman within the definition of this section.[4] It is for this reason that teachers employed in educational institutions are not workmen' as educational institutions do not fall within the definition of industry"[5].

In *Banglore Water Supply and Sewerage Board* v. *A Rajappa*[6] while overruling the *University of Delhi* case and holding that education is an industry within the meaning of S2(i) of the Industrial Disputes Act, 1947 Justice Krishna Iyer observed about teachers not being 'workmen':

> "Perhaps they are not, because teachers do not do manual work or technical work. We are not too sure whether it is proper to disregard, with contempt, manual work and separate it from education, nor are we too sure whether in our technological unverse, education has to be excluded. However, that may be a battle to be waged on a later occasion by litigation and we do not propose to pronounce on it at present".

Similar sentiments were echoed by Venkataramiah, J. in *Miss. A. Sundrambal* v. *Government of Goa, Daman and Diu*[7] when he observed :

> "We may at this stage observe that teachers as a class cannot be denied the benefits of social justice. We are aware of the several methods adopted by unscrupulous management to exploit them by imposing on them unjust conditions of service. In order to do justice to them it is necessary to provde for an appropriate machinery so that teachers may secure what is rightly due to them. In a number of States in India laws

4 S 2(s) of the Industrial Disputes Act, 1947.

5 See the report, Para 33.10

6 AIR 1978 SC 548

7 1988 I LLJ 61 (SC)

have been passed for enquiring into the validity of illegal and unjust terminations of services of teachers by providing for appointment of judicial tribunals to decide such cases. We are told that in the State of Goa there is no such Act in force. If it is so, it is time that the State of Goa takes necessary steps to bring into force an appropriate legislation providing for adjudication of disputes between teachers and the managements of the educational insititutions. We hope that this lacuna in the legislative area will be filled up soon."

The case was decided on pre-1982 facts. So it seems that the court was not apprised of legislative attept to fill the lacuna i.e. amendment in the definition of 'workmen' in S2(s) of the Industrial Disputes Act, 1947 by the Industrial Disputes (Amendment) Act, 1982 [Act No. 46 of 1982] made effective from 21-8-1984. Insertion of one of the new categories of work, namely 'skilled' now makes it possible for teachers to be included in the definition of 'workmen'.

As far as inclusion of teacher under S2(i) of Minimum Wages Act, 1948 is concerned it seems that in *Haryana Unrecognised Schools Association v. State of Haryana*[8] the Honourable Court seems to have departed from rule of 'Literal Interpretation' in haste. Referring to the Statement of Objects and Reasons of the Act, which declares that "the justification for statutory fixation of minimum wages is obvious. Such provisions which exist in more advanced countries are even more necessary in India, where workers' organisations are yet poorly developed and the workers' bargaining power is consequently poor", the Court observed:

"In introducing the Bill it had been stated that the items in the Schedule are those where sweated labour is most prevalent or where there is a big chance of exploitation of labour. The Act had been passed for the welfare of labour deriving legislative competence from Item 27 of the Concurrent List in the Seventh Schedule to the Government of India Act, 1935. The object of the Act is to prevent exploitation of the workers and for that purpose it aims at fixation of minimum wages which the employer must pay."

The Honourable Court went on to say :

"There cannot be any dispute with the proposition that while construing the provisions of a statute like Minimum Wages Act a beneficial interpretation has to be preferred which advances the object of the Act. But nevertheless it has to be borne in mind that the beneficial interpretation should relate only to those employments which are intended to be covered by the Act and not to others."

8 Supra n. 1

Section 27 enables the appropriate Government to add to either part of the Schedule any employment in respect of which it is of the opinion that the minimum rates of wages should be fixed under the Act. In the instant case addition was made by the Government of Haryana to Part I of the Schedule to cover the *concerned educational institutions*.

The Minimum Wages Act, 1948 defines an 'employee' in S2(i) as follows;

"employee" means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in scheduled employment in respect of which minimum rates of wages have been fixed, and includes an out-worker to whom any articles or materials are given out by another person to be made up, cleaned washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purpose of the trade or business of that other person where the process is to be carried out either in the home of the out worker or in some other premises not being premises under the control and management of that other person; *and also includes an employee declared to be an employee by the appropriate Government;* but does not include any member of the armed forces of the Union.

While deciding the issue in this case the court held:

"Since the teachers of an educational institution are not employed to do any skilled or unskilled, manual or clerical work and therefore could not be held to be an employee under Section 2(i) of the Act, it is beyond the competence of the State Government to bring them under the purview of the Act by adding the employment in educational institution in the Schedule in exercise of power under Section 27 of the Act."

To buttress its opinion the Honourable Court cited similar observations made in *Miss A Sundrambal* v. *Government of Goa, Daman and Diu.*[9] It is respectfully submitted that the Honourable Court appears to have overlooked the difference in the definition of 'workman' and 'employee' in the two Acts. Under S2(i) of the Minimum Wages Act, 1948 the appropriate Government has been given power to declare any person employed in scheduled employment to be an 'employee'. It is with respect to this overiding power that Government of Haryana declared teachers to be 'employees' in the *concerned educational institutions* and fixed minimum wages for them. The Honourable Court appears to have missed this point while quashing the impugned notifications of the Government of Haryana.

To sum up we can say that under the Industrial Disputes Act, 1947 education is an 'industry' and teachers are 'workmen'. Whereas under the

9 Supra n. 7

Minimum Wages Act, 1948 it is open to the appropriate Government to declare education a 'scheduled employment' and teacher an 'employee'. Education is the 'mother of all industries', unless it is looked after properly a country cannot expect to prosper. That is why teachers imparting education need to be given protection of the labour laws till a comprehensive legislation dealing with education is available for them.

FOREST CONSERVATION AND PROTECTION : JUDICIAL ENFORECEMENT IN INDIA

Aruna B. Venkat *

I. INTRODUCTION

Indian higher judiciary has played a pivotal role in control and prevention of environmental pollution by directing the concerned authorities to discharge their statutory responsibilities. However, judicial intervention for the enforcement of environmental legislation has its own contraints and limitations. First, the judiciary has to function within the framework of the existing legal system, which is not conducive to effect quick, and expeditious relief to the victims of environemntal degradation. Second, judicial intervantion can only be preventive and not protective and promotive. Protection, preservation and promotion of environment is solely the job of the legislative and executive organs of the state. While the legislature has done its job by enacting the necessary legislation not only for the prevention of environmental pollution but also for its protection and promotion, it is the executive, which has to play the major role in the protection and promotion of environment. It is unfortunate that the executive has failed to take its responsibility seriously. And its failure has been mainly responsible for judicial activism in the area of environment in the country. Finally, the judiciary cannot directly reach purely private commercial enterprises for the enforcement of fundamental right to clean environment unless their operations are covered and regulated by legislative measures, which need judicial enforcement.

In this context it may also be appreciated that the individuals have not only been guaranteed fundamental right to hygienic environment but also been imposed fundamental duty to protect and preserve the environment[1], which includes the duty to move the courts for its protection[2]. The important question here is what kind of duty that is expected of the citizens of the country? Of cource, the citizens are constitutionally enjoined not to indulge in wanton destruction and impairment of environment. Since poverty is the major cause of environmental degradation, citizens who are suffering from abject poverty are

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1 See Article 51-A(g) of the Indian Constitution

2 See Article 32 (1) of the Indian Constitution which confers a fundamental right to move the Supreme Court.

compelled to do so due to the force of certain socio-economic circumstances, which are beyond their control. It is in this context that the state's constitutional duty to provide the necessary wherewithal to enable them to exercise and enjoy their right to live with human dignity would become relevant and significant. In this context, it has been opined that "so long as the state does not discharge this constitutional obligation it cannot reasonably expect citizens to discharage their fundamental duty to protect and improve the natural environment. In a way, the citizens' fundamental duty envisaged under Article 51.A(g) would become merged with, and gets converted into, the states' obligation under Articles 21 and 48.A"[3]

Therefore, it is very clear that the common man's ability to protect and preserve environment is directly related to the state's ability to remove poverty in the country. Again, the fundamental right to clean environment which is comprehended by the right to life guaranteed in Article 21 of the Indian Consstitution has not only been creatively interpreted by the higher judiciary but also been transformed into an efffective statutory obligation of the state authorities to prevent environmental degradation and defilement. In this process the apex court has used both "Precautionary Principle" and "polluter pays" principle to combat the menace of environmental pollution.[4]

In the creative interpretation of the right to life the Indian environmental activists have played a pivotal and commendable role by initiating public interest litigation not only to draw the attention of the courts to the failures of the statutory authorities but also to seek the issuance of necessary directions to prevent and control environmental pollution. Of these environmentalists, Mr. M.C.Mehta's name deserves special mention. His services have received international recognition, which is evident from his selection for the grant of prestigious Magsaysay award for the year 1997 "for claiming for India's present and future citizens their constitutional right to a clean and healthy environment".[5]

II. Environmental Protection and Writ Jurisdiction

The various statutory regulatory authorities are expected to discharge their responsibilities effectively and efficiently, so that the legislative measures,

3 B.Errabbi "*Environmental Protection Constitutional Imperatives- Indian Experience*" in R.P. Anand, Rahmatullah khan and S. Bhatt (ed) Law Science and Environment (1987).

4 The Indian Supreme Court has taken the view that these principles are an essential part of the Indian environmental law. See *Vellore Citizens Welfare Forum* v. *Union of India*, A.I.R. 1996 S.C. 2715 and *Indian Council for Enviro-Legal Action* v. *Union of India*, A.I.R. 1996 S.C. 1069.

5 See Times of India 16, July 1997.

which are meant to promote, protect and preserve environment and to curb pollution, become effective instruments of pollution control. In this respect, the Indian Courts have resorted to both common law remedies and writ jurisdiction to compel concerned polluter to obey the environmental laws.

The common-law remedies in the form of remedies against nuisance, negligence, trespass have proved to be inadequate to meet the demands of justice in invironmental cases. Therefore, it is the writ jurisdication of the higher courts, that has been used most frequently to combat "Environmental Terrorism".

Before we discuss the judicial enforcement of various environmental legislations by the use of writ jurisdiction, it is worthwhile to mention briefly the scope of this jurisdiction, which has been used so creatively, and purposively to protect environment.

Article 226 of the Constitution empowers every High Court to issue to any person or authority, including, in appropriate cases, any government, within its territorial jurisdiction, directions, orders or writs, including writs in the nature of habeus corpus, mandamus, prohibition, Quo warranto and certiorari not only for the enforcement of funamental rights, but also for any other purpose.

Similar power has been conferred on the Supreme Court under Article 32[6] of the Constitution, which is confined only to the enforcement of fundamental rights. Most of the pollution cases that have been brought before the Supreme Court and the High Courts have come as PIL petitions under Articles 32 and 226 respectively.

Under Article 136[7], the Supreme Court has also discretion to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal.

Coming to the judicial enforement of laws designed to conserve and protect forests in India the landmark legislation on this subject is the Forest (conservation) Act 1980 which has been judicially interpreted in a number of cases. This aspect has been discussed below.

III. Forest Conservation and Protection: Judicial Enforcement

Forests are the gifts of nature and are the green lungs of World State. The condition of forests in India is in a pathetic condition as the forest cover in the country has gone down to less than 20% of the total landmass. There are many

6 See article 32(2) of the Indian Constitution.

7 See Article 136 of the Indian Constitution.

reasons for forest depletion. Forests are destroyed mainly for massive development projects such as dams, mining operations and timber supply. Tribals also destroy forests for their use as fuel, food and building materials. The subject of "forests" was a state subject until it was shifted to the concurrent list by the 42 constitutional amendment. The Indian Forest Act, 1927 gives the states jurisdiction over both public and private forests. Public forests are divided into three categories,namely, reserved forests, village forests and protected forests. The 1927 Act also provides for protection and compensation for legally recognised individual and community rights to forest land or forest products.

The Ministry of Environment and Forests was set up in 1980 and the Forests Conservation Act, 1980 was enacted by Parliament in 1980. The statement of Objects and Reasons of the Act indicates that the Act was passed with a view to checking deforestation which has been taking place in the country on a large scale and which had caused ecological imbalance and thus led to environmental deterioration. The Act was amended in 1988. The 1982 National Forest Policy was revised and was adopted in 1988. A look at the forest laws and National Forest Policy indicates that the Indian Government has adopted a policy sympathetic to the needs of forest dwellers. According to the forst policy the rights and concessions enjoyed by tribals living within and near forests should be fully protected. The National Forest Policy envisages that the domestic requirements of fuel wood, fodder, minor forest produce and construction timber be the first charge on forest produce.

Forest (conservation) Act, 1980 as amended in 1988 imposes restrictions on the powers of the State Government in the interest of preservation of forests by prohibiting the use of forest land for non-forest purposes. Section 2 of the Forest Act, 1980 requires the State Governments not to issue, without the approval of the Central Government, any order stating that any forest land shall cease to be reserved or that any forest land may be used for any non-forest purposes. The Act also prohibits the State Government form assigning any forestland by way of lease or otherwise to any private person or a non-Governmental body. According to the Act, the term "non-forest purpose" means the breaking up or clearing of any forest land for the cultivation of tea, coffee, spices, rubber, palms, oil, breeding plants, horticultural crops or medicinal plants, or any purpose other than reforestation. The expression "non-forest purpose" does not embrace any work relating or ancillary to conservation, development and management of check-posts, fire lines, wireless communications and constructoin of fencing, bridges and culverts, dams, water holes, trench marks, boundary marks, pipelines or other like purposes.

The Act envisages the constitution of an Advisory Committee to advise the Government with regard to the grant of approval by the Central Government

under Section 2 or any other matter connected with the conservation of forests which may be referred to it by the Central Government. Any contravention of the provisions of Section 2 would invite penal sanctions.

It may be appreciated that the application of the concept of "Sustainable Development" is more appropriate and relevant in the context of judicial attemps to harmonise the competing claims of developments with those of the preservation of forest wealth and ecology. In the context of protection and preservation of forests, the neeed for rapid industrialisation and the consequent demands for the establishment of forest based industries and others including of mining and thermal power, have influenced the courts to adopt a more tolerant approach to activities affecting preservation and protection of forest wealth. However, the recent judicial trend has been to discourage and prohibit all non-forest activities in the forest areas.

Another aspect which the courts have been invited to examine has been the issue of customary and traditional rights of tribals living in the forests over forest produce. In this context, it may be noted that while the national and state forest policies envisage the protection of the customary rights of tribals the forest laws are not in tune with this policy. This phenomenon has affected the rights of the tribals unduly.

Thus, in *Sushila Saw Mills* vs *State of Orissa*,[8] the petitioner-appellant questioned the closure order, issued under Section 4(I),[9] of Orissa Saw Mills and Saw Pits (Control) Act, 1991, directing him to close his Saw Mill and its operations on the ground that it was situated within the reserved forest or protected forest or forest area within 10 kms from the boundary of such forest area which was known as prohibited area. Challenging the closure order, the petitioner-appellant ffled a writ petition under Article 226 of the Constitution, questioning the validiy of Section 4 of the State Act on the ground, *inter-alia,* that it was violative of his fundamental right to carry on any trade or business guaranteed under Article 19(I)(g) of the Indian Constituion. The High Court rejected this contention and dismissed the petition.

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8 (1995) SCC 615

9 Section 4(1) of Orissa Saw Mills and Saw Plts (Control) Act 1991 States :

"On and after the appointed day, no person shall establish or operate a saw mill or saw pit except under the authority and subject to the conditions of a licence granted under this Act:

Provided that no person shall establish or opearte any saw mill or Saw pit within a reserved forest, protected forest or any forest area or within ten kilometers from the boundary of any forest or forest area".

On appeal, it was contended that the decision of the High Court was unsound and that the Act did not contemplate total prohibition of the right to carry Saw Mills business. Rejecting the appeal, the Supreme Court referred to the relevant provisions of the Act whose object was to protect and conserve forest and environment and which authorised the issuance of the closure order. Section 4 regulated the establishment and operation of Saw Mills and Saw Pits under the Act. It enjoined that on and after the appointed day no person shall establish or operate a saw mill or saw pit or sawing operations except under the authority and subject to the conditions of liceness granted under the Act. The provision imposed further prohibition that no person shall establish or operate any saw mill or saw pit which was stituated in a reserved forest, protected forest or any forest area or within 10 kms from the boundary of such forest or forest area. Section 5(1) gave power to the State to declare a prohibited area.

The Supreme Court held that the right to carry on trade or business guaranteed under Article 19(I)(g) was not absolute but was subject to statutory restriction in the public interest under Article 19(6)[10] of the Constitution which might amount to prohibition in certain cases.[11] In conclusion the Court observed.[12]

> "It is seen that the reserved forest is being denuded or depleted by illicit felling. Thereby denudation of the reserved forest was noticed by the legislature. The preservation of the forest is a matter of great public interest and one of the rare cases that demanded the total ban by the legislature. It is, therefore clear that the statute intends to impose a total ban which is found to be in 'public interest' to preserve forest wealth and environment and to put an end to illicit felling of forest growth"

In *State of H.P.* vs *Ganesh Wood Products*,[13] the authority of the Government of the State of H.P. to permit the establishment of any new katha industries in the State was examined by the Supreme Court in the context of a writ petition by an M.L.A. before the High Court which came in appeal before the Supreme Court. In this case the Government of the State of H.P. gave permission to three applicant units out of six recommended by its industrial Project Approval and Review Authority (IPARA) to katha manufacturing industries for manufacture of katha from khair trees in the State. This was questioned by a MLA and an existing katha manfacturing unit by a writ petition on the ground that the establishment of these industries would lead to

10 See Article 19(6) of the Indian Consititution.

11 See *Narendra Kumar* vs. *Union of India* AIR. 1960 SC 430.

12 See supra n. 8 at 618.

13 (1995) 6 SCC 363.

indiscriminate felling of katha trees in the State which would have a deep and adverse effect upon its environment and ecology. They alleged that the raw material available in the State (katha trees) for manufacturing katha was not sufficient to sustain the proposed industries and hence no permission should be granted for the new units.

The High Court dismissed the writ petition and directed the State Government to give permission to all units recommended by IPARA.

The Supreme Court held that katha industry was not a subject covered by the Industrial Development and Reasearch Act, 1952, a Central law nor was there any State law covering this subject. According to the Court, since this subject was covered by entry 24 of list II of 7th Schedule of the Indian Constitution it was within exclusive province of the State. Since there was no law, the executive power of the State extended to the said subject matter.[14]

The Government of the State of H.P. not only evolved a forest policy but also framed certain guidelines to be followed for the industrialisation of the State. It constituted the Industrial Projects Approval and Review authority (IPARA).[15]

The Court also held that while approving the projects, it was certainly open to the Government to say that having regard to the availability of the raw material it shall not approve more than a particular number of units in a particular industry. Therefore, approval, disapproval from the State must abide by the Government's policies and guidelines evolved or enunciated in that behalf.[16]

The Court further held that in according approval for establishment and running of forest based indsutries in general and the katha industry in particular, the Government must take into consideration all the relevant Central and State laws which have a bearing on the establishment of these industries. According to the Court while giving permisssion for the establishment of these industries the Government must be aware of its obligation of sustainable development which required that proper balance between the forest wealth and establishment of industries must be struck and maintained. The Court held that in so far as forest based industries were concerned there was no absolute or unrestricted right to establish industries notwithstanding the policy of liberalisation annnounced by the Government of India which had to be understood in the light of the National

14 See Article 162 of the Indian Constitution.

15 See supra n. 13 at 374.

16 Id. at pp. 376-77.

Forest Policy devised by the Government of India itself and in the light of the several statements applicable in that behalf.[17]

The Supreme Court, after taking into account all the relevant materials allowed the appeal and remanded the case back to the High Court with a direction that while deciding as to where the interests of justice and equity would lie, it should take into account and balance public interest with the interest of the respondents. The High Court should also take into consideration the estimate of raw material (khair trees) and its expected availability at present and in the years to come to be made by the Himachal Pradesh Government with the help of an expert Committee.[18] It observed :

> "[T]he state should obtain a proper estimate of the khair wood in the State and also to make an estimate of its availability in each of the coming years with the assistance of an expert body to be appointed in consultation with the Ministry of Environment, Government of India. Such an estimate should cover both the Government and private lands/forests and must be arrived at keeping in view the National and State forest policies and the relevant statutory provisions.... Pending the passing of final orders by the High Court pursuant to these directions, none of the five units—shall take further steps towards setting up the factory. The status quo as on today shall continue, the Government and all concerned shall take steps to ensure observance of this direction".[19]

In *State of Bihar* vs *Banshi Ram*,[20] the petitioner filed a writ petition before the Patna High Court questioning a letter written to him by an official of the Bihar Government which stated that the petitioner's mining lease which was granted to him prior to the commencement of the Forest (Conservation) Act, 1980 for winning mica in respect of a particular area could not be extended for winning other minerals which were considered to be associate minerals of mica without prior permission of the Central Government under Section 2 of the Forest Act, 1980. The High Court having allowed the petition, the state came in appeal before the Supreme Court.

The main question before the Supreme Court was whether or not the lessee of a mining lease granted for winning a certain mineral in a particular area prior to the coming into force of the Forest Act, 1980 could be given permission, on his applications after the coming into force of the Act, to win new minerals

17 Id. at p. 389.

18 Id. at p. 393.

19 Id at pp. 394-95.

20 AIR 1985 SC 814.

discovered in the same area without the permisssion of the Central Government under Section 2 of the Forest (Conservation) Act, 1980.

The Supreme Court while affirming the decision of the High Court, held that a reading of clause (ii) of Section 2[21], of the Act in the light of the explanation would make it clear that after the commencement of the Act no fresh breaking up of the forest land or no fresh clearing of the forest on any such land could be permitted by the State Government or any authority without the prior approval of the Central government. But if such permission had been accorded before coming into force of the Act and the forestland was broken up or cleared, then no Central Governments's approval would be necessary[22].

The Supreme Court observed [23] :

> "We are, therefore, of the view that while before granting permission to state mining operations on virgin area section 2 of the Act has to be complied with, it is not necessary to seek prior approval of the Central Government for the purpose of carrying out mining operations in a forest area which is broken up or cleared before the commencement of the Act".

In *Nyamavedi* vs *State*[24], the petitioner questioned the legality of the State's proposed project for the establishment of biological park in the "Agastha vanam" area of the "Agasthya vanam Biological Park" in the State of Kerala on the ground that the proposed project would not only be violative of the Forest (Conservation) Act, 1986 but also pose threat and danger to the environment and ecology. Countering this contention, it was argued for the State that the prime purpose of the project was really afforestation and protection of the forest. It was asserted that the project was intended to preserve the forest wealth in its pristine glory[25].

The High Court held that if the proposed project was not violative of any statutory and constitutional provision, then the scope of judicial review under Article 226 was limited. After an examination of the proposed project in the light of section 2 of the Forest (Conservation) Act, 1980, the Court dismissed the petition on the ground that the petitioner failed to substantiate her contention. In this connection, the High Court observed [26].

21 See section 2 of the Forest Act 1980.

22 Id. at p. 816.

23 Ibid.

24 AIR 1993 Ker 262.

25 Id. at 264.

26 Id. at pp 269-70.

"The State Government has decided to establish Biological Park taking into account the expert opinion and after due deliberations. So long as there is no violation of any statutory provision the policy decision of the Government cannot be interfered by this Court under Article 226 of the Constitution of India."

IV. Protection of Forests and the Customary Rights of Tribals in Forest Wealth

In a couple of cases the question of reconciling the rights of tribals living in forest over the forest wealth with the need for the protection and preservation of forests has been adverted to by the Indian higher judiciary. Judicial approach to the protection of tribal's rights has been handicapped by the fact that while National Forest Policy recognises the tribal people's customary rights and concessions and declares to protect and maintain those traditional rights there is no corresponding legislative commitment as is evident from the provisions of the Forest Act, 1980.

Thus, in *Banwasi Seva Ashram vs. State of U.P.*[27], a letter written by the petitioner was converted into a writ petition under Article 32 of the Constitution to examine the claims of the Adivasis living within Duds and Robertsgang Tehsils in the District of Mirzapur in Uttar Pradesh to forest land and related rights. The State Government declared a part of these jungle lands in the two tehsils as reserved forest as provided under section 20[28] of the Forest Act, 1927 and proceeding to declare the areas as reserved forests were underway under section 4[29] of the Act. It was brought to the knowledge of the Court that the Adivasis and other backward people living within these two Tehsils for generations had been using the jungles around for collecting the requirements for their livelihood, fruits, vegetables, fodder, flowers, timber, animals by way of sports and fuel wood. After the State Government's declarations under sections 4 and 20 of the Forest Act, 1927 their rights were interfered with by the forest officers. Hence this writ petition.

The Supreme Court issued several orders earlier detailing the modalities to be adopted for the settlement of the claims of the adivasis and backward classes in these areas. In this case the Supreme Court directed the Record Officers and Forest Settlement Officers to relax the procedural rigours of sections 4 and 6 of the Forest Act and adopt a suitable procedure that would adequately safeguard the rights and interests of the adivasis and Banawasis living in Mirzapur

27 AIR 1987 SC 374 .

28 See section 20 of the Forest Act, 1927.

29 See section 4 of the Forest Act. 1927.

District of U.P. before constituting a reserved forest therein. The Court authorised the U.P. Legal Aid and Advice Board, Lucknow to look after the cases of Banwasis and Adivasis in regard to their claims against the State Government, as well as National Thermal Power Corporation (NTPC) which sought to require forest land for its project construction.[30]

In *Banwasi Seva Ashram* vs. *State of U.P.*[31] the Supreme Court finally disposed of the proceedings of the Banwasi case and the monitoring process so far as the NTPC was concerned. The Court directed that the NTPC has to ensure that the rights of the oustees were determined in their respective holdings and that they were properly rehabilitated and adequately compensated. This had to be done in collaboration with the State Government.

In *A.K.Thangadurai* vs. *D.F.O., Madhura*[32] the petitioners questioned the validity of certain orders passed by the respondent refusing to renew the forest leases earlier granted in their favour. These orders were made pursuant to the Government's decision not to renew Cardamom leases on the expiry of the period of existing leases. This was in view of the general policy decisions of the Government to grant forest leases only to small farmers or landless persons or tribals depending for their living on cardamom cultivation alone.

Allowing the petitions, the High Court applied the doctrine of promissory estoppel, observing that the petitioners in this case had applied for renewal of leases, paid renewal fee and premium as demanded and were in possession of leasehold lands and had incurred expenses substantially for improving the land. It was only long after that the Government issued its new policy to grant cardamom cultivation to small farmers, tribals and landless poor.[33]

While examining the legal and constitutional validity of the Government's policy of leasing of reserve forest lands for the purpose of cardamom cultivation the Court held that the power to grant forest lands was rooted in section 18 of the Tamil Nadu Forest Act, 1882 read with para 130 of the Tamil Nadu Forest Department Code and was not traceable to the provisions of the Cordamom Act or of the forest Act, [34]. The Court also held that Article 48A which contemplated "safeguarding of the forests" did not stand in the way of the State laying down its own policy and criteria for the lease of the forest lands for the purpose of cardamom cultivation or any other cultivation.[35]

30 See supra n. 27 at 376.

31 31. Id. at 921.

32 AIR 1985 Mad. 104.

33 Id. at p. 111.9.

34 Id. at p. 100.

35 Id. at p. 111.

V. Ban on Non-Forest Activities in Forest Areas

The case of *T.N. Godavarman Thirumulkpad* vs. *Union of India*[36] is yet another significant decision where the Supreme Court issued an interim direction banning all non-forest activities in forest areas without the prior approval of the Cental Government as required under Section 2 of the Forest Conservation Act, 1980. The court held that all-mining activities, running of saw mills for non-forest purposes were not permissible without the prior approval of the Central Government[37]. The Court showed its concern for the maintenance of ecological balance and for the preservation of the tropical wet evergreen forests of Tirap and Changlang in the State of Arunachal Pradesh by banning the felling of all kinds of trees in these forests. The court also ordered the closure of all those saw mills, veneer mills and plywood wills, which were operating not only in these forests, but within a distance of 100 kilometers from the borders of the State of Arunachal Pradesh (i.e. those operating in Assam). The Court also ordered the suspension of the felling of trees in al forests except in accordance with the working plans of the State Governments as approved by the Central Government[38]. In order to ensure the effectiveness of the above interim directions, Court also imposed a complete ban on the movement of cut trees and timber from any of the seven North-Eastern states to any other state in the country either by rail, road or waterways[39].

The Court also issued directions to all State Governments to identify within one month areas which are "Forests" irrespective of whether they are so notified, recognized or classified under any law and irrespective of the ownership of the land of such forest areas which were earlier forests but stood degraded, denuded or cleared; and areas covered by plantation trees belonging to the Government to file, within two months, detailed reports regarding the number of saw mills, veneer and plywood mills actually operating within the State, particulars about their ownership, the licenced and actual capacity of these mills for stock and sawing, their proximity to the nearest forest and their source of timber[40].

The Court also issued individual directions to the Govenments of the States of Jammu and Kashmir, Himachal Pradesh, Uttar Pradesh, West Bengal and Tamil Nadu[41].

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36 (1997) 2 SCC 267.

37 Id. at 269.

38 Id at page 270-271.

39 Id. at 271.

40 Ibid 164.

41 Id. at 272-73.

In the same case the Court issued further direction for the setting up of "High-Powered Committee" to oversee the strict and faithful implementation of its orders in the North-Eastern Region[42].

The Court held that the provisions of the Forest Conservation Act, 1980 were meant to be applicable to all forests irrespective of the nature of the ownership or classification of these forests. According to the Court, the word "forest" must be understood in its dictionary meaning. So understood, the expression "forests" would cover all statutarily recognised forests, whether designated as reserved, protected or otherwise, for the purpose of Section 2 (1) of the Forest Conservation Act, 1980. The Court held that the term "forest" occuring in Section 2 of the Act would include not only the forests as understood in its dictionary meaning but also any area recorded as forest in the Government records inspective of the ownership. The Court stressed that this was the sense in which the would "forest" should be understood[43] which was made in quite a few decisions of this Court[44].

Lastly, the case of *Eacharan Illiathi vs. State of Kerala* [45] a serious constitutional lacuna in regard to the power of the States to provide for tribal welfare was brought to the fore. In this case the tribal protection measures taken by the State of Kerala under the Kerala Forest Act, 1961 were declared unconstitutional on the ground that the State legislature had no competency to legislate on the tribal welfare in the absence of an entry in the State list of Schedule VII of the Constitution. The Kerala High Court held that even a most liberal interpretation of entry 19-"forests" of the State List did not comprehend the hill tribes within its scope so as to confer power on the State Legislature under the head "forests" to legislate upon.[46] To remove this lacuna it has been suggested that "Tribal Welfare" should be incorporated as an entry in the concurrent list so that both the centre and the states can take up legislative measures to save the tribal people and protect their habitat.[47]

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42 (1997) 3 SCC 312 to 313.

43 see supra n. 36 at 269-270.

44 See *Ambica quarry Works* v. *State of Gujarat* (1987) 1 SCC 213 *Rural Litigation and Entitlement Kendra* v. *State of U.P.* (1989) supp (1) SCC 504; and *State of Bihar* v. *Banshi Ram Modi*, (1985) 3 SCC 643.

45 1970 K.L.T. 1069.

46 Id. at p 1072.

47 P. Leelakrishnan "*Forest and Tribal people: Law and Practice*", (1985) Cochin University Law Review, 259 at 268

AGREEMENT TO RENT A WOMB : WHETHER IMMORAL OR OPPOSED TO PUBLIC POLICY - CRITICAL ANALYSIS

J. K. Chauhan[*]

There had been a long time practice to keep a woman as mistress or concubine or second wife. The objective of such a practice might have been to have physical relations or to have a child/children or to have company and comforts. This kind of arrangement was never sought to be legitamized through judicial process. But recently an agreement to rent a womb was solicited to be declared as legal and constitutional.[1] In this case, a married woman, having bed-ridden husband and a child entered into an agreement with a childless couple by which she agreed to conceive a child for the issueless husband by having extra marital sexual relations with him. As consideration to rent her womb, the woman was promised payment of money and other allied expenses during pregnancy and after the delivery of the child. The possible object of the agreement was two-fold. *First,* to produce a child for the issueless couple. *Second,* to earn money in order to support the ailing husband and the minor child. This agreement raised an important question as to whether it be declared valid and enforceable in view of the above stated objects or whether it be declared immoral and opposed to public policy under Indian Contract Act, 1872.[2]

The achievement of the first object can be effected by following all the socially and legally, recognised methods. These are, *firstly*, through the physical sexual intercourse between the married couple which is a normal and natural method. *Secondly*, by practising *'Niyog'* (a consented sexual intercourse to bear a child outside marital relations) which was followed during ancient times. *Thirdly*, by scientific methods, like artificial insemination invitro and vivo fertilisation. *Fourthly*, by adopting a child under the law. Now, it needs to be examined whether child produced by the above mentioned agreement falls under any of the four methods or not. Obviously, it would not be covered by the *first* method. A childless person was already married and has a living wife. He has

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[1] Chandigarh Newsline, dated June 7, 1997, page 1 under the caption 'Notice to Admn in womb-renting case.'

[2] Section 23 of the Act provides that the consideration or object of an agreement is lawful, unless..... the court regards it as Immoral or opposed to public policy.

not obtained divorce from his wife and the other woman has also her living husband. Having sexual relations by them in the presence of living spouses would amount to prostitution[3] and punishable as such. So parties cannot enter into an agreement to produce a child which is against the law. Whether *second* method of *Niyog* to have a child is applicable to this agreement? Before this practice of having a child by this method is applied, it would be relevant to examine the principles of *Niyog*. According to this practice whenever a woman had become widow or whose husband was incapable of producing a child under certain circumstances could bear a child outside the marital relations from other person. But this practice had some limitations as stated by Dayanand Saraswati in *Satyarthprakash.*[4] The limitations are as follows:

(a) *Niyog* must get social recognition and consent of reputed members of the society and family of the parties.

(b) *Niyog* by woman could be either from the same or upper cast but definitely not from the lower caste. It is illustrated that Vaish woman could have from Vaisha, Kashatriya or Brahamin man, Kashatriya woman from Kashatriya or Brahamin man or Brahamin woman from Brahamin man only.[5]

(c) *Niyog* should be as far as possible within the same family e.g. with the younger or elder brother of the husband of the woman.[6]

(d) *Niyog* must be with the consent of husband or wife as the case may be. If husband is physically incapable of producing a child then wife can have *Niyog* and vice-versa. In support of this he has mentioned the example of Queen Kunti and Madri who after the death of Chitranangad and Vachitravirya, their husbands respectively had *Niyog* with Vyasji. As a result of this Dharitrashtra was born from Ambika, Pandu from Ambalika and Vidhur from maid-servant.[7]

(e) As a consequence of *Niyog*, the child born would get the name, cast, *Gotra* of the woman and not of the man with whom she had the physical act.[8]

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[3] (The) Prevention of Immoral Traffic Act, 1956 section 2 (f): Prostitution means an act of female offering her body for promiscuous sexual intercourse for hire, whether in money or kind, and whether offered immediately or otherwise, and the expression 'Prostitution' shall be construed accordingly.

[4] Printed by Vedic Library, Dayanand Asharam, Ajmer. (Printed 35th time).

[5] Id. p;p. 106-107.

[6] Id. p. 108.

[7] Id. p. 110.

[8] Id. p. 105.

By applying these limitations, the agreement to rent a womb and provide a child to issueless couple does not properly fit into this method. As per limitation (e), the child born out of such an agreement would get the name, caste, *Gotra*, etc. of the woman and not of the man who wants to have a child. Moreover, in this case woman has already got a son and she cannot practise a *Niyog*. However, it would be different matter if a woman who is issueless practises this method in which case the child would be hers.

This practice is an ancient one. The times have changed. The circumstances have changed. This method was possibly followed because of (a) the non-existance of the advances in medical science of artificial fertilisation (b) non-existance of codified laws, and (c) practice of succession to the kingdom/empire. These factors are not applicable now. Medical science of artificial fertilisation has advanced. The law prohibiting physical act outside the marital status has been codified and is in force.[9] The system of royalties and kingdoms has been done away with and democracy has taken its place. So, the agreement to have a child does not fall under this mathod also.

The *Third* method of having a child through scientific means is followed by childless couples. This method has fulfilled their long felt desire to have a child. The systems of artificial *insemination* and *invitro fertilisation* are two available techniques.[10] According to Dr. R.P. Sapru there may be either physical causes of infertility or biological inadequacies. In both the cases process of bearing a child may became difficult or impossible. In the case of physical infertility egg from the female and sperm from the male belong to the same couple. In the case of biological deficiency, if father is unable to produce adequate and effective sperm while the mother is perfectly normal, it would be necessary to obtain sperm from other source to impergnate the mother. But, if on the other hand, according to R.P. Sapru,[11] the mother is unable to produce the egg cells or has inadequate birth passages, it would not be possible for her to conceive. In that case, the eggs would have to be obtained from some other source and perhaps also implanted in other woman who is then called a surrogate mother. By this method, many childless couples were blessed with a child and their strong desire to have child was fulfilled. Besides these two methods, a third method called *'vivo fertilisation'* was reported in a Newspaper.[12] According to Dr. Ahuja, he transferred by spiranting the eggs from the functional ovary in a syringe containing a special solution. He then injected the eggs near the opening

9 See supra n. 3.

10 R.P. Sapru, *Surrogate motherhood: Cause for concern* The Tribune, dated July 25, 1977, p. 11.

11 Ibid

12 *Rare Medical feat at Ludhiana* by Dr. Iqbal Singh Ahuja, The Tribune, dated September 25, 1977 at p. 5.

of functional fallopian-tube on the other side. The intra-uterin insemination was done under ultrasound guidance. The vivo technique was a success when patient was declared pregnant. In this case, Dr. Ahuja noticed that patient had left side functional ovary with no fallopian tube and perfect right fallopian with non-functional ovary.[13]

The method of having a child through these scientific techniques has been socially accepted in the society. This system has come to stay, bringing cheer and happiness to childless couples. It is obvious that the child produced by the agreement under consideration would not fall under this method.

The *fourth* method of adopting a child by childless couple under the Adoption and Maintenance Act, 1956,[14] is in vogue at present. Such couples have adopted a child from different sources e.g. child from relatives or from orphanages and destitute homes or whose parents have died or have been killed, etc. The adoption of a child would serve two-fold purpose i.e. the long cherished desire of the childless couple would be fulfilled and adopted child would get an opportunity of good life, education and rise in life to serve the society in a better way.

Now coming to the second object of the agreement which is to support ailing husband and the child, it is admitted that this is not the way as the means are equally important as the ends. In the past whenever an appeal for financial help for medical treatment was made through the press, generous help from individuals as well as from Voluntary Organisations engaged in social service flowed. It may be noted that also the financial help from many NRIs did come, which was rejected by the woman.[15]

It is clear that a child born out of the agreement between a woman and childless couple would not fall under any of the above-explained methods. This kind of agreement will also be not treated as valid and enforceable. Now the main question that arises is whether or not this agreement would be considered as 'Immoral' or opposed to public policy.

Immorality depends upon the norms accepted by the society at a particular point of time. An act which interferes with marital relations, is considered to be immoral. the money given to a married woman to obtain divorce from her husband, the lender agreeing to marry her subsequently,[16] is considered immoral. Similarly, an agreement to sell or hire articles for the purpose of

13 Ibid.

14 Section 7 of the Act says, "Any male Hindu who is of sound mind and is not a minor, has the capacity to adopt a son or a daughter in adoption...."

15 Chandigarh Newsline, dated July 17, 1997., p. 1.

16 *Bai Vijli* v. *Nansa Nagar*, (1805) 10 Bom 152.

prostitution,[17] a house given on rent for running a brothel,[18] advancing a loan to the prostitute to carry on her trade,[19] are considered to be immoral. While some courts are of the view that sexual immorality or illegal co-habitation agreement is immoral,[20] others have taken an opposite view.[21] The Supreme Court in *D. Nagaratamba* v. *Kunuka Ramayya*,[22] speaking through Bachawat, J. has recognised past co-habitation as a good consideration.

The concept of immorality has been given a restricted meaning and it has been confined to sexual immorality. The Supreme Court explained the scope of sexual immorality in *Gherulal Prakash* v. *Mahadeo Dass*,[23] that operation of sexual immorality as applicable for settlement on consideration of concubinage, a contract for sale or hire of things to be used in brothel or by a prostitute for purposes incident to her profession, an agreement to pay money for future illicit co-habitation, promise in regard to marriage for consideration or contracts facilitating divorce, are all immoral and void.

As per the decision of the courts mentioned above,[24] the agreement to rent-a-womb does not fall within the scope of the concept of the immorality. The object of agreement is not only to have sexual relations or future co-habitation but also to conceive and give birth to a child which is outside the ambit of immorality.

The term 'Public Policy' is not capable of any precise definition. It means the policy of the law at a stated time. An act which is injurious to the interest of the society is against public policy. Any agreement which is prejudicial to social or economic interest of the community and its enforcement will be against the public policy. It is the policy of the courts that one's right of contractual freedom should be recognised. But,at the same time, if the contract is against the

17 Alla Baksh v. Chuni (1877) Punj. RCC No. 26.

18 Pranbalhav v. Tulsibala AIR 1958 Cal. 713.

19 Bholi Baksh v. Gulia, (1877)-Punj RCC No. 64.

20 Godrej v. Parvati AIR 1938 PAt 308,
Husseinali Gasan v. Dinbai, AIR 1924 Bom. 135.
Manocka Gounder v.Mannaininal AIR 1958 Mad. 392.
Subhash Chandra v. Nousadbai AIR 1982 MP 236.

21 Dhiraj Kuer v. Bikramjit Singh (1831) 3 ALL 787.
B.V. Ramma Rao v. Jayamma AIR 1953 MYS 33.
Pyare Mohan v. Narayani AIR 1982 Raj 43.

22 AIR 1968 SC 252.

23 AIR 1959 SC 781.

24 See Supra ns. 16 to 23.

public policy, then courts would not hesitate to declare the agreement void. The decision of the court would depend upon the recognised notions of interest of the community at a particular time. Notions vary from country to country and from time to time. The term 'public policy' was explained by the Supreme Court in *Gheru Lal*, thus :

> "Public policy or policy of the law is an illusive concept, it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly horse', etc. The primary duty of the court is to enforce a promise which the parties have made and uphold the sanctity of contracts which form the basis of society."[25]

In this case the court suggested that though heads of public policy are not closed, yet in the interest of stability in the society, it is better not to make any attempt to discover new heads of public policy. But the law relating to public policy must change with the passage of time in order to meet the demands of the contemporary social values in the society. In this connection it would be relevant to examine the new departures made by the courts after the judicial trends which have emerged since the Supreme Court's observation *Gheru Lal's* case. In *Rattan Chand Hira Chand v. Akar Nawaj Jung*[26] the Andhra Pradesh High Court held :

> In a modern progressive society with fast changing social values and concepts it becomes more and more imperative to evolve new heads of public policy, whenever to meet the demands of new situations. Law cannot afford to remain static. It has, of necessity to keep pace with the progress of society and judges are under an obligation to evolve new techniques or adapt old techniques to meet the new conditions and concepts.[27]

Similarly, the Rajasthan High Court in *Associated Cement Companies Ltd.* v. *State of Rajasthan*[28], observed,

> "Public policy does not remain static, in any given community. It may vary from generation to generation. Public policy would be almost useless if it were to remain in fixed moulds for all time..... The judges must look beyond the narrow field of past precedents.... The judges are to base their decision on the opinions of men of the world as distinguised from opinion based on legal learning."[29]

25 Supra n. 23 at 795.

26 AIR 1976 AP 112.

27 Id at 117.

28 AIR 1981 Raj. 113.

29 Id at 137.

In this very direction, the Apex Court in *Central In-land Water Transport Corporation* v. *B. N. Ganguly*[30] created a new head of public policy "*unfair or unreasonable dealings*". The court held that Government Corporations imposing upon a needy employee a term that he can be removed from the service by giving three months notice or pay in lieu of notice and that too without any grounds, would amount to exploitation. The Court further observed that such a contract would be '*unfair*' and regarded as opposed to *'public policy'* in case parties are not economically on equal footing and that there is a wide gap in their bargaining powers. In such a case one of them is in a position to ruthless exploitation.

In the light of above stated position, it may be concluded that "*an agreement to rent-a-womb*" would fall under separate head of '*public policy*'. Such agreements are against the social interest of the society, against the moral values of the society and against the laws of the land. The desire to have a child is a natural instinct of the married couples but this is not the proper way to have a child. It should be achieved by socially accepted and legally enforceable modes. This kind of agreement would be unethical and immoral with many social ramifications. Hence these cannot be legally and constitutionally enforceable.

[30] AIR 1986 S.C. 1571.

POLYGAMOUS MARRIAGES AND MUSLIM LAW

*Vinod Behari Sinha**

I. INTRODUCTION

During the ancient times, polygamy was prevalent globally among all the communities. But with the emergence of modern liberal values such as equality between male and female, protection of human dignity etc. and the concern against cruelty to women etc. the marriage laws[1] have been re-examined and reformulated all over the world. In this process, the polygamy could not stand the test of these values because it perpetuates cruelty to women. It has been abolished in most of the countries. Even in the muslim countries, where polygamy is regarded as of divine origin, it has either been banned or stringent conditions have been hedged that the plural marriage by a muslim has become very difficult. Unfortunately, India has no such law for muslims while the people of other communities have been prohibited from contracting bigamous marriage. If contracted, such a marriage would not only be void but also be an offence punished under Section 494 of the Indian Penal Code[2] . This dichotomy of law has given rise to incessant demands from various quarters for the enactment of Uniform law. Opponents of law reform contend that the right to have more than one wife, at a time, has been bestowed to them by their divine law i. e the Holy Koran and no agency on earth can intrude into their divine law. The need of the hour is to enact a law providing for monogamy among the Muslims without encroaching their divine law. This paper seeks to analyse the relevant verses of the Holy Koran, legal nature of bigamous marriage, and the reforms introduced in the Muslim countries in order to make a case for monogamous marriage among the Muslims.

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[1] Section 5 together with section 11 of Hindu Marrige Act. 1955 declares plural marriages void. Parsi Marriage and Divorce Act 1936 provides that plural marriages contracted by a parsi is void and is punishable under section 494 of Indian Penal Code.

[2] Section 494 of I. P. C. reads as under:

Whoever having a husband or wife living, marries in any case in which such marriage is void, by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven yerars, and shall also be liable to fine.

II. POLYGAMY AND THE HOLY KORAN

The Holy *Koran*, as the muslims believe, is of divine origin and all the rules contained therein are supreme laws. Its only verse upon which the muslims claim to have acquired the right of polygamy is *Ayat* (verse) of Sura (chapter) 4. The *Ayat*[3] runs as under:

"If ye fear that ye shall not
be able to deal justly
with the orphans,
Marry women of your choice,
Two, or three, or four;
But if ye fear that ye shall not
Be able to deal justly (with them)
Then only one, or
That which your right hands possess.
That will be more suitable,
To prevent you
From doing injustice.

The *Ayat*, thus, leaves no ambiguity regarding polygamous union. The permission is not unqualified. It is subject to limitations and conditions. First, only limited polygamy is permitted. Second, it is permitted only when a muslim fears of being unjust to orphan. Third, equal treatment to all wives is insisted upon. It is believed that these conditions are so difficult to comply that it amounts to virtual prohibition. [4]

(a) Limited Polygamy Permitted

At the time of emergence of Islam, an unlimited polygamy was in vogue in Arab. The Babylonians, Assyrians, Persians and Israelites practised polygamy and there was no limitation on the number of wives[5]. The prophet denounced this practice as it was the root cause of misery, injustice and mental torture to women. Nevertheless he did not want to abolish it for the simple reason that it was an age-old practice rooted in the community. Besides, the polygamy was rampant at that time not only in Arab but in other countries of the world as

3 THE HOLY KORAN: ENGLISH TRANSLATION OF THE MEANING AND COMMENTARY REVIEWED AND EDITED BY THE PRESIDENCY OF ISLAMIC RESEARCH IFTA at P. 206.

4 Ammer Ali, MOHAMADAN LAW 159(1985) Vol. II

5 Karim, Al -haj Maulana Fazhul, AL-Hadis:AN ENGLISH TRANSLATION AND COMMENTARY 264 (1988)

well[6]. He feared that its complete abolition would arouse discontentment among the followers of Islam and would also be difficult to meet the exigency which would arise due to decrease in the population of men during war. Therefore, instead of abolishing polygamy, he has restricted the number of wives to four.

(b) Fear of Being Unjust to Orphans

Islam imposes, on every muslim, a pious obligation to provide guardianship to orphans or to take care of them irrespective of differences of sex. [7] In Meeca where prophet lived, Pagans ruled, and his followers preached against the evils prevailing in the society in the name of paganism. Paganism developed enemity between the pagans and the Meccans and a number of battles took place between them. Later on, these battles were joined by the Jews as well[8]. Many had lost lives in these battles Women had lost their husbands and young children their loving fathers. These widows and children had to be provided for. If they had been left to the mercy of circumstances, they would have perished and the community would have weakened to such an extent that it would have been impossible for them to survive. Their treatment was to be governed by the principle of greatest humanity and equity. Against this background, an obligation of caring the orphans was imposed on every muslim.

Mere providing guardianship or caring of orphans would not be enough for a man to contract polygamous marriage. It must be coupled with the fear of being unjust in dealing with them. Then he can contract second or third or fourth marriage during the life time of the first wife. The greed for properties of an orphan or lust for beauty of an orphan girl might drive his or her guardian to deal with her or him unfairly. As the orphans happened to be weak, ill-treated and oppressed, the Holy Kuran strictly prohibits the appropriation of the properties of an orphan by the guardian. To prevent the guardian from appropriating their properties, the Holy Koran has embodied in *Ayat* 220 of *Sura* 2, 6 and 10 of *Sura* 4 his duties towards properties of the orphans. In these *Ayats*. *Ayat* 2 and 10 of *Sura* 4 are most relevant. *Ayat* 2[9] ordains that the

6 Cragg, Kenneth: THE MIND OF QURAN 7. (1973)

7 *Ayat* 6 of*Sura* 4 of the Holy Koran; *Supra* note 3 at 207-208
Make trial of orphan
Until they reach the age
Of marriage;if then ye find
Sound judgement in them

8 Fyzee, A. A. A. OUTLINES OF MOHAMMADAN LAW 11 (1976); Also see Mulla PRINCIPLES OF MOHAMMADAN LAW, XII (1972)

9 *Ayat* 2 of *Sura* 4:

guardian should neither change his worthless property from the good property of orphan nor should mix it up but should restore it to him on reaching the age of soundness. Similarly, a guardian might not fall into allurement of the beauty of an orphan girl. *Ayat* 3 (quoted above) permits him to marry women of his choice. Therefore, many translators and commentators[10] of the Holy *Koran* have taken the word 'orphans' used in the *Ayat* as comprehending orphan girls.

Now the question arises: Does the expression marry women of your choice carries the with it the right of a muslim to marry woman other than a widow or a mother of an orphan girl? The traditional interpretation has been put upon this verse by Aisha, the wife of Prophet. She has included in it any woman even an orphan girl. According to her, this is the orphan girl who is under the care of her guardian and her property and beauty might please him. A guardian is however, forbidden to marry unless he assigns justice to her and gives her dowry according to the usage. A similar interpretation has been put forth by the presidency of Islamic researches. According to this view one can marry an orphan if one is quite sure that he will in that way protect her interests and her property with perfect justice.

In view of the objectives sought to be achieved through the *Ayat*, the above interpretation does not appear to be sound. The *Ayat* seeks to provide new lease of life to orphans and widows, whose life has been shattered due to loss of their fathers or husbands in the battles *on the foundation of humanity and justice and not on the interests of men*. If a man is permitted to marry an orphan girl who is under his guardianship he would provide guardianship only to that orphan girl who is either beautiful or having property. No man would like to marry that orphan girl or widow who does not possess any of these considerations. A similar view has been expressed by Maulana Mohammad Ali. He emphasised

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To orphans restore their property
(when they reached their age),
Nor substitute (your) worthless things
For (their) good ones;and devour not
Their substance (by mixing it up)
With your own. For this is
Indeed a great sin.

10 Comment on *Ayat* 3 of *Sura* 4 in THE HOLY QURAN: ENGLISHTRANSLATION OF THE MEANING AND COMMENTARY:*Supra* note 3 at 206.

Marry the orphans if you are quite sure that you will in that way protect their interests and their property.

"All that it says is that if a muslim comes across to such a female orphan he may if it other wise is agreable to him, contract second marriage, a third marriage and a fourth marriage. . . . " See B.R. Verma, ISLAMIC LAW 87 (1986)

that the Holy Koran had, enjoined that "if you could not be otherwise just to orphans, marry the mother of such orphans so that you might, thus be interested in their welfare and for this purpose, you were allowed to contract other marriage". [11] Leaving no ambiguity in the meaning of the word, he further said that by 'women' in chapter 4:3 means the mother of orphans and it was made clear by the *verse* 127.

If it is accepted that the word 'women' should be given liberal meaning even then its meaning can not be stretched beyond the widows because the verse does not permit men to enjoy through plural marriages but seeks to ameliorate the conditions of war widows. Keeping this objective in view, a man is permitted to marry any widow who seems good to him. But this permission is subject to the condition that, in this manner, he would be able to provide justice to the orphan girl who is under his guardianship.

(c) All Wives Should Be Treated Equally

Subsequent to the solemnizahin of plural marriage it is imperative for a muslim to treat many with equity. In other words, a muslim must treat all his wives equally. What does the equal treatment include? According to Ballie[12] equal treatment of wives is limited to providing equal company and maintenance. According to him, control of mind is in the hands of Allah, so a man is not guilty if his mind, naturally, turns to one wife

On the other hand, some scholars do not to relate the equal treatment to merely company with the wives but extend to love and affection as well. Alfred Guillaume, while commenting on the *Ayat*, holds that an absolute justice in the matters of feeling is impossible[13]. He take the expression as insisting on emotional equality. Hodkinson[14] also proceeds on the same etymology. He observes that the Koran imposes a moral obligation on the husband that he should be able to treat his wives equally. [15] Mohammad Zaifulla Khan has emphatically laid down that you could not keep perfect balance emotionally between your wives, howsoever, much you might desire. [16] Love, as the basis of equal treatment of wives, has been asserted by Lahore High Court as well. [17]

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11 Maulana Mohammad Ali THE PRINCIPLES OF ISLAM 640 (1980)

12 B.E. Ballie 'A DIGEST OF MOHAMMADAN LAW' 189 (1957)

13 A. Guillauma ISLAM 159 (1968)

14 K. Hodkinson MUSLIM FAMILY LAW 95 (1984)

15 Also See Mst Zubaida Begum vs. Sardai Shah' A.I.R. 1943 Lah 310

16 M.Z. Khan QURAN 92 (1970)

17 Ms Zubaida Begum vs Sardar Shah Supra note 15

Indeed, the view that the equal treatment to all the wives relates not only to providing equal material things and company but also to providing equal love and affection to wives, appears to be in conformity with both the marriage institution and the true intention of Holy Koran. But to do so for a man is a herculean task or rather impossible because only either on the dissatisfaction from the first wife or on the allurement of property or beauty of other woman, a man would undergo second marriage with another woman. After auch a marriage, it is natural for a man to be attracted more towards his new wife than the old one and there would be no equal distribution of love between them. Keeping this fact in view, it has already been revealed in *Ayat* 129 of *Sura* 4 that however, a man may try he could not treat his wives equally[18]. When it is impossible for a man to treat his wives equally, the prescription amounts in reality, to a prohibition for having more than one wife. The examination of *Aayat* 3 of *Sura*4, thus, reveals that a muslim is permitted to have four wives at a time but the contracting of second or third or fourth marriage is permitted only when he is caring for or has provided guardianship to an orphan. Not only this it is also mandatory for him to provide equal material things, company, love and affection to all the wives. But it is difficult for a human being to satisfy these conditions. Therefore, Mishkat-ul-Masabih has aptly maintained that from these two verses (*Ayat* 3 and 129 of *Sura*4), it is clear that Islam enjoins upon muslims taking only one wife but it keeps reservations and safeguards to meet the cases of emergency.[19] Alfred Guillaume also thinks that *Koranic* prescirption amounts, in reality, to a prohibition.[20]

III. Legal Effect on Marriage if contracted in defiance of Koranic Prescriptions

In case a muslim contracts plural marriage in defiance of the attributes mandatory for such marriage the question would then arise as to what would be

18 *Ayat* 129 of *Sura* 4
Ye are never able
To do justice between wives
Even if it is your ardent desire
But turn not away
(from a women) altogether
so far to leave her (as it were)
Hanging in the air.

19 'Al- Hadis' An English translation and commentary of Mishkat-ul-Mashabih 665 (1988)

20 Supra: note 13 at 159

the nature of such marriage? Only Mutazili forbids a second union, during the subsistence of prior contract, and treats such union as illegal.[21] On the other hand, two main schools Sunni and Shia, regard the plural union contracted even without the compliance of conditions as stipulated by the *Ayat*, valid. But the law established by these schools in contravention of *Shariat* which is embodiment primarily of the law laid down by the Holy Koran would not be valid. Therefore, such marriage should be treated against the law laid down by *Shariat*. To arrive at this conclusion, an attempt shall be made to draw inference from the law which deals with the classification of marriages as laid down by Sunni and Shia schools. Both the schools recognise void (batil) marriages and these are those unions which are prohibited on the grounds of consanguinity, affinity and fosterage. These disabilities can not be removed at any time. But the disabilities arising out of irregular marriage, could be removed. After the removal of the irregularity, the marriage becomes valid. For example, the fifth marriage, during the subsistence of permissible limit of four marriages, is irregular and after the dissolution of one of four marriages, the marriage becomes valid. This kind of marriage is recognised only by Sunni and not by the Shia school. According to Shias, any disability for marriage, whether removable or not, would hold the union void. Applying this principle to the question under consideration, the law that emerges is that if a muslim contracts second or third or fourth marriage with the woman other than the mother of an orphan who is being cared of or to whom the guardianship has been provided, the marriage should be treated as void under both the schools as this condition for plural marriage can not be complied with after the marriage.

Another requirement for plural marriage which a muslim has to satisfy after the marriage is that he should treat all his wives equally. If he does not satisfy this condition, the wife can seek the dissolution of marriage on the ground of cruelty.

IV. Reforms made in Muslim Countries

The polygamy not being congruent to the modern civilized norms, almost all the muslim countries have either abolished it or have made its contract difficult by law, despite the fact that both the Sunni and Shia schools give unqualified permission to a muslim for plural marriage. In Tunisia and Turkey, it has been prohibited. Taking it firmly that no human being can treat his wives equally in every respect, the contract of second marriage has been declared invalid in Tunsia.[22] At the time of enactment of this law, the legislators gave subjective interpretation to the indicia of equal treatment. According to them, it

21 Amir Ali Mohammadam Law' 159 (1985)

22 Code of Personal Status 1956-Arts 18 and 21

included equal love and affection to wives. The Prophet might be capable of this as he was exceptional. These requirements were beyound ordinary men. But in Turkey[23] the second marriage would be invalid until the dissolution of the first marriage. The court has been empowered to declare such marriage illegal only when the first marriage has not lawfully been dissolved subsequent to solemanisation of second one. In Pakistan, Iraq, Iran, Syria, Indonesia, Singapur etc. polygamy has not been abolished, yet the regulatory measures have been adopted to control it. These measures have made bigamous marriage difficult. In these measures, the grounds, on which the polygamy can be contracted have been specified but these grounds differ from country to country. Along with it, it has been made mandatory for a muslim to take prior permission from the judicial authority. In Pakistan[24] the Arbitration council has been empowered to grant permission for polygamous union on any of the grounds such as sterility, physical infirmity, physical unfitness for conjugal relation, wilful avoidance of decree for restitution of conjugal rights or insanity on the part of existing wife. If the prior permission is not sought the second or third or fourth marriage would not be illegal but the husband would be punished. In Iran[25], Iraq[26] and Syria[27] the conditions for plural marriage are that the husband must be capable of maintaining plural wives and some lawful benefits must be involved in it. In other words, equality only in the matters of providing material things and maintenance, is insisted upon. Cognisance of equal love and affection has not been taken into account.

V. Conclusion

Most of the muslim countries, have introduced reforms in polygamous marriage, but, unfortunately, no step in this direction has been taken in India merely because of the apprehension that it would antagonise the muslims. If the *Ayat* 3 of *Sura* 4, through which the muslims claim to have acquired the right of polygamy, is strictly enforced, there would be no reason for the muslims to oppose it because thereby *Shariat* would not be encroached instead that would be enforced. Thus the law should specify in unambignous terms that the second or third or fourth marriage, during the lifetime of the first wife, would be void if it is contracted without compliance of the first condition of the *Ayat* e, i, if you fear that you shall not be able to deal justly with orphans. Along with it, the meaning of the word women as used in the *Ayat* must also be explained as

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23 Civil Code 1926 -Arts 93 and 112

24 Family Law Ordinance, 1961 section 6.

25 Marriage Law 1931-37. Art 9

26 Iraqi Law of Personal Status 1959 Art. (4) (a)

27 Syrian Law of Personal Status 1953 Art 17

including that woman who is supposed to have natural interest in the protection and promotion of the interest of the orphan. This will be in accordance with the true objective of *Shariat* and no muslim would oppose it . Only that man would he allowed to have polygamous marriage who is desirous to discharge pious obligation.

CONSTITUTION OF THE CONSUMER FORA : SOME REFLECTIONS

Y. Krishnan[*]

Is the prescence of the President on the bench of a Forum mendatory?

The Hon'ble Supreme Court in *Gulzari Lal Agrawal* Vs. *The Accounts Officer*[1] has quashed the order of the National Consumer disputes Redressal Commission (NC), holding that an order passed by two members of the State Commission (of West Bengal) without the junction of the President was illegal and void. It is proposed to examine how far the order of the Hon'ble Supreme Court is both legally persuasive and expedient.

At the outset, it may be mentioned that the Hon'ble Supreme Court had taken the amendments introducing amended sub Sections (2) and 2(A) of Section 14 of the Consumer Protection Act[2], as having been made in the statute with effect from 18.6.1993 whereas, in fact, these two amendments were made on 15th June, 1991.

These amendments not only amended Section 14(2) but also added Sections 14(2A), 18 A and 29 A to the C.P.A. To appreciate the significance of the import of the amendments, the original and the new sections are reproduced in juxtaposition.

Act No. 34 of 1991 made the following substitutions/ammendments :

Original Position prior to amendment

Sec. 14(2) :

"Every order made by the District Forum under Sub-section (1) shall be signed by all constituting it and if there is any difference of opinion the order of the majority of the members constituting it shall be the order of the District Forum".

Position after the the amount

"Every proceeding referred to in sub-section (1) shall be conducted by the President of the District Forum and at least one member thereof sitting together".

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[*] Former member of the National Consumer Disputes Redressal Commission

[1] (1996) 10 SCC 590

[2] Here after called C.P.A.

As the District Forum has three members including the President, the amendment of 15.6.1991 changed the quorum from three to two with the stipulation that one of the two must be the President.

Sec. 14(2A)

"Every order made by the District Forum under Sub-section (1) shall

be signed by its President and the member or members who conducted the proceedings."

This was merely a consequential addition following the amendment of Sec. 14(2).

Sec. 18A :

"Vacancy in the office of the President.

" When the office of the President of the District Forum or of the State Commission, as the case may be, is vacant or when any such President is by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such person, who is qualified to be appointed as President of the District Forum or, as the case may be, of the State Commission ....."

The new Sec. 18 A enjoins that the President of the District Forum as well as the State Commission, must always be a judicially qualified person - a serving District Judge or High Court Judge or a person who has been or is qualified to be a District Judge or High Court Judge as the case may be.

It would be seen that the law is positive : the Consumer Fora must always be headed by judicially qualified persons. This intention of the legislature is crystal clear from Sec. 18 A. It *ipso facto* rules out a member who is not so judicially qualified from ever acting as the President of the Fora.

Sec. 29 A :

Vacancies or defects in appointment not to invalidate orders :

No act or proceeding of the District Forum, the State Commission

> or the National Commission shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the Constitution thereof.

As the sub-heading of Sect. 29 A shows this was a 'saving clause' - that the proceedings of the Consumer Fora do not become invalid merely due to any technical flaw in the constitution of the Consumer Fora benches. It does not dilute in any manner the mandatory requirement of the substantive provisions of Secs. 14(2) and 14(2A) and 18 A which make the junction of judicially qualified person in the benches of the forum mandatory. In fact this section was specifically inserted to validate a large number of orders passed by District Forums having a single member (President) benches.

The only other amendment of the Act which is deemed to affect the Constitution of the Consumer Fora benches is that made by the addition of Sec.2(1) (jj) by the amendment Act of 18.6.1993.

In Sec.2(1) (jj), the term "member" has been defined to include the President and a member of National, and State Commissions and the District Forum. The Hon'ble Supreme Court specifically took cognizance of this amendment[3] whose interpretation has to be harmonized with that of the other relevant sections on the Constitution of the Consumer Fora.

> On a reference to the statement of "Objects and Reasons" for the C.P. bill of 1993 it is seen that the purpose of the insertion of this sub-clause is not explained therein. In fact it is not known how and what stage and why this sub-clause was inserted in the amendment Act of 1993.

The Government of the State of West Bengal in exercise of its powers under sub-Section (2) of Sec.30 of the C.P.A. framed the West Bengal Consumer Protection Rules, 1987. Rules 6(9) and 6(10) lay down that when a vacancy occurs in the office of the President of the State Commission or he is unable to discharge his functions due to any cause (illness, absence etc.) the senior most member of the State Commission shall discharge the functions of the President till he resumes office. There are similar corresponding provisions on this matter in regard to the Constitution of the District Forum in Rules 3(7) and (8) of the same Rules.

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3 See Paragraphs 4, 15 and 17 of the Supreme Court order.

The Hon'ble Supreme Court, applying the principle of harmonious construction to Secs. 14(2) and 14(2A) and sub-clauses (9) and (10) of Rule 6 of the West Bengal Rules, stated that it could never be the intention of the legislature to stall or render the State Commission non-functional in the absence of the President for any reason, and that the interpretation of a Statute ought to promote the cause of the Consumers and the object and spirit of the Act.

The Court held that "as and when the President of the State Commission is functional, he along with at least one member sitting together shall conduct the proceedings but where the President being non-functional, sub-rules (9) and (10) of Rule 6 will govern the proceedings ..... the senior most ..... member ..... shall discharge the function of the President until a person is appointed to fill 'such vacancy'. This sub-rule is made with a view to make the State Commission functional in the absence of the President and not to allow the State Commission to render non-functionl for want of the President....."[4]

The Apex Court further noted that the West Bengal Government had framed the rules in the year 1987 and that the validity of sub-rules (9) and (10) of Rule 6 was never challenged.[5]

The power to makes rules under the C.P.A. is derived from Sec.30 of the Act. Sub-Section 2 of the provision empowers the State Government to make rules for carrying out the provisions contained in sub-section (3) of Section 10, clause (c) of Sub-section (1) of Section 13, Sub-section (3) of Sec. 14, Section 15 and sub-section (2) of Section 16 of C.P.A.

The composition of the District Forum is determined by Sec10, and that of the State Commission by sec.14 of the Act. Sections 10(3) and 16(2) of the Act empower the State Governments to frame rules regarding the terms and conditions of srvice including salary, honorarium or other allowances payable to the members of the District Forum and State Commission. The State Government have no power to frame rules concerning the Constitution or composition of the District and State Fora.

The doctrine of "harmonious interpretation" is to be applied where a statute suffers from the vice of inconsistency. It is then the duty of the law courts to ascertain the intention of the legislature, *sententia legis,* and interpret the statute accordingly. The principle of harmonious construction cannot be invoked to resolve any inconsistency between the statute and the rules made thereunder. It may be noted that the statute is an Act of parliament and the rules are the subordinate delegated legislation and have to be intra vires the

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4 See supra n. 1 at 596.

5 Ibid

statute. This is evident from the Supreme Court ruling in *B.C. Banerjee* vs. *Sate of Madya Pradesh*[6] that "a rule making authority has no plenary power. It is to act within the limits of the power granted to it"[7].

The Supreme Court in para 18 of its order also stressed that there had been no challenge to the validity of sub-rules (9) and (10) of Rule 6 of the Rules.[8]

Considering the nature of the work which the Consumer Fora have to do under the C.P.A., the Supreme Court itself considered the participation of the President in the proceedings of the District Forum and State and National Commissions as imperative.

In *Fair Air Engineers Pvt. Ltd. Vs. N.K. Modi*[9] the Supreme Court, while discussing the question whether proceedings of the forums created under the Act are legal proceedings and whether the authorities have the trappings of judicial authorities, has emphsised that Sec.10, which deals with the Constitution and Composition of District Forum enjoins that District Forums shall include a person who is or who has been or is qualified to be a District Judge as its President. Similarly Sec.16, which prescribes the composition of the State Commission, provides that the President of the State Commission must be a person who is, or has been a Judge of a High Court. Similarly under Sec.20 of the Act, the President of the National Commission has to be a person who is or has been a judge of the Supreme Court. "Thus the presiding officers of the Forums are judicial officers and in the case of Commission, they are sitting or retired judges of the High Court or the Supreme Court. as the case may be."[10]

Again in *Indian Medical Association* vs. *K.P. Santha & Ors.*[11] the Supreme Court considered the contention of the Indian Medical Association that the composition of the District Forum, the State Commission and the National Commission was such that they could not fully appreciate the complex issues which might arise in complaints of medical negligence. The Supreme Court observed :

> "..... [A]ll the Consumer Disputes Redressal Agencies are headed by a person who is well versed in law and has considerable judicial or legal experience.[12] On the other hand, presence of laymen as members of the Consumer Disputes Redressal benches ensures that Consumer Fora are not excessively obssessed with leagalism : they are not legaslistic and hyper-technical as law may tend to become. Their presence on the Consumer Fora, in the words of Prof. White quoted by the Supreme Court will "act as an antidote against excessive technicality."[13]

Further, after taking into account the provision vesting certain powers of a civil court in the Consumer Fora, the provision for appeal and revision, the provisions regarding enforcement of the orders of the Fora, the Supreme Court in the case of *Fair Air Engineers* held that the "District Forums, the State Commission and National Commission have all the trappings of a civil court and judicial authority."[14] This again makes it imperative that judicial officers must be included in the Constitution of the Consumer Fora.

Now we may examine the effect on the Consumer Fora of a bench being headed by the senior most member, even if he is not judicially qualified, in the absence of the President. We will have a forum having the trappings of a civil court and vested with judicial authority, conducting quasi-judicial proceedings manned by persons who have no knowledge of law and no judicial experience. There is also the risk that such a Forum or Commission can easily be tripped by a clever lawyer on points of law and procedure. In fact the Hon'ble Supreme Court was conscious of this risk when in *Gulzari Lal Agarwal*[15] it observed[16]:

> "having regard to the composition of the District Forum and the State Commission, it is more appropriate and desirable to make the appointment of the President of the District Forum and the State Commission without any delay since the complaints under the Act involved fairly large stakes which require a judicial approach."

In conclusion, it is submitted that the rules of the CP. Act alone cannot determine the Constitution of the benches of the Consumer Fora which are *de facto* courts of law. Therefore, they must be headed by person who have adequate knowledge of law and procedure and have adequate judicial experience. This would ensure their ability and expertise to deliver justice of the same standard as the public expects from the courts of law. It is respectfully submitted that the order of the Hon'ble Supreme Court needs reconsideration at the earliest.

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6 (1970) 2 Scc 467

7 Id. of 472.

8 See paragraph 18 of the order

9 A.I.R. 1997 S.C. 533

10 Id. at. 535

11 (1995) (11) C.P.R. 412

12 Id. at. 423

13 Id. this is the observation of Prof. white which was quoted by the Supreme Court in *Indian Medical Association* case at para 35

14 See supra note 9 at p. 536

15 See supra n. 1

16 Id. at. 596.

TWO CHEERS FOR THE SUPREME COURT'S RULING ON SEXUAL HARASSMENT

By

Naveen Kumar

The Supreme Court's decision in *Vishaka* v. *State Rajasthan*[1] stands out not only because it is the first comprehensive decision on the subject, but also because of its unique style of judicial craftsmanship and activism. The case owes its existence to the activist zeal of social activists who moved the Supreme Court of India thourgh public interest petition. The immediate cause for the filing of the petition was an alleged brutal gang rape of a social worker in a village of Rajasthan.

In *Vishaka's case* the Court's attention was drawn towards a matter of grave social concern i.e. sexual harassment at workplaces. It is well known that generations of women have to suffer from unwelcome, unwanted sexual treatment by men. It is only around 30 years back that the specific term sexual harassment has been coined in developed part of the world.

In India too this problem is not new, but amazingly neither there is enough authentic subject nor there is a single piece of legislation addressed to the issue of sexual harassment at workplace. The magnitude of the problem can be assessed by looking at the outcome of the various studies carried out by many institutions.

During 1992-97 years, National Commission for women received 1817 written complaints under "crimes against women" out of which as many as 49 were concerned with sexual harassment at workplaces[2]. According to a recent survey 60 percent of working women said they have faced sexual harassment, 54 percent which was in the form of non-verbal overt sexual conduct, while 39 percent of that was constituted by uninvited sexual remarks[3]. The survey further reveals that in 46% cases of sexual harassment at work places, superiors or

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1 (1997) 6 SCC 241. Herinafter referred as Vishakha's case.

2 See Booklet of Complaint Pre-litigation Counselling Cell, brought out by the National Commission for Women. The number seems not very high but it is because of restricted definition of workplace and less reporting of cases.

3 Survey conducted by Sakshi; an NGO See India Today, September 1, 1997 page 67.

supervisors (of the victim) were wrongdoers. In an equal number of cases, the victim was subjected to harrassment by either a collegue or peer.[4]

Every incident of sexual assault leaves a traumatic impact on the victim. This makes sexual harassment one of the most offensive and demeaning experience undergone by any working women. It subjects women to a feeling of revulsion, disgust, anger and helplessness and results in severe emotional and physical stress. The resultant trauma, anxiety, nervousness depression ultimately would destroy her work efficiency and in many cases comples her to leave the job.

Sexual harassment affects the economic gains of the enterprises as victim becomes less motivated and less productive; thus both quality and quantity get reduced.

Keeping the urgency of issue in mind the Supreme Court came out with 12 guidelines to combat sexual harassment at workplaces[5]. These guidelines are

4 See Telegraph 18.8.97

5 These guidlines are:

(a) All employees or persons in charge of workplace whether in the public or private sector should take apporpriate steps to prevent sexual harassment. (This is general)

(b) Other relevant guidelines are as follows :

(i) Express probhition of sexual harassment. In particular the victims and witnesses should be protected from discrimination and victimisation.

(ii) Where such conduct (of sexual harassment) amounts to misconduct disciplinary action should be initiated by the employer.

(iii) Complaint machanism is to be created in employer's organisation for reddressal of the complaint. The complaint should be ensured time bound treatment.

(iv) Complaint machanism may include provision for Complaints Committee. Complaints Committee should be headed by a woman and there should be not less than fifty percent of female members. To avoid pressure from above ranks, one outsider member familiar with sexual harassment issue should be there

(v) Employees shold be allowed to discuss the issues of sexual harassment at worker's meeting and should as defined by the Court, be notified, published and circulated at workplaces.

(vi) Disciplinary rules and regulations should include rules regarding the prohibition of sexual harassment and provide penalties thereof.

(vii) The private sectors should take steps for prohibiting sexual harassmaent under the Industrial Employment. (Standing order) Act 1946.

supposed to fill up the vacuum created by the absence of appropriate legislation on the concerned subject.

Most significantly the apex court declared that every incident of sexual harassment results in violatioin of fundamental rights of gender equality and the right to life and liberty. It is a clear violation of rights under Arts 14, 15 and 21 of the Constitution. It is also an attack on victim's fundamental right under Art. 19 (1) (g). The significance of this declaration lies in the fact that a victim who has undergone the experience of sexual harassment can seek recourse to the Supreme Court under Art. 32 of the Constitution. After *Bodhisatva Gautam's* case[6] the remedy under Art. 32 is available against any private entity as well.

The apex court further observed that the meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all facets of gender equality including prevention of sexual harassment and abuse.

The supreme court took the assistance of International Conventions and norms in interperating the fundamental rights guaranteed by our Constitution. There is no reason, the court said, why these International Conventions can not, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

Taking note of the fact that the present civil and penal laws in India do not adequately provide for any specific law to protect women from sexual harassment in workplaces and that the enactment of such legislation may take considerable time, the Supreme Court was of the view that it is necessary and expedient for employer at workplaces as well as responsible persons or institutions to observe certain guidelines to ensure prevention of sexual harassment of women.

The Supreme Court ruled that it shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent and deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement and prosecution of acts of sexual harassment by taking all necessary steps.

(viii) Appropriate conditions should be created for work so that the women should not feel that there is hostile environment.

(ix) If the alleged conduct amounts to a specific offence under criminal law the employer shall initiate appropriate action in accordance with law, making a complaint with appropriate authority.

[6] (1996) 1 SCC 490

DEFINITION OF SEXUAL HARASSMENT

The Supreme Court defined sexual harassment as inclusive of such unwelcome sexually determined behaviour whether directly or by implication so as to cover :

a. physical contact and advances;

b. a demand or request for sexual favours;

c. sexually - coloured remarks;

d. showing pornography;

e. any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

The Court further observed that where any of these acts are committed in circumstances where the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work (whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprises) such conduct can be humiliating and may constitute a health and a safety problem. It is discreminatory, for instance, when the women has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or when it creates hostile work environment. Adverse consequences might be visited if the victim does not consent to the demands.

The ruling of the Supreme Court in *Vishakha's* case has been hailed as landmark judgement, all over the country, by almost all women's rights organisations and media. This is a remarkable judicial effort made in our country to address the issue of grave social concern. The Judgment is welcome because it will boost the confidence and courage of all working women to come out with their grievances of sexual harassment.

With due respect to the Court, a few comments on certain aspects of the judgment, which appear rather weak,will be useful. It is humbly submitted that the Court has failed to take into account certain facets of the problem which could have been addressed in more particular and appropriate way. These unresolved issues might be pointed out as follows:

1. The court could have included within its beneficial sweep the substantially large number of working women in unorganised sectors, who face sexual harassment as much, if not more, as any other working women. These women which constitute approximately 80 percent of working women in our country. They suffer from vices of ignorance, illiteracy and economic compulsion. These directions of the Apex Court have little bearing upon the problems of women who are agriculture labourers, domestic servants,

sanitary workers etc. whose peculiar socio-economic conditions put them in more vulnerable position. Thus, it may be submitted that the sexual harassment in the workplace is a phenomenon equally associated with working women in un-organised sector and should have been addressed by the Court. Amazingly, work places in rural areas have been missed in a case which itself was inspired by an incident of alleged rape of worker in a village.

2. Like the unoranised women other groups left out are the students and such other women apprentices and trainees who are equally exposed to the menace of male harassment. The university campuses have become safe haven for teasers. According to a recent survey conducted by Gender study Group, "91.7 percent of women hostellers and 88.2% of women non-hosteller talked about sexual harassment on Delhi University campus roads. These women said they face harassment on campus roads almost, everyday, sometimes many times in a single day"[7]. With due respect to the Court none of the guidelines have come to protect the women in schools and colleges etc.

3. The incidents of the sexual harassment gives rise to feelings of disgust, revulsion and emotional trauma. To deal with such situations the Court could have directed for the constitution of counselling Committees consisting of women activists and psychologists who could take care of the emotional trauma etc. associated with sexual harassment. The complaint Committee contemplated by the Supreme Court would hardly be adequate to cater to the specific needs of the victims of sexual harassment.

4. The most painful reality which shuts the mouth of the victim is the long, tedious, expensive and uneven road to justice. The Complaint Comittees to some extent may be helpful but it can not help the cases which go to the regular courts - thus separate mobile courts for sexual harassment cases might have been considered by the Supreme Court, which could dish out expeditious and instant justice.

5. As the roots of the problem of sexual harassment lie in the attitudinal chemistry of the male which he inherited from the century's long patriarchial set up, at this front the males need to be helped out. In some countries like Japan there is training programme in employment sectors for training the workers as to how to deal with the working female colleague employees. The working women have to be oriented in such a way, as to be more assertive. A women should be prepared to accept the fact of sexual harassment, if it happens, without any guilt, or shame. She has to be trained to purge all negative feelings. The court could have directed the

[7] See Pioneer, September 19, 1997 p.1 (front page)

employers for such orientation or training at certain intervals basis. Since, a law, howsoever, stringent cannot change the attitudinal chemistry of a male where the root of the problem lies, the man needs to be re-educated, re-socialized and be helped to liberate himself from such traditional mentality where he used to see the female as mere object of pleasure. The court could have included one more direction for training and orientation programme to be run by persons who are sensitive towards the issue and possess understanding of psychological cause and affect of sexual harassment.

To conclude, the Supreme Court decision has made a positive contribution in the identification of a vital social problem, inventing a new judicial remedy to deal with it and inaugurated a new style of judicial activism that expressly acknowledges court's legislative role. But all this is only good enough to raise two cheers for the Court's bold initiative. The third cheer is withheld because the courts beneficial ruling contained nothing for the unorganised women worker, the sexually harassed non-working girl students. This section of women may not have caught the Court's attention, but in terms of the reality of social existence of girls it may not be safe to ignore these sections of women.

RESTRUCTURING THE SECURITY COUNCIL : AN AGENDA FOR RADICAL REFORMS

*Amitendra Nath Sinha**

Of late, the issue of restructuring the Security Council (SC) has been high on the agenda of the world community. The reason is not far to seek. The partial enlargement which was effected by the amendment of 1965[1] has miserably failed to satisfy the aspirations of non-permanent members who have been reduced as second class members[2]. Moreover in the last decade there has been a phenomenal growth in the power and stature of a number of countries who want to be treated at par with the five permanent members of the Security Council, with full fledged rights, including the controversial right to veto . The need for reforms has been further necessitated by the fact that despite the threefold increase in the membership of United Nations(UN) there has not been a corresponding increase in the permanent membership of the SC. Apart from these geo-political compulsions, the reforms have been accentuated by the fact that the UN has been facing the severest crisis of legitimacy and credibility. Indeed the UN gains its legitimacy from the collective will of international community and this element appears to be missing due to the narrow compositional base. Therefore if the security council is to retain its moral sanctity and political effectiveness it is imperative that it should have wider representation. This article attempts to examine the existing constitutional structure of SC, the lacunae in the system and its consequent fall out and moreover to find ways and means to radically reform it so as to make it an active neutral broker of peace.

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1 See amendments to Articles 23, 27 and 61 which entered into force on august 31, 1965: UNJY (1965), 159.

2 This is so because, as the expression "non permanent members" suggests, they are not permanent. They are to be elected for a term of 2 years and the retiring members are not eligible for immediate re-election. Further, it is the General Assembly which elects them having due regard to the contribution of members of the UN to the maintenance of international peace and security and to other purposes of the organisation and also to equitable geographical distribution. Also the permanent members enjoy an exceptional status, not only by virtue of their permanency but also by reason of special voting power amongst which the most important is the power of "veto".

It may be recalled that the UN was formed to create a new world order; to save succeeding generations from the scourge of war[3]; to maintain international peace and security[4]; to develop friendly and co-operative relations among nations[5]; to address international problems of an economic, social, cultural or humanitarian character[6]; and to promote fundamental human rights and freedoms[7]. To perform these variegated functions. The UN Charter has established a number of principal organs, of which the SC is undoubtedly the most important[8]. It is so because it has been entrusted with the "primary responsibility for the maintenance of international peace and security"[9] - the most fundamental function for which the UN came into existence.

Therefore it seems quite reasonable for various countries to clamour for a permanent berth in the esteemed Council . Of late various proposals have been forwarded for its expansion. The leaders of countries in the waiting like India, Germany and Japan have their own perceptions about their inclusion.

The German leadership[10] apart from academicians[11] strongly argue that as a second step of such reform Japan and Germany should be included, with full fledged powers of veto. An active propaganda orchestrated by the western media has created a hype that these two are the only genuine candidates qualified for a permanent seat . India on the other hand is eyeing for a permanent seat in view of its high profile leadership among third world countries . Another view is that a number of countries across the globe viz., India, Brazil, Ethiopia, Germany, Japan, Italy, Nigeria and Zaire be given a permanent seat. Yet another dominant view is to lay down certain objective criteria for selection viz., economic strength military might, geographical area, population, human rights record, financial contribution & participation in the UN sponsored programmes.

3 Preamble to the Charter of the United Nations.

4 Charter of the United Nations, Art. 1 (1)

5 Id., Art. 1(2)

6 Id., Art. 1(3)

7 Id.

8 Id., Art 7 (1)

9 Id., Art 24(1)

10 Chancellor Helmut Kohl rejected the idea of German membership of the SC without a veto.

11 Bredow, wilfried Von, "*The Multilateral obligation: German perspective on the UN system*", in Krause Keith and knigh W. Andy (ed). State, Society and the UN System: Changing Perspective on Multilateralism; p. 23. United Nations University Press, Tokyo 1995.

Thus we find that though there is a divergence of views on the question as to who be included or what be the criteria[12] there is unanimity on the issue that there is a pressing need to expand the Security Council. The criteria mentioned above are very much valid for the inclusion or exclusion of a country to the Council.. But all of them fail to address a few basic questions which lay at the core of this agenda, which tend to ask why is there a need for reform? Has the present system become anachronistic? What is the aim and purpose of this enlargement? Is the reform necessitated merely by the fact that the aspirations of a few countries cannot be satisfied under the existing system and so they need to be accommodated on a permanent basis or is there another noble principle prompting such reform? Will the inclusion or exclusion of a few countries give the SC much needed legitimacy, moral sanctity and political effectiveness? Will it help in creating a new just world order?

NECESSITY FOR REFORM

Though the demand for reform of SC has always been there it has been further accentuated by the sea changes which have taken place in the international arena in the recent past. The demise of Soviet Union and the consequent fall of the Eastern Block upset the equilibrium maintained hitherto . The United States emerged as the sole super power and quite naturally came to dominate the entire ambit of international relations (which includes the UN in general and SC in particular). The inherent danger of an uni-polar world can be gauged with reference to a number of incidents operating under the collective security system. The first and foremost comes the 'Gulf War'.

On August 2, 1990 Iraqi tanks and troops invaded and occupied Kuwait extinguished its territorial integrity and snuffed out its political independence. Indeed it was a flagrant violation of the UN Charter and an affront to the civilized World order. The very day an emergency session of SC, called at the request of Kuwait, adopted a resolution wherein it condemned the invasion and demanded unconditional withdrawal of all Iraqi forces from Kuwait . What caused uneasiness among the diplomatic circle was the unprecedented haste[13] with which one resolution after another was passed (about a dozen in number adopted between the period Aug. 2, 1990 to Nov. 29, 1990). This left the impression that at the very outset a military solution had already been decided

12 For a brief overview, see Tad Baley "*Can the UN stretch to fit its future*", Bulletin of the Atomic Scientists (Ap. 1992):38-42. for a comprehensive survey of SC proposals, see Hanna New Combe, "*Reform of the UN Security Council*", Peace Research Review 8 (May 1979) No. 3.

13 See infra n. 16.

upon by the United States and its allies[14]. The sanctions imposed against Iraq (vide Security Council Resolution 661) were not given sufficient time to achieve their desired result. Moreover, the Secretary General of the United Nation was not given an opportunity to use his good offices to avert the War[15]. . According to Article 42 SC has to determine the adequacy of measures under Art. 41 and should it consider inadequate, it may take such action by air, sea or land forces as may be necessary to maintain international peace and security . It means that the Security Council not only organises action but actually implements them when it is necessary[16]. The resolution No., 678 did not do so, instead, it authorised one member to decide whether force would be necessary six weeks hence, and if yes, to initiate, organise and implement[17].

There were cases in which, so to say, a blank cheque was given to those nations which had under the US leadership brought their armed forces to the Gulf area and not under the auspices of the Security Council, to use them against Iraq/Kuwait[18].

The main distinction between League and the UN is that under the League Covenant the League Council only recommended the kind of force to be used in case of an aggression. If a state or states acted upon that recommendation then the decision was that of the state and not that of the Council[19]. By permitting states to determine when to use force, a prerogative of SC, Resolution 678 put the clock back in time[20]. Moreover the idea that the SC can authorise under Articles 42, 51 (as the US & its supporters pretended) use of force by some unspecified nation against some others, and outside the control and supervision of the Council makes nonsense of the notion of the collective security embodied under Ch. VII[21]. While Kuwait considered it a historic shift, the Yamanese delegate sensing the danger of the unipolar world, contended that the Security Council should not be allowed to be turned into a foreign office of great powers.

14 Verma, S. K "*Security Council Action under Chapter VII: An Agenda for Reform of the UN Collective Security System*" Evidence at p. 13, 1991.

15 Id.

16 See Anand R. P. United Nations and the Gulf Crisis, Ist ed. Banyan Publications, New Delhi, 1994 at p. 21.

17 Id .p. 22

18 Rajan M. S., World Order and the United Nations. Essays from a Nonaligned Perspective, Har-Anand Publications, New Delhi, 1995 at p. 129.

19 League Covenant, Art. 16 para 2.

20 *Supra* n. 16 at p. 22.

21 *Supra* n. 18 at p. 130.

It further complained that for the first time in the history of Security Council powers were being granted to undertake unspecified action without a clear definition of the Security Council's role and power of supervision over those actions. No wonder that the then Secretary General was forced to deny that it was a UN war[22].

It has been argued by some authors that no international enforcement action would succeed unless one of the great powers expresses its willingness to undertake it. But this line of argument fails to appreciate that enforcement cannot and should not be dependent upon the interest or willingness of a superpower. It is however, pertinent to pose a question here that in cases where no willingness is expressed will the SC refuse to take any measure? Legally speaking such proposition would defeat the vary purpose of the UN. In realistic terms it might be true that the action by the US was largely because its vital interests were at stake in Kuwait (supply of oil) and in the Gulf region.

Another unique case which deserves attention for the purpose of our analysis is the so called US action m 'Haiti'. In that case a coup by the army overthrew the democratically elected government. The US proposed a draft resolution before the SC for taking collective military action under the Art. 42 of the Charter to oust Haiti's military rulers. The Security Council on Aug. 1, 1994 adopted resolution wherein it authorised the members states to form a multilateral force under a unified command and use all necessary means to remove the military leadership. No time period for taking the action was specified and it was left at the discretion of the states. Such resolution it is argued is unprecedented in the annals of the UN. It is in tune with the Reisman's argument that force may be justified to oust a repressive government. [23]. The danger of this line of argument has been rightly underlined by Schacter by noting that it would introduce a new normative basis for recourse to war[24]. It would further give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or the goal of self determination[25]. Indeed such intervention by a multilateral force is barred by the provisions of article 2(7). The UN is precluded from intervening in matters which are essentially domestic in nature.

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22 The then Secratary General Perezde Cuellar, flatly denied that it was a UN war at all, for the troops had neither gone under the UN flag with blue uniform nor under a joint command whose headquarters as the United Nations.

23 Raisman, W. Michael, "*Coercion ad self-determination : Construing Charter Article 2(4)*" AJIL vol. 78 (1984), quoted by Dr. S.K. Kapoor in "International Law" 10th ed Central Law Agency, Allahabad, 1994 at p. 642.

24 Schacter, Oscar, "*The Legality of pro-democratic Invasion*" AJIL, vol. 70 (1984), quoted by Kapoor at p. 645.

25 Id.

Similarly the Security Council Resolution concerning the Kurds in Iraq (and consequent carving out a territory within Iraq for Kurds) appeared to give different interpretation to Article 2(7) of the Charter concerning non-interference. (although it may be noted that the intervention in Iraq was not conducted under the auspices of the Resolution). Like wise the Security Council Resolution concerning the extradition of Libyan Nationals for the bombing of an American Civilian airlines highlights the dangers of unipolar world.

In the absence of any quasi-judicial checks on the constitutionality of the action of the SC, the only way to save the SC from becoming the foreign department of great powers is to completely democratize it. As should be with regards to both its composition as well as voting procedure. Only then can the rule of law be promoted in international affairs.

AGENDA FOR RADICAL REFORMS

Thus, it is clear that UN Security Council is crying for radical reforms so as to remove its inherent handicaps and revitalize it with power and legitimacy. The aim of restructuring should not be merely crowning a power by a permanent berth but the underlying principle should be the improvement in the functioning of the SC and streamlining the entire UN system. In recent years the Security Council sanctions have come to lack credibility in the eyes of the right thinking nations. They have become the hostage of the militaristic adventure and economic blackmail of the lone super power. The other members of the SC (especially the other four permanent members) have been rendered mute spectators (due to their vested interests). The only course open is to go for complete transformation of the basis which is provided by the Charter itself.

The first and foremost guiding principle is the Preamble to the Charter which opens with the resolve that "we the people of United Nation determine to save succeeding generations from the scourge of war..... to reaffirm faith in the equal rights..... and the nations large and small.....". The United Nations system is based on the principle of sovereign equality of members[26]. This means that giving a privileged position to a few countries merely on the basis of their status[27] is contrary to the spirit and letter of UN charter. It is true that the signatories agreed to such provision but the very basis of an organization,

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26 Charter of the United Nations Art. 2.1

27 In 1945 the criteria for permannent membership of the SC was based primarily on the military capabilities of the victorious allies reflecting the international situation as it existed at the end of the Second World War. For an overview see Kumar S., "*The Gulf War : A Challenge to World order*, in S. Kumar ed., year book of India's Foreign Policy 1990-91 Tata McGraw-Hill Publishing, New Delhi 1991, 14.

which is intended to survive the onslaught of time, should be democratic and not autocratic.

According to Art. 24 of the U.N. Charter the primary responsibility for the maintenance of international peace and security rests on the SC. This power is conferred by members of the UN (semblance of representative form) on the SC in order to ensure prompt and effective action by the UN. The members agree that in carrying out its duties under this responsibility the SC acts on their behalf[28].

What significance can be attached to the above words? The irresistible conclusion at which one arrives is that members should act as representatives of the members of the UN. They should function in accordance with the dominant world view and not in consonance with their narrow domestic politico-strategic interests.

If the Council members are not democratically elected but have got the berth by virtue of their great status they are bound to act in accordance with their own national interests rather than reflect the collective will of member states. It is true that the organisation created by the Charter is not a "Super state" or anything resembling a world government. But it is also true that in the light of the present role of UN it can no longer be regarded merely as a collective security mechanism. Rather, now the aim of UN has come to be attached with a just world order where nations large and small peacefully co-exist and social progress be achieved with better standards of life in larger freedom.

All this can be achieved only if democratic spirit permeates the entire UN structure. This will require the democratization of the entire process of representation and voting system in accordance with the principle of sovereign equality of states. By this I mean that all the members of the SC should be democratically elected by the member states represented in the General Assembly. A detailed principle in line with the election of non-permanent members can be formulated[29]. Time span of the members of the SC may be fixed after the expiry of which they will have to get reelected. Periodic elections will help the SC to reflect the collective will of the member states, be more responsive and sensitive to the dominant world view.

The natural corollary of this Glasnost will be democratization of the voting procedure . This will necessitate the doing away of the veto system and other privileges of the great five.

Any decision be it substantive or procedural can be taken by two-third majority (of course firstly the way for consensus should be explored). This will

[28] Charter of the United Nation, Art, 24.

[29] Id., Art. 23.

ensure smooth and harmonious function of SC in particular and the UN as a whole.

Indeed, these radical reforms are difficult to implement because the privileged states have a vested interest in preventing reforms that would undermine the rules of the game that benefit them. Moreover any such changement will require the amendment of the Charter. The procedure is far from flexible. Art. 108 requires it to be adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional process by two thirds of the members of the UN including all the permanent members of the SC. This amendment will be opposed not only by great powers but also middle powers (despite the desire by the majority of member states)[30] because obviously it might not be in their short term interests. Merely because it is likely, to be opposed by a priviledged lot we need not stop our agenda. For it is conceivable that the world public opinion which impelled the inclusion into the Council of non-permanent members will force the permanent members to undertake these much needed amendments.

To sum up, the hiatus between the 1945 configuration of power and realities of global politics in the recent decades has given rise to demands for institutional reform. As Secretary General Waldeheim once put it, "Some of the assumptions on which the United Nations was based have proved unfounded..... The organization has for example proved to be of limited value as an instrument of collective security..... the idea of maintaining peace and security in the world through a concert of great powers would seem to belong to the nineteenth rather then twentieth century. The fossilized material circumstances have gone through what can be aptly termed as metamorphosis. The prevailing ideas, thoughts and practices are being analysed and quite often being rejected in the search for new. The UN as an instrument of world peace needs to adapt itself to changing flux else it would end up as a redundant institution in no time.

[30] *Supra* n. 18 at p. 36.

EXPANDING THE HORIZONS OF ARTICLE 12 OF THE INDIAN CONSTITUTION : UNWELCOME TREND!

Vikram Raghavan

On the 13th of February 1996, the Supreme Court delivered a verdict of far reaching significance[1]. It declared that private corporate bodies cannot claim exemption from the scope of Article 32[2] and if it found that the authorities have not taken the action required of them by law, by which the right to life of the citizens of the country is jeopardised, it is the duty of the Court to intervene[3]. The Apex Court's pronouncement is also important for it held that its judgment in an earlier decision, *M.C.Mehta v. Union of India*[4], was correct and could not be said to contain any *obiter* observations regarding whether a private company was a part of the term 'State' and therefore amenable to the directions of the Court under its writ jurisdiction. This article seeks to examine in the background of the history of case law on the scope of Article 12, the implications of this judgment.

MEANING OF THE TERM 'STATE'

The fundamental rights that are guaranteed in the Constitution can be enforced only against an entity that satisfies the term 'State' in Article 12. This expression is defined to include the Government and the Parliament of India, Government and the legislature of the states and all local and *other* authorities (emphasis mine). While the nature of the entities that are defined to constitute the 'State' is generally clear, there existed considerable controversy over the ambit of the term 'other authorities'. The Madras High Court[5] opined that it had to be interpreted *ejusdem generis,* to imply only those authorities exercising governmental or sovereign functions and thereby only an entity that was part of the executive government could be characterised as 'State' under Article 12.

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* IV B.A.,LL.B.(Hons.), NLSIU.

1 Indian Council For Enviro-Legal Action v. Union of India, (1996) 3 SCC 212.

2 Article 32 of the Constitution endows the Supreme Court with the power to issue writs and directions for the enforcement of the fundamental rights guaranteed in the Constitution.

3 *Supra* n. 1 at para 54.

4 AIR 1987 SC 1086.

5 *University of Madras* v. *Shanta Bai*, AIR 1954 Mad. 67.

This view was followed by other High Courts too[6]. The view of the Madras High Court was overruled by the Supreme Court in *Rajasthan Electricity Board v. Mohan Lal*[7], wherein the application of the *ejusdem generis* rule to determine the scope of the term 'other authorities' was rejected. The Supreme Court held that the word would include all authorities created by the Constitution or Statute, on whom powers are conferred by law[8].

In 1975, the Supreme Court had to decide whether some statutory corporations came within the definition of 'State' under Article 12[9]. The Court was divided and the majority held that since the corporations were created by statutes and had statutory powers to make rules and regulations, they qualified to be called 'other authorities'.[10] Mathew, J. in his separate but concurring view suggested that the expression, 'State' had to be looked at in the light of the modern setting and that statutory corporations were primarily agencies or instrumentalities of the state for carrying on trade or business that would otherwise have been carried on by a department of the state concerned[11] . In dissenting, Alagiriswami, J. preferred to hold that since none of the statutory corporations shared the sovereign power they could not be said to be part of the 'state'[12].

INSTRUMENTALITY AND AGENCY TEST

In what is known as the *International Airports Authority Case*[13], Bhagwati, J. ruled that 4 corporations acting as agencies or instrumentalities of the government vis-a-vis the fundamental rights are part of the term 'state'. The judge enumerated factors to be taken into account in order to gauge whether an

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6 *B. W. Devdas* v. *Selection Committee*, AIR 1964 Mys. 6; *Krishna Gopal* v. *Punjab University*, AIR 1966 Punj. 34.

7 AIR 1967 SC 1857.

8 This was the approach of the majority comprising Subba Rao, C.J., Shelat, Bhargava, and Mitter, JJ. The judges were of the view that the statutory authority need not be engaged in performing any government or sovereign functions. The minority view was expressed in an opinion by Shah, J., who held that it would be necessary for the body to perform the sovereign function to make rules, so as to fall within the ambit of the term 'state'..

9 *Sukhdev Singh* v. *Bhagatram*, (1975) 1 SCC 421.

10 The majority view was expressed by Ray,C.J., Chandrachud and Gupta, JJ. (paras 1-73).

11 Paras 74 - 122.

12 Paras 124 - 195.

13 *R.D. Shetty* v. *International Airports Authority, (1979)* 3 SCC 489.

entity was part of the state in a subsequent decision.[14] Subsequent decisions of the Court applied and adopted these factors in determining whether a body was part of the expression. 'State' under Article 12[15].

THE OLEUM GAS LEAK CASE

A writ petition was filed in 1985 under Article 32, by an environmentalist, M.C. Mehta, seeking a direction to close and relocate the caustic chlorine and sulphuric acid plants of Shriram Industries located in Delhi. While this petition was pending oleum gas leaked from one unit affecting several persons. The Inspector of Factories and Assistant Commissioner (Factories) issued orders shutting down the plants. Shriram filed a writ petition against this order. In the meanwhile, applications for compensation were filed in the original petition of M.C.Mehta. The Court passed six orders in relation to the petitioners before it, but the significant one for our purpose is the decision on compensation that was

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[14] *Ajay Hasia v. Khalid Mujib,* (1981) 1SCC 722; In this case Justice Bhagwati enumerated the following factors :

i. If the entire share capital of the corporation is held by the government it would go a long way towards indicating that the corporation is an instrumentality and agency of the government.

ii. Where the financial assistance of the state is so much as to meet almost the entire expenditure of the corpoartion it is impregnated with government character.

iii. Whether the corporation enjoys monopoly status, which is conferred or state protected,

iv. Existence of deep and pervasive state control may afford an indication that the corporation is a state agency or instrumentality,

v. If the functions of the Corporation are of public importance and closely related to government functions it would be a relevant factor in classifying a corporation as an instrumentality or agency of the government.

vi. If a department of government is transferred to the corporation, it would be a strong factor supporting this inference of the corporation being an instrumentality or agency of the government.

[15] *Som Prakash Rekhi,* was a decision that was rendered on the same day as *Ajay Hasia, supra* n. 14, in which Krishna Iyer, J. borrowed Bhagwati, J.'s to which he was also a party, *See, Som Prakash Rekhi v. Union of India,* (1981) 1 SCC 449. (The Bharat Petroleum Corporation, a company taken over by the Government was held to be part of the term and was required by the Supreme Court to respect the fundamental rights; *See, B.S. Minhas v. Indian Statistical Institute,* (1983) 4 SCC 582 (the Indian Statistical Institute); *P.K Ramachandra Iyer v. Union of India, (1984)* 2 SCC 141 (Indian Council of Agricultural Research); *Mahabir Auto Stores v. Union of India,* (1990) 3 SCC 752 (Indian Oil Corporation).

demanded from Shriram due to the gas leak[16]. In making an order on the compensation part of the petition filed under Article 32, the important impediment the Court naturally faced, was whether, Shriram Industries was part of the term 'State' in Article 12, so as to be amenable to the writ jurisdiction of the Supreme Court. The Court overcame this hurdle by stating:

> " . . .We have not had sufficient time to consider and reflect on this question in depth. The hearing of this case before us, concluded only on 15th December 1986, and we are called upon to deliver our judgment within a period of four days. We are therefore of the view that this is not a question on which we must make any definite pronouncement at this stage.."

Some allege that this was done because of the urgency of pronouncing judgment within four days of the conclusion of the arguments, as the presiding judge was to retire[17]. The Court was also acting beyond its jurisdiction in entertaining the writ petition, without deciding the status of the company. Perhaps, it would not be improper to classify the order passed in the case as a nullity. Previous decisions of the Court have pointed to the fact that an order delivered without reference to the relevant provisions of the Constitution, or while lacking jurisdiction are not binding[18] and *Shriram* could have chosen to ignore this ruling. But some academic writing suggests that Shriram was an agency and instrumentality of the State, due to various reasons like production of chemicals and fertilizers in the public interest, government regulation of the enterprise under various statutes and the assistance granted by the Government to Shriram[19]. The Court tried to reconcile the difficulty of bringing Shriram Industries under Article 12 by relying on American precedents, where private companies acting under the colour of the state are deemed to be engaging in state action.

Rosencranz, is of the opinion that the question was kept open, so as to prevent a deluge of writ petitions that would seek to subject private enterprises to writ proceedings, asserting infringement of fundamental rights[20]. In *Union*

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[16] *M. C.Mehta v. Union of India,* AIR 1987 SC 1086.

[17] S.N.Singh, *'Compensation for Pollution - Writ Petition: An Inadequate Remedy'* Chartered Secretary 116 (February 1988).

[18] *Municipal Corporation of Delhi v . Gurnam Kaur, (1989)* 1 SCC 101; *A.R.Antulay v. R.S.Nayak,* (1988) 2 SCC 602.

[19] *See,* Vinod Shankar Mishra, Environment Disasters and the Law 33-34 (1994).

[20] Rosencranz, Noble and Divan, Environmental Law and Policy in India 334 (1991).

Carbide v. Union of India[21], Ranganath Mishra, C.J. in his concurring opinion held;

" In *M.C.Mehta's Case,* no compensation was awarded as the Court could not reach the conclusion that Shriram (the delinquent company) came within meaning of State in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution. Thus what was said was essentially *obiter*..."[22]

UNNIKRISHNAN 'S CASE

In *Unnikrishnan's Case,* the Supreme Court dealt with the question of the validity of capitation fees charged by private professional institutions from students that they admitted[23]. Mohan, J. in his concurring judgment discussed the nature of functions discharged by these institutions. He was of the view that they must discharge a public function and this meant that they must act fairly, and therefore be subject to Article 14. The judge relied extensively on the observations in an earlier case[24] , where it was held that the power under Article 226[25] could be used to issue a mandamus to any person or authority performing a public function, as the power endowed on the High Court was wider than the Supreme Court's power under Article 32 and the powers of the English courts to issue prerogative writs. The writ in that case, was issued by the High Court to a private college, *aided with funds of the government* (emphasis mine). This ruling was further supplemented to by Mohan, J., who held that the emphasis is on the nature of the duty and it must be held that these institutions discharge public duties irrespective of whether they receive state aid. But these observations do not resolve the problem of Article 12. In fact in the case relied upon by Mohan,J., it was clear that it was only the term, 'authority' in Article 226 that must receive a liberal meaning unlike the terms 'State' in Article 12[26] However this was not taken note of, and it cannot be said that Mohan, J.'s views in *Unnikrishnan* resolved the question as to whether private institutions are part

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21 (1991) 4 SCC 584 (emphasis added).

22 *Ibid .at paras* 14 and 15.

23 *Unnikrishnan* V. *State of Andhra Pradesh,* (1993) 1 SCC 645.

24 *Andi Mukta Sadguru v. V.R.Rudani,* (1989) 2 SCC 691.

25 A power conferred upon the High Courts to make orders or issue writs against any person or authority not only for the enforcement of a fundamental right, but for any other purpose. The reference point of Article 12, which mandates that the entity against whom a writ or order is issued must be classified as falling within the term "State", is not applicable to the power of the High Court, it is used only to limit the power of the Supreme Court under Article 32 only.

26 *Supra* n. 24 at para 18.

of the term 'State' in Article 12 for them to come under the purview of the writ jurisdiction of the Supreme Court.

RAJASTHAN POLLUTION CONTROL CASE

Apart from Mohan, J.'s observations in *Unnikrishnan* and Ranganath Mishra, J.'s opinion in *Carbide,* the ruling in *Oleum Gas Leak,* was not revisited till 1996. A petition was filed under Article 32 in the Supreme Court that the environmental pollution caused by private industrial units was being allowed to continue unabated by the pollution control authorities. The rights of the residents of the affected area were alleged to be violated. The Court requested an expert body to study the situation. Nothing concrete was done and the units tried to cover up the chemical sludge that was causing the pollution. The Pollution Control Board also admitted its helplessness in closing these units, which continued to defy its various orders to tackle the pollution that they were causing. It was contended by the private units that they were not covered under Article 12 and Ranganath Mishra, J.'s, observations in *Carbide* were cited, to show that no proceeding under Article 32 could be initiated against them by the petitioners. The Court rejected this contention by ruling:

1. The writ petition was not really for issuance of appropriate directions against the respondents, but was directed against the authorities to compel them to perform their statutory authorities, since their failure to do so undermined the guarantee of life under Article 21. It was the duty of the Court, therefore, to intervene in this regard.
2. If an industry is established without obtaining the requisite permission and clearances and it is run in disregard of the life and liberty of the citizens, it was the duty of the Court to intervene[27].
3. The observation of Ranganath Mishra, J. in *Carbide,* was unnecessary for the purposes of the case. The *Oleum Gas Leak Case* could not be said to contain any *obiter,* for the parties had been directed to institute actions on the basis of the law declared.
4. The Court appended a footnote to its judgment pointing out the distinction between the *Oleum Gas Leak Case* and the one before it . It stated that the latter involved a violation of law and disobedience of the orders of the Court and therefore there was a need to ensure the observance of law and of its orders as part of enforcement of fundamental rights[28].

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27 *See, supra* n. 1.

28 *Ibid.* at 230.

5. The footnote that was attached, also stated that if the Central Government omits to do its duty under the environmental statutes, the Court could issue appropriate directions to it[29]. However, the footnote also contains a strange observation;

> "..It is not open to the court in an appropriate situation, to award damages against private parties as part of the relief granted against public authorities. This is a question upon which we do not wish to express any opinion in the absence of a full debate at the bar.."

The implication of this sentence, tucked away discreetly in the footnote is not very clear. If the Court intended to suggest that the private party could not be proceeded against in an action in which public parties are arraigned, it has not progressed from its position in the *Oleum Gas Leak Case,* where a similar ambivalent stand was adopted as to the status of the private party in the case. Further, by leaving the question open, as the Court appears to have done, it does not give it any right to condemn the critique of the *Oleum Gas Leak Case,* by Ranganath Mishra, J., who rightly relied on the fact that the main question whether a private party is state was not decided and accordingly accorded the status of *obiter* to the pronouncement.

Alternatively, the Court may have intended to suggest by the sentence extracted above, that in an action launched primarily against public authorities, all kinds of relief can be sought against private parties, but not the payment of damages. Even this approach of the Court is not correct since, it leaves open the question as to whether any steps can be directed against private parties in the absence of any determination as to their actual status under Article 12. In fact, Court directed the Central Government to recover the cost of remedial measures from the units concerned, without directly ordering them to pay. If the Court did not intend to address by its orders the polluting industries directly, then what was the need to declare that the *Oleum Gas Leak Case*, had correctly stated the law as regards the inclusion of a private party within the ambit of Article 12. The duty of the Court to intervene in matters relating to the environment and those that concern the rights of citizens is clearly without doubt, but whether in the guise of making such an intervention, the Court can be permitted to ride roughshod over the express provisions of a controlling Constitution like ours, is the crucial question that must find an appropriate answer. In any case, the fact that the Court did not want to pronounce on an important matter essential for the determination of the liability it sought to inflict, due to what it perceived as the lack of a full debate at the bar, gives the impression that the Court tried to adopt the Oleum

[29] *Id.*

Gas Leak Case 's, strategy of making a party liable without caring to lay down the law comprehensively, which is its constitutional duty. Article 141 of the Constitution endows the Court with the power to declare law that shall be binding on all courts throughout the country. This sacred prerogative was conferred by the Constitutional Fathers on a non legislative body like the Supreme Court, in the hope that the scholarship and wisdom of its incumbents would ensure that it undertakes this important task with utmost seriousness and sincerity of purpose, which it is respectfully submitted does not seem to inform the decisions either in the *Oleum Gas leak* Case, or its successor, the *Rajasthan Pollution Control* Case. The Court could have, if it wanted, confined the invocation of the writ remedy against a private party only when the life and liberty of the citizens are in jeopardy. However, with the expanding notions of the right to life and liberty taking within its fold new dimensions such as the right to education, shelter, medical treatment etc., the possibility of private parties being hauled in writ proceedings for the violation of these rights looms large. Non - State entities like companies including multinationals do need regulations to be kept in check, but to subject them to a remedy intended only as a measure against state action amounts do doing violence to the constitutional scheme. The need for the ordinary remedies that are available against these entities to be overhauled cannot be understated, but the initiative should be taken by the legislature and the executive, without the judiciary having to misapply a constitutional remedy to these bodies. In this regard, it is regrettable that an important development in the field of tackling problems of the nature that the Court was confronting went unnoticed by it. The Environmental Tribunal, was created in 1995, by virtue of the provisions of the Environmental Tribunal Act, 1995[30]. This forum has been conceived primarily to deal with liability as a result of accidents that caused damage to the environment and provides a framework in which compensation is to be paid in the event of environmental damage. Unfortunately the existence of this body was not brought to the notice of the Court, which instead made a fervent plea for the setting of 'environment courts'.

The meaning and scope of Article 12 cannot be over - expanded, it will certainly lead to a collapse of the judicial system. An overburdened judiciary is not conducive to the prevailing mood of speedy justice and reduction in court arrears.

[30] *Act 27 of 1995, which received assent of the President of India on 17 June 1995.*

BOOK REVIEWS

CONSTITUTIONAL CONFLICTS IN CONTEMPORARY MALAYSIA BY H.P. LEE Oxford, Kuala Lumpur, 1995. Pp.xxiv+155. Price: Not mentioned.

A Constitution lays down a set of fundamental principles of governance of a State. It establishes the principal institutions of a Government and outlines their 'functional' boundaries. All the Governmental organs derive their authority from, and discharge their responsibilities within the framework of, the Constitution. It, thus, devises a foundational paradigm for the polity of a State and operates as a fundamental law.[1]

However, the constitutional paradigm is dictated by political and social values, ideologies and compulsions, prevailing at the time of the framing of a Constitution. These values and ideologies, obviously, cannot be similar for all times to come. They are bound to change. A Constitution, therefore, has to remould itself to adapt to these changes and political and social compulsions, if any. It has also to resolve the prevailing constitutional, political and social crises.[2] A Constitution, during such a process, might lead to some tensions, crises and conflicts between the constituent units of a State.

The book under review,[3] the title of which is self-explanatory, delves into three major constitutional issues, emerged in Malaysia during 1983-1993. They are: the legislative power of the Malay Sultans; the removal of Tun Salleh Abas, the then Lord President of Malaysia, and two other judges of the Supreme Court, and the withdrawal of the personal immunity of the Malay Rulers. These issues,

1 Generally see K. C. Wheare, *Modern Constitutions*, (Oxford, 1 966).

2 However, there is no unanimity among the constitutional scholars and judges of higher courts as to the limits of the amending powers of Parliament. For example, the Supreme Court of India held that basic features of the Indian Constitution can not be altered through constitutional amendments. See, *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 and *Minerva Mills v. Union of India*, AIR 1980 SC 1789. A contrary view has been taken in Malaysia. For example, see, *Loh Kooi Choon v. Government of Malaysia*, [1977] 2 MLJ 187; *Phang Chin Hock v. Public Prosecutor*, [1980] 1 MLJ 70, and *Mark Koding v. Public Prosecutor*, [1982] 2 MLJ 120. [These judicial pronouncements, in essence, suggest that the Parliament of Malaysia has power to amend the Constitution in ways it thinks fit (including constitutional amendments that are inconsistent with the Constitution itself.) provided they comply with the manner and form provided by the Constitution itself.]

3 H. P. Lee, *Constitutional Conflicts in Contemporary Malaysia*, (Oxford, Kuala Lumpur, 1995).

in the opinion of the author, have not only altered the constitutional equilibrium in the balance of powers in the Malaysian polity but also have subjected the Federal Constitution and constitutionalism to tests and trials.

In fact, all the chapters of the book under review, except the chapters dealing with the constitutional history and the Constitution (Amendment) Act 1994, are a revised version of the author's earlier published work.[4]

(I) THE CONSTITUTIONAL CRISIS OF 1983

In chapter two, captioned 'the Constitutional Crisis of 1983', the author, against the backdrop of the relevant provisions of the Federal Constitution of Malaysia and of the prevalent political scenario, examines the constitutional propriety of the Constitution (Amendment) Bill 1983 and of the refusal of Sultan Ahmad Shah, the then Yang di-Pertuan Agong, to assent to it. The Bill, in essence, was designed:

(i) to curtail the hitherto unguided and unregulated discretion of the Yang di-Pertuan Agong (and of a State Ruler) to give or withhold his assent to a Bill and to oblige him constitutionally to accord his assent to a Bill within 15 days of the Bill presented to him, and,

(ii) to replace the 'satisfaction' of the Yang di-Pertuan Agong by the 'satisfaction' of the Prime Minister for issuing a proclamation of emergency.

The Yang di-Pertuan Agong, who initially, on being briefed by the Prime Minister, agreed to assent to the 1983 Bill, refused to do so when all the Sultans at the Conference of Rulers unanimously voted against the acceptance of the Bill and resolved that the King should not give the Royal Assent to the Bill.[5]

The author, perceiving royal assent to a Bill as a 'privilege' of a Ruler,[6] and recalling the dilemma in which the Yang di-Pertuan Agong was placed,[7] opines

4 The Constitutional Amendments in Malaysia - A Quick Conspectus,18 *Malaya Law Review* 59 (1976); The Malaysian Constitutional Crisis: King, Rulers and Royal Assent, *Lawasia* 22 (1984); A Fragile Bastion under Siege - the 1988 Convulsion in the Malaysian Judiciary, 17 *Melbourne University Law Review* 386 (1990) and Hereditary Rulers and Legal Immunities in Malaysia, 12 *University of Tasmania Law Review* 323 (1993).

5 Article 38 (4) of the Federal Constitution mandates: " No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of Conference of Rulers."

6 See *supra* n. 3 pp. 28-30.

7 If the Yang di-Pertuan Agong went against the wishes of the Conference of Rulers, he could have been removed from the office by a resolution of the Conference, if such a resolution was supported by five members of the Conference. *[Vide*, article

that the 1983 Bill was unconstitutional for being violative of the 'privileges, position, honours or dignities of the Rulers' without complying with the constitutionally mandated consent of the Conference of Rulers.[8]

However, in the light of democratic functioning of a body politic and constitutional conventions in other (similar) jurisdictions (like the UK), one, with equal force, may contend that the royal assent to a Bill is merely a constitutional formality required to convert a duly passed 'Bill' into an 'Act'. Such an assent, it may be argued, can, at the most, be 'withheld' but cannot be 'refused' by a constitutional monarch.[9] The refusal to assent to a Bill by a state Ruler not only tantamounts to an 'unconstitutional' act'[10] but also undermines the privilege of the Legislature to make laws. This line of argument seems to be more logical, pragmatic, politically viable, and constitutionally justifiable. Nevertheless, it is needless to mention that the provisions of article 38 (4) of the Federal Constitution mandating consent of the Conference of Rulers, become relevant only if, one, like the author, perceives that assenting to a Bill is a 'privilege' and not a 'constitutional formality'.

However, negotiations between the Government and the Rulers led to an 'agreement' and 'understanding' between them concerning the fifteen-day Royal assent rule pertaining to a State Bill.[11] The then Acting King, Tuanku Jaafar Abdul Rahman, in pursuant of this 'agreement' and 'understanding', accorded his Royal assent to the 1983 Bill. The Constitution (Amendment) Act

32 (4) r.w. Part III of the Third Schedule.] And by complying with the wishes of the Conference of Rulers, he had to ignore the advice of the government.

8 Supra n. 3 p. 29.

9 For example, see F.A. Trindade, the Constitutional Position of the Yang di-Pertuan Agong, in Tun Mohamed Suffian, H. P. Lee, and F.A. Trindade, (eds.), *the Constitution of Malaysia: Its Development: 1957-1977*, (Oxford, 1979) 101 (111), and Y.A. M. Raja Azlan Shah, the Role of Constitutional Rulers In Malaysia, in F. A. Trindade and H. P. Lee (eds.), *the Constitution of Malaysia: Further Perspectives and Developments*, (Oxford, Singapore, 1986) 76.

10 See, Y.A. M. Raja Azlan Shah, the Role of Constitutional Rulers In Malaysia, *ibid.*

11 " The actual terms of the purported oral understanding are not publicized as yet. The author of the book under review merely speculates that the State Rulers had given some oral assurance that they would not withhold royal assent in respect of state legislation if the fifteen day royal assent rule was withdrawn. However, a commentator asserts that documents surrounding the 1983/1984 constitutional crisis indicate that the fifteen -day royal assent rule to a State Bill was withdrawn by the Government in return for the provisions enabling the Yang di-Pertuan Agong to be bypassed at the federal level. He also feels that the objective of the 1984 amendment was not to restore the legislative role of the Rulers at the State level but to deprive them of the more politically significant veto power over constitutional amendments under articles 159(5) and 38(4). See, Shad Saleem Faruqi, the Sceptre, the Sword and the Constitution at a Crossroad, [1993] 1 CLJ xlv (liii).

1984, accordingly, repealed the fifteen-day Royal assent rule to a State Bill to leave the legislative powers of the State Sultans unrestricted and restored the proclamation of emergency to the 'satisfaction' of the Yang di-Pertuan Agong. However, it provides that the Yang di-Pertuan Agong may withhold his assent to a non-money Bill and to return it to the House in which it has originated with a statement of reasons for his objection to the Bill. The House, to which the Bill is returned may reconsider and vote on it again and to send it to the Yang di-Pertuan Agong for his assent. The Yang di-Pertuan Agong, now, is constitutionally obliged to accord his royal assent to the Bill within thirty days (in substitution of the earlier proposed 15 days) after it is presented to him, and if he fails to assent to such a Bill within the stipulated time it will automatically become law after the expiry of thirty days. [12]

A decade after the 1983 constitutional crisis, however, despite the purported 'understanding' between the Government and the Rulers during 1983, the Constitution (Amendment) Act 1994, makes it obligatory on the part of the Yang di-Pertuan Agong[13] as well as a Ruler[14] to assent to a Bill submitted to him

12 Art. 66(4). The Yang di-Pertuan Agong shall within thirty days after a Bill is presented to him

(a) assent to the Bill by causing the Public Seal to be affixed thereto, or

(b) if it is not a money Bill, return the Bill to the House in which it originated with a Statement of the Reasons for his objections to the Bill, or

(4A) if the Yang di-Pertuan Agong returns a Bill to the House in which it is originated in accordance with clause (4) (b), the House shall as soon as possible proceed to consider the Bill. If after such reconsideration the Bill is passed by the votes of not less than two-thirds of the total number of members of that House in the case of a Bill for making any amendment to the Constitution other than an amendment excepted pursuant to Article 159, and by a simple majority in the case of any other Bill, with or without amendment, it shall be sent together with the objections to the other House by which it shall likewise be considered, and if similarly approved by members of that House, the Bill shall again be presented to the Yang di-Pertuan Agong for assent and the Yang di-Pertuan Agong shall give his assent thereto within thirty days after the Bill is presented to him.

(4B) If a Bill is not assented to by the Yang di-Pertuan Agong within the time specified in clause (40 (a) or (4A) hereof, it shall become law at the expiration of the time specified in clause (4) (a) or (4A), as the case may be, in the like manner as if he had consented to it.

13 Article 66 after the 1994 Amendment reads as under:

"66(4) The Yang di-Pertuan Agong shall within thirty days after a Bill is presented to him assent to the Bill by causing the Public Seal to be affixed thereto.

(4A) If a Bill is not assented to by the Yang di-Pertuan Agong within the time specified in clause (4), it shall become law at the expiration of the time specified in that clause in the like manner as if he had assented thereto."

within thirty days of its presentation to him and deems such a consent if he does not assent to it within the stipulated period.

It is significant to note that the author in his editorial note published in 1986,[15] doubting the constitutional significance of the undisclosed 'understanding' between the Government and the Rulers, opined that the purported 'understanding' cannot stop the government, present as well as future, from bringing constitutional amendments, contrary to the 'understanding', to the Eighth Schedule of the Federal Constitution to bring the royal assent of a state Ruler in line with that of the Yang di-Pertuan Agong at the federal level envisaged in the 1984 Constitutional amendment. However, the political scenario and climate, pre-and post-1994 Constitutional Amendment, proved him wrong when he cautioned that such a move would be politically 'unwise'.[16] The post-1994 scenario has neither witnessed any social unrest, political turmoil, royal wrath on the executive nor judicial actions.

However, it is interesting to note that this time neither the Yang di-Pertuan Agong refused to give his assent to the 1994 Constitution (Amendment) Bill nor the Conference of Rulers, unlike in 1983, urged the King to withhold his Royal assent or voiced its resentment over the proposed constitutional amendments curtailing their so-called 'privilege'. The government also, most probably, did not think it necessary to obtain (the constitutionally required) consent of the Conference of Rulers[17] before moving the 1994 Bill.[18] The 'silence' of the Rulers, calculated or callous, is left to speculations.

The author, however, in the second chapter has not delved into the above mentioned second controversy pertaining to the emergency powers. He simply offers a few glimpses of the constitutional transformation of the emergency powers in Malaysia[19] to appreciate the repeal by the 1984 Amendment Act of

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14 Section 11 (2 A) & 11 (2B), inserted in the Eighth Schedule, Part I, provides:

"(2A) The Ruler shall within thirty days after a Bill is presented to him assent to the Bill.

(2B) If a Bill is not assented to by the Ruler within the time specified in subsection (2A), it shall become law at the expiration of the time specified in that subsection in the like manner as if he had assented to it."

15 H. P. Lee, Postscript: the Malaysian Constitutional Crisis: King, Ruler and Royal Assent, in F. A. Trindade and H. P. Lee (eds.), *supra*, n. 9, 237.

16 For almost similar opinion of Y.A. M. Raja Azlan Shah, see Y. A. M. Raja Azlan Shah, the Role of Constitutional Rulers In Malaysia, *supra*, n. 9.

17 See art. 38 (4), *supra*, n. 5.

18 See Michael Vatikiotis, King and Country-Government Further Clips Rulers' Wings, *Far Eastern Economic Review*, May 19,1994 p. 23. *Cited from*, Lee, *supra*, n. 3, p. 130.

19 See *supra* n. 3, pp. 34-36 and 102-108.

amendments effected to article 150 by the 1983 Amendment Act (intending to replace the 'satisfaction of the Yang di-Pertuan Agong' by the 'satisfaction of the Prime Minister' for issuing a proclamation of emergency). He feels that 'the 1983 amendments to article 150 contained the potential for an unscrupulous leader to introduce dictatorial rule' and the 'Rulers had rendered a singular service-possibly, unwittingly-to the nation by forcing a governmental retreat on those amendments'.[20]

However, surprisingly, the author, neither probes into the *rationale* of the emergency powers, which, as he has acknowledged, have 'tended to become the normal order of things' replacing 'constitutional government with emergency administration as the normal system of rule', in many Asian, African and Latin American countries, nor traces the historical antecedents of the emergency powers in Malaysia. In the absence of such a discussion, a reader might find it difficult to agree with the author that invocation of emergency in Malaysia in 1964, 1966, 1969 and in 1977 posed 'problems of profound significance for the state of constitutionalism in Malaysia', and 'governments in many developing countries are always looking for excuses, even of the flimsiest kind, to draw on the emergency powers to introduce authoritarian rule' and are 'most reluctant to surrender them even when the crises no longer exist'.[21] One may sincerely believe that the emergency proclamations issued in 1964 (to face the Indonesian confrontation opposing the formation of Malaysia); 1966 (to combat collapse of civil government in Sarawak); 1969 (to combat the May Thirteenth racial riots) and 1977 (to handle the political crisis in Kelantan) were politically imperative as well as constitutionally justified. These proclamations, in no sense, seem to be proclamations on the 'flimsiest' excuses 'to introduce authoritarian rule'. Nevertheless, his disapproval to the Constitution (Amendment) Act 1981, empowering the executive to declare an emergency and to perpetuate emergency rule for unlimited periods and excluding a proclamation of emergency from judicial review, justifies his observation that 'unrestrained invocation of emergency powers poses a threat to the rule of law'.[22]

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20 The author, expressing his satisfaction over the retreat of the Government from the amendments to article 150 and ascertaining the constitutional implication thereof, observed that the 1983 amendments to Article 150 contained the potentials for an unscrupulous leader to introduce dictatorial rule and the Rulers had rendered a singular service-possibly, unwittingly-to the nation by forcing a governmental retreat on those amendments. (at p. 38).

21 *Ibid.* pp. 102 -103.

22 *Ibid.* at p. 106.

(II) THE JUDICIARY UNDER SIEGE

The chapter captioned the 'Judiciary under Siege' delves into the background of, and the incidents leading to, the removal of Tun Salleh, the then Lord President of Malaysia, and Tan Sri Wan Suleiman and Datuk George Seah, the then Supreme Court Judges on their proved 'misbehaviour'. It also explores the various constitutional and political dimensions of the upheaval which affected the Malaysian judiciary in 1988. The author doubts the constitutional propriety of the composition of the two tribunals and of the members thereof recommending respectively the removal of the then Lord President and the then two justices of the Supreme court, and offers a penetrating critical appraisal of the deliberations of these tribunals and the reports thereof, which have been described as among the most despicable documents in modern history'. [23] The author, in the backdrop of his analysis, feels that the removal of the Lord President and of the two Supreme Court judges not only 'rudely undermined the independence of judiciary'[24] and the constitutional checks and balances but also brought 'the judiciary to heel'.[25]

The Constitution (Amendment) Act 1994, according to the author, gives another serious blow to the independence of judiciary . It, inter alia, allows the removal of a judge of the High Court, the Court of Appeal, and of the Federal Court for violating 'Code of Ethics'[26] prescribed by the Yang di-Pertuan Agong, on the recommendation of the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts, in consultation with the Prime Minister.[27] He, reacting to the 1994 amendment, observed:

--- [W]ith the Tun Salleh saga still fresh in the minds of many people, the move may convey the impression that this is the final nail hammered into the coffin of judicial independence. Such an impression is partially offset by the fact that the judiciary is entrusted with the task of drawing up the code. However, the Chief Justice is perceived to be beholden to the Prime Minister, the requirement of consultation with the latter regarding the code, may evoke some concern. Nevertheless, this position is preferable to allowing the government to dictate the contents of the code. By allowing the judges to draw up the code themselves, some of the lingering fears of the public will be allayed.[28]

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23 Geoffrey, Robertson, Justice Hangs in the Balance, *the Observer*, 28 August 1988, p. 22, *cited from*, ibid. p. 60.

24 *Ibid. p.* 74.

25 *Ibid. p.* 96. Also see, Tun Salleh Abas and K. Das, *May Day for Justice,* (Magnus, Kuala Lumpur, 1989).

26 The Code of Ethics has now been promulgated. For relevant clauses of the Code see M. P. Jain, *Constitutional Law, Survey of Malaysian Law: 1994, p.* 101 (103-104).

27 27 Article 125 (3A) of the Malaysian Constitution.

28 *Supra*, n. 3, at 127.

The present reviewer however, in the backdrop of the tenet and tone of the hitherto constitutional provisions permitting the removal of a Judge on the ground of (unguided and unregulated) 'misbehaviour', [29] and recalling its use in the removal of Tun Salleh and two judges of the Supreme Court, finds it too difficult to agree with the author when he perceives the1994 Amendment Act as 'the final nail hammered into the coffin of judicial independence'. Similarly, a perusal of the relevant provisions of the Code of Ethics[30] does not support the author's apprehension figured in the above mentioned observation. It seems to be too presumptive. 'Consultation', as a constitutional requirement, between different organs of a State in managing affairs of a State is not uncommon in contemporary democratic polities. These consultations, as reflected in the workings of constitutions, constitutional practices and constitutionalisms in democratic states, undoubtedly, operate on (unwritten) constitutional faith and constitutional conventions. A modern democratic polity is premised on the doctrine of co-operation and co-ordination between different limbs of a State rather than on (watertight) separation of powers.

(III) THE ROYAL IMMUNITIES

The battle over royal immunities, initiated by the Constitution (Amendment) Bill 1993, which was apparently triggered off by the infamous Douglas Gomez incident, is focused in the fourth and the fifth chapters of the book under review. The author succinctly explains the thrust of the Bill, lists the reasons therefor, and evaluates the conflict between the Government and the Rulers on the Royal immunities.[31]

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29 Pre-1994 Amendment Article 125(3) provided for the removal of a Judge, *inter alia,* 'on the ground of misbehaviour'.

30 According to clause 3(1) of the Code of Ethics a Judge is not to: (a) subordinate his judicial duties to his private interests; (b) conduct himself in such manner as is likely to bring his private interests into conflict with his judicial duties; (c) conduct himself in any manner likely to cause a reasonable suspicion that: (i) he has allowed his private interests to come in conflict with his judicial duties so as to impair his usefulness as a judge; or, (ii) he has used his judicial position for his personal advantage; (d) conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto; 9e) lack of efficiency or industry; (f) inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions and the writing of judgments; (g) refuse to obey a proper administrative order or refuse to comply with any statutory direction; (h) absent himself from his court during office hours without reasonable excuse or without prior permission of the Chief Justice, the President of the Court of Appeal or the Chief Judge, as the case may be; and (i) be a member of any political party or participate in any political activity.

31 See *ibid.* pp. 86-96.

The 1993 amendment Bill, in essence, was intended to remove the hitherto constitutionally guaranteed personal immunity of the Malay Rulers[32] and to uphold the rule of law. The constitutional amendments pursuant to the Bill[33] have not only led to a few turning points of far reaching consequences in the balance of power in the Malaysian constitutional system but have also made significant inroads into the sovereignty and the constitutional status of the Malay Rulers. These amendments, in ultimate analysis, have reduced the Malay Rulers to merely constitutional monarchs within the Malaysian parliamentary democracy.[34]

The book under review makes a good reading. It gives an adequate insight into the constitutional as well as political aspects of the major issues emerged from the so-called controversial constitutional amendments. It offers a convincing evaluation of the probable consequences of these amendments on the polity, constitutionalism, and the constitutional power structure in Malaysia. Some of the constitutional amendments led to the 'constitutional conflicts' in contemporary Malaysia, however, may be perceived as 'the natural evolution of a mature system from the symbols of monarchy to the reality of democratically elected power'.[35] The book under review indeed lends support to the veracity of a comment on the constitutional crises in Malaysia that 'on the one hand, conventions and understandings are necessary for the functioning of even an elaborate written Constitution and, on the other hand, the statement of imperative propositions in a written Constitution does not itself ensure

[32] See article 181 (2) of the Federal Constitution.

[33] The 1993 Bill, however, had undergone two drafts to incorporate a few proposals of the Conference of Rulers. A major among them was the establishment of a Special Court to try offences committed by the King or a Malay Ruler and civil cases involving them. However, the Conference of Rulers, at the eleventh-hour, recommending the establishment of an Advisory Board to recommend to the appropriate state authority for the removal of the Ruler involved before he is charged or sued, asked for some more time to deliberate upon the proposed amendments. The Prime Minister, undeterred by the stand of the Conference of Rulers, tabled the 1993 Bill in the Parliament, which was passed with the requisite majority by both the Houses. The author, in the instant chapter, offers a list of convincing reasons for the 'Rulers' back-down' and evaluates the constitutional significance of the battle over Royal immunities.

[34] Nevertheless, the Yang di-Pertuan Agong has been described as a 'visible symbol of unity in a remarkably diverse nation' and ' Malaysians may not as yet be able to say 'we can damn the Government and cheer the King' as Englishmen are apt to say . But there is no denying that the office is the symbol of unity, the fountain of justice, mercy and honour - a role which neither the President of the United States nor Napoleon could ever dream to play'. See, Y.A. M. Raja Azlan Shah, the Role of Constitutional Rulers In Malaysia, *supra*, n. 9.

[35] Michael Kirby, Foreword, *supra* n. 3, viii at ix.

obedience. Constitutional law remains a blend of legal rules, agreements, practices, politics, and speculations in its elusive way, challenging, maddening, alluring."[36]

Dr. Khushal Vibhute*

[36] L. A. Sheriden, Book Review, (1980), VI *Journal of SEA Studies*, at 423. *Cited from*, H. P. Lee, Postscript: the Malaysian Constitutional Crisis: King, Ruler and Royal Assent, *supra* n. 15, p. 251.

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BOOK REVIEWS

EQUALITY, LIBERTY AND PROPERTY UNDER THE CONSTITUTION OF INDIA (1997)

by A.M. Bhattacharjee : Eastern Law House, Calcutta pp. 172, Rs. 200/-

The book under review[1] by A.M. Bhattacharjee is an updated version of Sir Chimanlal Setalvad Law Lectures, University of Bombay (1996) delivered by the author. These lectures have provided opportunities for many distinguished lawyers, judges and jurists to examine and re-examine various subjects of constitutional jurisprudence in contemporary India. It is no mean achievement for the author to have joined the select band of these constitutional jurists, who have delivered these prestigious lectures, which eventually have got published and have been recognized as excellent works of legal scholarship.

The author having worked as a Judge and later as Chief Justice of Bombay High Court, had every reason to choose *'liberty, equality and property'* as the theme for his discourse, for these constitute the core of fundamental human rights under the Constitution of India. Contemporary India has witnessed a major and unprecedented role by the Supreme Court in defining and re-defining the content of these rights,[2] more particularly, liberty and equality. In these pronouncements the Supreme Court has shown remarkable courage and craft and has added new dimensions to the fundamental rights, much larger than what was in the minds of the makers of the constitution, in effect an excercise in constitutional policy-making. Growing recognition of that fact has occasioned a major debate in contemporary constitutionalism about the foundations of this policy-making by the Supreme Court.[3] This has been more distinct in the areas of human rights and fundamental freedoms dispensations because the new extended horizons of these rights could, perhaps, not be explained with reference to what was constitutionalized by the framers nor, perhaps, by reference to the canons of interpretation developed over the years.[3(a)] The present work should therefore fall in that category of authors who examine judicial precedents in constitutional cases in the light of above. Necessarily the focus in the present book has been on the Supreme Court's precedents on

1 Equality, Liberty and Property under the Constitution of India (1997), hereinafter referred to as Bhattacharjee.

2 See generally Jawahar L. Kaul (ed.) *Human Rights Issues and Perspectives* (1995) particularly Parmanand Singh's article in the book, pp. 3-11

3 See e.g. Baxi, U., *Courage, Craft and Contention* (1985). See also Rajeev Dhawan, "Judge and Be Judged" 461 *Seminar* Jan. 1998, pp 79-84.

3(a) For an inquiry into the legitimacy of constitutional policy making by US Supreme Court, see Perry, Michael J., *The Constitution, the Courts and Human Rights* (1982)

Equality, Liberty and Property, which, among all courts, has the last word on constitutional matters.

The book is divided into 5 chapters. Chapter one gives an overview of the statutory interpretations in constitutional cases being applied by the Supreme Court. The author cites precedents to highlight diametrically contrary observations which explain the ambivalence relating to the interpretation of various provisions of our Constitution.[4] The author also takes umbrage at the incorporation of some American doctrines in our constitutional jurisprudence[5], e.g. American 'Due Process Clause' having been expressly rejected by the drafters has ultimately found its way in the Indian constitutional realm after *Maneka Gandhi's*[6] case. Needless to say that the Supreme Court has been consistent in following the dictum of *Maneka Gandhi* in subsequent cases.[7]

Chapter 2 examines the 'equality clause' of the Indian Constitution in theory and in practice. Even if we have the broadest connotation of equality clause, yet it is not possible to ensure equality to all under the present socio-economic dispensation according to the author. The equality clause has been restructured to mean equality before law and equal protection of the law only to those who are similarly situated.[8] The author also questions the propriety of incorporating the doctrine of classification as a permanent adjunct to Article 14. According to him it has resulted in classificatory legislations proving anti-thesis to classless egalitarian socio-economic order. He ventures to show how even a reasonable classification can lead to class legislations.[9] In this case it is instructive to distinguish between *equality in fact* and *equality in law*.[10] While the latter precludes discrimination of any kind, the former may necessarily involve different treatment in order to attain a result which establishes an equilibrium between different situations. This dictum has been a guiding principle in interpreting the equality clause not only at national levels but even in international arena as well.[11]

Chapter 3 reviews the decisions given by the Supreme Court over the years in the area of 'life and liberty.' The author has reviewed these decisions in the context of expansion of the scope of expressions like life and liberty in Article

4 Bhattacharija, p. 4

5 Ibid. p 7.

6 AIR 1978 SC. 597

7 See e.g., *Mithu* v. *State of Punjab*, AIR 1983 SC 493

8 *Supra* note I, p. *19, 27*

9 Ibid p. 41

10 Emphasis added.

11 See e.g., *Minority Schools In Albania*, Advisory opinion, PCIJ 1935-SCR AIB No. 64

21 by the Supreme Court. The author has painstakingly examined the relationship between Articles 19 and 21 of our Constitution. He disputes the thesis that all 'personal liberties' or 'freedoms' not specifically dealt in Article 19, must be deemed to have been comprised in Article 21.[12] He further argues that distinction between 'life and liberty' in Article 21 has reached almost a vanishing point as many of the rights squeezed in within the expression life are really liberties.[13] He has also noted the expanding horizons of Right to Life under Article 21 of the Constitution and thus the start of a new constitutional jurisprudence. Article 21 is now comprehended to include anything and everything necessary to make *life effective, meaningful* and *worth living* and to enable one to live with human dignity. Such a disposition, however, involves difficulties particularly in relation to embodying claims to positive fenefits under act 21.[14]

Right to 'acquire and dispose of property' has ever been so essential for the excercise of all fundamental rights. It has been the bedrock of all capitalist systems and has been recognized as one of the most important fundamental rights. Our Constitution also did so recognize it by guaranteeing 'right to property' in Articles 19(1)(f) and 31 which have been repealed by Sectiones 2 and 4 of the Constitution (Forty Fourth) Amendment Act, 1978. After the amendment the right to property has been reduced to that of a legal right rather than a fundamental right. Chapter 4 discusses the questions relating to the effect of the amendment on the fundamental right to property and the effect of repeal on Articles 31 A and 31 C. The author argues and shares Prof. Tripathi's and Prof. Tope's views that even after the amendment the right to property is still a fundamental right under Article 21. As between Articles 19 and 21, they cover and deal with all personal freedoms. While six of such are distinctly mentioned in Article 19 and given additional protection, Article 21 *"takes in and comprises the residue"*.[15] Following this, since right to property is no longer mentioned in Article 19 as a distinct right, it would be included in the expression 'personal liberty' in Article 21. If that be so the effect would be, *"that right not to be deprived of property except according to procedure established by law"* shall also be a fundamental right under Article 21.[16] He has also relied on *Olga Tellis*[17] which ruled *right to life to include right to livelihood,* that some amount

12 *Supra* note I, 57

13 Ibid 68 -70

14 Emphasis supplied. See also Parmanand, supra note 2, p. 11.

15 The author has particularly relied on *Maneka Gandhi* (AIR 1978 SC 597) for such a proposition. Emphasis supplied.

16 *Supra* note I, p 133, emphasis supplied. For author's contradictory approach on this, See note 12 and the accompanying text

17 AIR 1986 SC 180

of property, acquired in whatsoever means, is inevitably and indispensably necessary for the very existence of life and the right to that amount of property would form part of the right to life.[18] Secondly, inspite of the repeal, a law which deprives the citizen of his property, in view of Maneka Gandhi, must not only be 'reasonable' but must also be 'right, just and fair' and therfore must provide just compensation.[19]

Chapter 5 summarizes the findings and the conclusions which is more or less a repeat of his operative arguments.

The book in its entirety is an important contribution to legal scholarship particularly in constitutional cases. The legal community would find interesting reading out of the book. While one may not entirely agree with the author's arguments and his thesis, nevertheless the author has shown a remarkable degree of maturity in comprehending and presenting differing nuances in complicated constitutional cases. The printing of the book is excellent, however, with minor spelling mistakes. The author is at times repetitive in his presentation. However, that does not in any way lessen the immense importance of the book as a reference book for both students and lawyers.

Jawahar Lal Kaul*

18 Supra note I, pp. 15, 73, 135, 147

19 Ibid pp 136 -139. However, See *State of Maharashtra* v. *Basantibai* (AIR 1986 SC 1466) and *Jilubai Khachar* (AIR 1995 SC 142) for a contrary view.

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LAW OF MAINTENANCE : AN EMPIRICAL STUDY (1996)

By *Jaya Sagade*, N.M. Tripathi Pvt. Ltd., *Mumbai*
PP XXIII+224, Price Rs. 100/-.

The book under review[1] has grown out of a dissertation *submitted by* the author for the degree of Ph.D. in Law at the University of Pune. It contains the Law of maintenance under various personal laws as well *as under* section 125 of the Code of Criminal Procedure.

The patriarchal character of the Indian Society expects the woman to be submissive and docile. Despite the constitutional mandate, the bias against women continues and forces them to accept the status of second class citizens in the society. It is this distinct gender bias against women that prompted the author to write this book. The author has traced the evaluation of gender inequality and has documented the laws and Judicial decisions that provide for women's rights within the patriarchal system. The significance of this book lies in the fact that it contains a critique of various legal provisions and judicial decisions from the feminist perspective .

The focus of this study was on the problem of women's maintenance which arises after the breakdown of marriage. Lack of shelter and lack of livelihood are her immediate problems. The scope of this study is confined only to the problem of alimony and maintenance between the spouses interse.[2]

The majority of the women belonging to the 'Housewife' category are mostly subjected to discrimination, Her household work is not valued as a gainful productive work. Therefore, the author, rightly suggests that the maintenance should be paid to her in the form of 'compensationt' for services during the marriage. It should not be viewed as an act of charity on the part of the husband. However, in reality this aspect is rarely taken into consideration. [3]

The Constitution of India guarantees certain fundamental rights and freedoms to men and Women equally. Article 14 ensures quality before Law. The Constitution does not merely prohibit discrimination on the ground[4] of sex but also empowers the State to make special provision for women.[5] Thus, the Constitution envisages an interventionist role for the State for the purpose of social welfare and reform. In pursuance of these provisions a number of social

1 Jaya sagade, Law of Maintenance . *An* Empirical Study (1996).
2 Id. at 3
3 Id. at P. 3
4 Article 15(1), Constitution of India
5 Id. Art. 15(3)

legislations have been passed to ameliorate the conditions of women. But, as the author, rightly laments, there is a schism between the law in the statute bock and the law in action.[6] Reform in law does not always make the desired impact as the social prohibitions play a more compelling role in our society than do legal permissions. For example, child marriages are still solemnized inspite of the child Marriage Restraint Act-1929. Same is the case with dowry as a social evil, inspite of the Dowry Prohibition Act, 1961.

The book is divided into seven chapters including the introduction and conclusion. The introductory chapter elaborates the conceptual framework and the relevance and scope of this work. In Chapters I to V, an attempt has been made to study the position of women in general and particularly under the different religion based personal laws. The author has discussed how these substantive legal provisions of maintenance grew and developed through the vicissitude of statutory enactments and decisional law.

The notable feature of the book is ChapterVI which is devoted to the comprehensive analysis of the decisions of the trial courts given under the matrimonial law and the code of criminal procedure. Prof. Sathe in his forward rightly observes:

> "What enhances the value of the research contained in this book is her study of the working of the trial court system in awarding decrees of maintenance".[7]

The author has succeeded in discussing the actual functioning of the law by analysing these trial court judgments. The empirical study of the trial court's cases is very illustrative and informative. The author claims, rightly, that this empirical part of the thesis constitutes its major contribution.

In chapter VII the author has given concluding remarks by suggesting some necessary reforms in the existing system in order to improve the law of maintenance and make justice a reality for the needy women. The author makes a fervent appeal for giving up the traditional adversary system adopted by the courts in deciding the maintenance issues to be replaced by conciliation methods and informal procedure. According to the author it is the only solution in the present circumstances. The author also criticizes the working of the existing family courts as not up to the expectation. The judicial trend shows that whenever women go to the court to claim maintenance the amount awarded is extremely low. The author further suggests that the judges need to play a more assertive role and avoid technical interpretations in the matters of maintenance.

6 Supra note 1, at 201.
7 Id. P.VII.

One of the remarkable features Of the book is its lucidity and coherence, also. there is a useful bibliography, table of cases and subject index. The author has not been consistent in citations and often wrong citations are visible. for example (P 15, F.N.52-56,58,at.P.20 F.N.86,87).

The author has done a remarkable job in bringing out this book. She has worked hard to complete this work. It is a contribution to scholarship.

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GOYLE'S LAW OF EASEMENTS AND LICENCES(2ND EDITION 1996) *by S. K. Roy Chowdhury* and *H. K. Saharay*, Eastern Law House, Calcutta Bound.P.P. 49+304 price Rs. 260/-

The book under review was originally written by Mr. L.C.Goyle, now appears in its Second edition, revised by M/s. S.K.Roy Chowdhury and H.K.Saharay with the latest case law.

The author has divided the book into two parts for the convenience of the readers. Part one deals with Easements. In this part there are five chapters. Chapter-I is introductory. It gives history, nature and scope of easements. Chapter-II discusses imposition, acquisition and transfer of easements. Chapter-III analysis the incidents of easements. Chapter-IV deals with disturbance of easements. In Chapter-V extinction, suspension and revival of easements are vividly explained. Every chapter is arranged in suitable heads and every head elucidates principles underlying the concerned Law of Easements.

In part two "Law of Licences" is discussed in three chapters viz. General surveys, grant of Licences and Revocation of Licences. The distinction between lease and licence is lucidly explained.

There are four appendices.The Indian Easements Act 1882 is given in full in first appendix. Relevant extracts from Specific Relief Act, 1963, Civil Procedure Cod, 1908 and Limitation Act 1963 are given in the other three appendices.

The book contains a Table of cases, Table of' statues and an Index.

This 2nd edition has not basically departed from its first edition which was written by the author himself who expired in October 1991. The editors have given ratios of leading decisions delivered by the Courts both in home and abroad. The book will be quite useful both to teachers and students interested in the subject.

The printing of the book is very neat. Paper used is quite nice. But the price is disproportionate to its volume. Only Libraries and affluent persons can and will afford it.

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JUSTICE KULDIP SINGH : VISION & MISSION (1997)

by Mr. Pawan Chaudhary : Vidhi Seva Chaudhary Kuteer, E-31, Manasarover Garden, New Delhi-110015. P.P. 134+X Rs. 250/-.

It is a matter of common knowledge for the students and scholars of constitutional law that the edifice of Indian Constitutionalism is built on the twin pillars of (1) Constitutional Supremacy and (2) Judicial Review which have not only been the core aspects of American Constitutionalism but also been its priceless gifts to the Indian Constitutionalism. The doctrine of Judicial Review, invented by the great Chief Justice Marshall of the American Supreme Court, has been the mainstay of the wave of judicial activism in India. While the activist judges like Krishna Iyer and Bhagwati led the Indian Supreme Court in its liberal interpretation of constitutional provisions guaranteeing fundamental rights during the late sixties and seventies, Justice Kuldip Singh has been its torch bearer during the nineties. During his tenure as a judge of the Indian Supreme Court for a period of over nine years (i.e. from 14 December, 1988 to 1 January, 1997), Justice Kuldip Singh delivered several seminal judicial opinions on various issues of constitutional significance, thereby giving a new impetus to the movement of judicial activism in the country. It is no overstatement to say that the learned judge has been the chief exponent of the new environmental jurisprudence, besides being the main architect of the new contempoorary Indian Constitutional jurisprudence in the country. His opinions have been marked by "simplicity", brevity", "clarity of mind" and "perfection of expression".

It is a matter of serious concern for legal scholars in India that the judges of the higher courts in general, and of the Supreme Court in particular, who strive to shape the country's new constitutional order are bound to pale into oblivion on their retirement. This is unfortunately so because of lack of the tradition of writing the biographies of judges in this country. It is disappointing that neither the judges have time and inclination to write their own reminiscences nor the legal scholars have interest in writing their biographies. That is the reason why judges' biographies have been few and far between in this country. The cost of this kind of neglect to the posterity, as Professor Baxi says,[1] would be too heavy. Therefore, there is an imperative need to change this tradition.

The book under review, written by Mr. Pawan Chaudhary, is a welcome departure from this tradition. Although the present work is not strictly a biography, it would, I am sure, inspire other scholars to attempt full-fledged biographies in future.

Justice Kuldip Singh's judgments cover a vast canvass of legal spectrum including constitutional law, criminal law environmental law, service law, land, tenancy and income tax etc. Of these, in some he concurred with the majority

[1] U. Baxi. Bharat Ke Mukhya Nyaymurty by Pawan Chaudhary Manmauji, p. vii

opinions, in some he delivered separate concurring opinions and in some he delivered dissenting opinions. In this book the author has presented some of the Judges' important judicial opinions selected at random, mostly in the area of constitutional law in a narrative and summary format for the benefit of the general reader without much gloss of his own except for a couple of interrogations by way of 'casual thoughts' on the issues of appointment of judges to the higher judiciary and the law of contempt in the introduction to the book. The author's attempt has been mainly, as he himself says, to present "Satyam Shivam Sundaram of Justice Kuldip Singh's constitutional pronouncements to his reader".

The author has expressed his deep concern at the utter raw deal meted out to the country's "distingnished jurists" and "advocates practising mainly in the subordinate courts" in the matter of appointment of judges to the higher judiciary in the country. It is unfortunate, as the author rightly opines, that, inspite of their being constitutionally eligible for such appointment, there has been no instance of a person from these two classes of candidates being appointed a judge of the higher judiciary since the commencement of the Indian Constitution. The author is more distressed that none of the judges of the Supreme Court in *Judges* I and II cases, including justice Kuldip Singh, had thought it necessary to refer to this omission. (p. ix)

The author also has expressed his distress and disappointment at the gross unruly behaviour of the leaders of the Delhi Bar Association resulting in the disruption of the functioning of the Delhi High Court some time in 1996. He is particularly anguished at the lenieney shown to them by the Delhi High Court after holding them guilty of "grossest possible contempt of the High Court". (pp. ix & x)

Besides an introduction, the book consists of five chapters in which the author has presented some of the leading judicial opinions of the learned judge dealing with different aspects of constitutional law. Thus, Chapters 1, 2, 3, 4 and 5 are devoted to the presentation of various judgements dealing with "Constitution", "Fundamental Rights", "Judiciary", " Jurisdiction" and Miscellanea", respectively. In each chapter the presentation of the cases is preceded by a brief overview of the topics which have been dealt with in these cases.

Since, the entire effort of the author has been to disseminate Justice Kuldip Singh's views on various issues of contemporary constitutional importance, it may be appropriate to give a glimpse of them as mentioned in the book.

On the issue of constitutional interpretation his approach has been one of nonconformingly activist. In *the Supreme Court Advocates-on-Record*

Association case the learned judge opined that the "judiciary in its attempt to interpret the Constitution, can in certain extreme situations stretch the meaning and if necessary to break it or in the guise of interpretation to replace the provision or re-write it" (p. 2). Interestingly, his views on judicial activism appear to belie his activist approach. He does not seem to believe in the concept of "judicial activism" for, in his opinion it is a misnomer. According to him the higher judiciary is under a constitutional obligation to dispense justice by ensuring that justice is not denied to any citizen for any reason. He believes, as the author says, in judicial humanism though not in judicial activism. (p. iv) Dealing with the scope of the right of the citizens to practice any trade, business or profession on road-pavements in *Sodan Singh's* case, he expressed the view that there could be no justification to deny the citizens their right to earn livelihood by using public streets, of course, subject to the imposition of reasonable restrictions contemplated under Article 19(6) of the Constitution. (pp. 52-53)

Dealing with the scope of the right to religion in *Sarla Mudgal* case the learned judge held the view that while Article 25 guaranteed religious freedom to all citizens, Article 44 which enjoined the State to ensure the enactment of "a Uniform Civil Code" divested the religious freedom from social relations and personal laws which were of secular character. Therefore, he strongly held the view that in India no community could claim to remain a separate entity on the basis of religion. (pp. 75 and 78)

In *Tata Press* case, while examining the question whether or not the publication of commercial advertisement could attract the protection of Article 19 (1) (a) read with Article 19 (6), the learned judge expressed the view that "commercial advertisement" was a part of speech under Article 19 (1) (a). He held the view that from the point of view of advertiser it was more than a commercial transaction as it involved dissemination of information to the public regarding the product advertised. In his opinion the right to freedom of speech encompassed not only the right to make a speech or express an opinion but also the right to listen, read and receive the said speech. (p.57)

His views on the independence of judiciary have been constructive and original. In the *Judges-II* case he emphasised on the independence of judiciary as an institution which had to act as an impartial arbitrator not only between the Government and private individuals but also between the Governments inter-se. On the issue of primacy of the opinion of the Chief Justice of India in matters of appointment of judges to the higher judiciary, he preferred the opinion of the Chief Justice to those of other constitutional functionaries. However, he was of the view that the Chief Justice should consult two of his senior most colleagues and that their opinions must be obtained in writing which should form part of the final recommendation. (pp. 92-93). The whole issue, it may be noted, has again assumed contemporary constitutional importance in view of the recent

Presidential reference to the Supreme Court for its advisory opinion on certain issues which were left open in *Judges-II* case.

The author deserves all the credit for the pains he has taken in compiling and organising all the relevant cases under different heads and sub-heads. The book will be useful not only to the general reader but also to the law students and scholars as it gives at one place some of the important judicial pronouncements of Justice Kuldip Singh in a summery fashion. The author should have presented a few more of his opinions dealing with environmental issues. That would have been more appropriate for his image as "environment friendly judge".

If the author is planning to attempt similar works in future, he is well advised to give more prominance to the perspectives of the judge whose biography he will be attempting in his narration and discussion. In the book under review the focus on Justice Kuldip Singh's opinions has not been adequate. The author is also well advised to be more careful with the exercise of proof reading to ensure the elimination of avoidable spelling mistakes.

On the whole, this work is a welcome addition to the scarce literature available on the lives and reminiscences of judges in the country.

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MURPHY ON EVIDENCE

by Peter Murphuy : Universal Law Publishing Co. Pvt. Ltd.
under special arrangement with Blackstone Press Ltd., London : Fifth Edition 1995 and First Indian Reprint, 1997 : pp. 566+LVIII Rs. 395/-

Peter Murphy's book *Murphy on Evidence*, now in its Fifth edition, has already become one of the leading books on the subject in the United Kingdom and the United States. As indicated in the Preface to the First edition dated July, 1980, the book was intended to serve the needs of the students of Bar examinations, Law Society's examinations and degree courses in Law, interested in the theory of Law as well as the considerations of practice in the courts. The context of the book was primarily the British society, through it also had relevance for the American society where more or less similar normative and institutional structures were in vogue. It is this British society context that underlay the need for a Fifth edition of the book : "The Criminal Justice and Public Order Act, 1994.... has proved us wrong. With the benefit of hindsight, it is easy to see that this is no sudden revolution, but simply the culmination of two decades of subtle change, during which the rights of the accused have gradually been eroded" (p.xi). It is hoped that the point of variation in the British and the Indian normative and institutional context was kept in mind at the time of undertaking the present Indian reprint of the book in 1997. Therefore, the following brief review of the book would be at two levels. First, at the level of appreciation of the original treatment and expontion of the subject and Second, at the level of relating it to the Indian normative and institutional context.

The book, running into 566 pages of text and 58 pages of Table of Cases, Table of Statues and Table of Rules, has given a fairly exhaustive academic treatment to the subject of Law of Evidence. The text is divided into 19 chapters, which are based on topic-wise logical unfolding of the basic rules of evidence in criminal as well as civil trials. The principles of Evidence Law are amply supported by leading judicial authorities coming from the courts in the U.K. The book begins with a useful introduction to the Law of Evidence in chapter 1, followed by chapter 2 which provides a detailed discussion on the evidentiary issues in the context of three typical criminal cases. The cases have been usefully exposed to give an idea of practical aspect of the rules of evidence. Chapter 3, devoted to "the judicial Function in the Law of Evidence" is a novel way of presenting some of the well known themes like inclusionary and exclusionary discretion, admissibility, unfairly obtained evidence etc. Chapters 4, 5, 6 and 11 relating to "The Burden of Proof and Standard of Proof", "Evidence of Character", "Evidence of Extraneous Acts and Disposition" and "Opinion Evidence", respectively, contain useful discussions concerning some of the rules of relevancy and burden. Chapters 7 to 10 discusses very eleborately the rule against hearsay and its exceptions. Chapter 9 is devoted to a full length

discussion in the implications of the accued's denials and silences, which has assumed special significance in the light of the recent development of statutorily doing away with the right to silence under the British Evidence Law. The remaining chapters 12 to 19 relate to other vital issues of Evidence Law. Since the discussions in all these chapters are judicial decision-oriented, one sees the book more as a judge made or judicially perceived Law of Evidence, which , at times, limits the value of the treatise to those readers who are not subject to the U.K. Laws.

Coming to the issue of relating the book to the Indian legal system in general and the Indian readers- Law students, law teachers, lawyers and judges - in particular, one encounters the problem at several levels. As the Indian Law of Evidence has been condified for over hundred years now, most of the evidentiary issues are resolved by the courts in terms of the provisions of the Indian Evidence Act, 1872. Therefore, the Law of Evidence laid down by the British judicial decisions and elaborated by the foreign academic authorities have little binding authority under the Indian Legal system. Furthermore, after Independence, the appellate judiciary in India have developed its own principles of Evidence Law, particularly in the area of admissibility or confessions, Dying Declarations, Rule of Corroboration, Privileged communications, Relevancy of statements in informal books of account and Expert opinion etc., which impells us to lay greater stress on the Indian Law of Evidence. However, legal treatise like the present one has value for lawyers and legal adjudicators who are looking for solutions to parallel legal issues. Even a good law student, legal academic and legal researcher is likely to benefit by the range of arguments that have been incorporated in the book in the English legal context. But it appears the publishers of the Indian edition may not have been so much concerned about the immediate utility of the book as much as with the long range benefits that may follow from globalization.

The flawless language and the style of effective articulation, the high standard of printing and paper are certain positive features of the book. Thus, despite the book's limited and immediate value as a text book or a law student's guide in India, it certainly deserves a place in the Evidence Law section of our Law Libraries that must serve as a source for our constant endeavour to marshalling new and off-beat arguments for the evaluation of the future Law of Evidence in India as well.

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