National Law School Journal

Volume 6 | Issue 1 Article 16

7-1-1994

In the Public Interest: Savitri Goonsekere

Mario Gomez

NATIONAL LAW SCHOOL JOURNAL

VOL. 6 1994 NLSJ

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
Nagarbhavi, Bangalore-560072

NATIONAL LAW SCHOOL JOURNAL

VOLUME 6 1994

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
NAGARBHAVI, BANGALORE.

Subscription Rates

National Law School Journal

Price: India Rs. 150 per year

Abroad US $ 16 / £ 10

March of the Law

Price: India Rs. 200 per year

Abroad US $ 20 / £ 12

Subscribers for both the above Journals will get a complimentary copy of the Student Advocate

Concessional Price Scheme

Those who subscribe for both Journals for three years will have to pay only Rs. 850/- instead of 1050/-.

Announcing our new series on 'Law and Medicine' likely to be released in July 1994.

(ISSN 0971-491X)

Subscriptions, order and inquiries for all the above should be sent to:

Librarian,
National Law School of India University,
P.O. Nagarbhavi,
Bangalore - 560 072, India.

NATIONAL LAW SCHOOL JOURNAL

VOLUME 6, 1994.

MODE OF CITATION

(1994) 6 NLSJ

PUBLISHED BY

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

NAGARBHAVI, BANGALORE - 560 072

TEL: 3303160 FAX: 080-3351674

NATIONAL LAW SCHOOL JOURNAL

VOL. 6 1994

CONTENTS:

BOOK REVIEWS

Editorial

The date is September 25, 1993. The morning sun specially smiles through the windows of the Vidhan Soudha to herald the first Convocation of the National Law School of India University - the only law University in India.

The gathering is impressive - judges, politicians, senior lawyers, parents, faculty and students. The excitement is showing. There is nostalgia all around - for a dream come true.

Looking back.... five years ago, the first batch of students had walked in to a new experiment. Challenges were formidable - as it was a quest towards excellence. But despite the 'ifs' and the 'buts' and the initial stumbling, with doubts raised on us relentlessly... We finally made it!

Where do we go from here? - Of course to the future - as excellence is a continuous process. But we now go with confidence. This confidence is based on conviction and the reality - of the fact that we have everything to succeed - a very real potential for excellence. It is time to be more ambitious and to spread our wings and be all set to reach higher skies.

The spell is broken as the President of India arrives. The entourage comes in led by the Registrar holding a mace followed by the Visitor of NLSIU - the Chief Justice of India, the Director, the Chief Minister, the members of various councils, the senior faculty - all dressed in bright, rich coloured gowns. It is now time for the most awaited moment of the day. The invocation song from the Vedas is sung reverentially. There is an unusual air of serenity and solemnity all around. After the Director's report, the Visitor declares the Convocation open. A sound of applause follows as medals and degrees are given. Then the President delivers the first Convocation address. These bright young graduates, who have just graduated, view law as an instrument for social change and human well being. An attitude inculcated in them through the five long years of hard work at NLSIU. Proudly holding their degrees, they now step out into the sunlight towards their respective goals.

This journal contains the first Convocation address of the President of India, Dr. Shankar Dayal Sharma. Besides, this issue offers a multiplicity of views on issues like human rights, rule of law, legal system, legal profession and legal education. It contains synopsis of some of the dissertations of our maiden M.Phil. scholars. We hope you enjoy this issue which is dedicated to our first Convocation and we move on, as we have a long way to go...

Asha Bajpai

ADDRESS BY DR. SHANKER DAYAL SHARMA

PRESIDENT OF INDIA

AT THE FIRST CONVOCATION OF THE NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE

Saturday, 25 September 1993

3 Asvina 1915 (Saka)

It gives me great pleasure to associate myself with the First Convocation of the National Law School of India University. I thank the authorities in the University for their kind invitation to me to be with you on this important occasion.

The National Law School of India University (NLSIU) has been developed in terms of the various branches of its curriculum, building of faculty strengths, the innovative approaches towards effective teaching with its emphasis on maximum teacher-student interaction, practical exposure to legal mechanisms, and the value-based inter disciplinary approach towards learning, understanding and application of law. I would like to congratulate the authorities of the University and all others for their effort in putting this unique institution on a sound footing in such a short period of time.

This Convocation marks the entrance of the first batch of graduates from the National Law School of India University into the legal fraternity in our country. I have pleasure in extending to them my greetings and felicitations. The students of the first generation in this institution have special importance. The progress and performance of each student will, in a way, reflect the efficacy and social value of the instruction imparted in the NLSIU.

Friends, "धर्मो रक्षति रक्षित:" is the motto of this University and this brings to mind the immensely profound heritage of thought concerning Law that belongs to us. Philosophies, doctrines, concepts and perceptions of great refinement enrich the corpus of legal thinking in our country. Ideas bearing a perennial relevance have been expressed with remarkable precision from the earliest times. (Dharma is a word that has entered the lexicon of the English language. Webster's New Collegiate Dictionary gives the following meaning: 'dharma': n. [Skt. fr. dhārayati he holds;] akin to L firmus firm : custom or law regarded as duty : the basic principles of cosmic or individual existence: Nature: conformity to one's duty and nature. The Concise Oxford Dictionary has it as : Right behaviour, virtue; the Law [Skt = a decree, custom]). The Rg. Veda refers to the existence of 'Sanat Dharmani' or ancient ordinances. Considering the antiquity of the Rg. Veda itself as humankind's earliest literature, one may only conjecture as to the even greater antiquity of these ordinances which even the thinkers in the period of the Rg. Veda considered ancient. The concept of 'Dharma' has therefore been with us for time immemorial. What does Dharma mean? The word is clearly derived from the root 'Dh.r'—which denotes : 'upholding', 'supporting', 'nourishing' and 'sustaining'. "धारयति इति धर्म:"— that which upholds is Dharma.

In the Karna Parva of the Mahabharata, Verse-58 in Chapter 69 says:

धारणाद् धर्मामित्याहू र्धर्मो धारयते प्रजाः।
यतु स्याद्धारणसंयुक्तं स धर्म इति निश्चयः।

(Dharma is for the stability of society, the maintenance of social order and the general well-being and progress of humankind. Whatever conduces to the fulfilment of these objects is Dharma; that is definite.)

The Brhadaranyakopanisad identified Dharma with Truth, and declared its supreme status :

"स नैव व्यभवत्तच्छे यो रूपमत्यमृजत धर्म तदेतत्क्षत्रस्य क्षत्रं
यद्धर्मस्तस्माद्धर्मात्परं नास्ति। अथो अबलीयान्वलीयांसमाशंसते
धर्मेण यथा राज्ञा। एवं यो वे स धर्मः सत्य वै तत् तस्मात्सत्यं
वदन्तमाहू र्धर्म वदतीति धर्मं वा वदन्तं सत्यं वदतीत्येतद्ध्येवैतदुभयं भवति।"

["There is nothing higher than dharma. Even a very weak man hopes to prevail over a very strong man on the strength of dharma, just as (he prevails over a wrong-doer) with the help of the King. So what is called Dharma is really Truth. Therefore people say about a man who declares the truth that he is declaring dharma and about one who declares dharma they say he speaks the truth. These two (dharma and truth) are this"]

A similar thought is expressed in the Ayodhya-kanda of the Valmiki Ramayana, in Verse-10, Sarga-109:

"सत्यमेवानृशंसं च,
राजवृत्तं सनातनम्।
तस्मात्सत्यात्मकं राज्यं
सत्ये लोकः प्रतिष्ठितः॥"

(From the ancient times the constitutional system depends on the foundation of Truth and social sympathy. Truth is the fundamental basis of the State; indeed the whole universe rests on Truth.)

The Rig. Veda states that the Law and Truth are eternal - born of sacrifice and sublimation:

"ऋतं च सत्यं चाभीद्घात् तपसोध्यजयत्।"

- Rig Veda X-190-1

The Niti Vakyamrit begins with the statement:

'अथ धमार्थ फलाय राज्याय नमः।"

The Yajnavalkya Smriti states:

"श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
सम्यक्मङ्कल्पजः कामो धर्ममूलमिदं स्मृतम्॥"

(The Sruti, the Smriti, the approved usages, that which is agreeable to one's inner most self or good conscience, and has sprung from due deliberation, are ordained as the foundation of Dharma.)

Chanakya has stated: " धर्मेण धारयते लोकः"(Chanakya Sutram 234) "Law and Morality sustain the world."

The Vaisesikasutra defines Dharma: as "that from which results true happiness":

"अथातो धर्म व्याख्यासामः।
यतोभ्युदयानिः श्रेयससिद्धिः स धर्मः॥"

The Bhagwad Gita refers to:

"स्वधर्मे निधनं श्रेयः॥"

Focussing on aspects of Dharma in the Arthasastra, Kautilya has indicated it "as the basis for securing and preserving power over the earth."

"तस्याः पृथिव्या लाभपालनोपायः शास्त्रमर्थशास्त्रमिति॥"

The essential aspect of our ancient thought concerning Law was the clear recognition of the supremacy of Dharma and the clear articulation of the status of 'Dharma', somewhat in terms of the modern concept of the Rule of Law, i.e. of all being sustained and regulated by it.

The Mahabharata has expressed this with great clarity. In the Shanti Parva Verse-3 (1), Chapter-90 says:

"धर्मायराजा भवतु न कामकरणायतु।"

that is, "the proper function of the King is the maintenance of the law, not enjoying the luxuries of life").

It then reiterates:

"तस्माद्धि राजाशार्दुल धर्मः श्रेष्ठतर स्मृतः॥"

-Shanti Parva, Verse-20, Ch. 90

(Law only is supreme, so the king who regulates society in fulfilment of the law discharges his functions appropriately.)

In Verse-9 of Chapter-5 in the Ashrama Vasika Parva of the Mahabharata, Dhritrashtra states to Yudhisthira:

"तत्रु शक्यं महाराज रक्षितुं पाण्डुनन्दन।
राज्यं धर्मेण कौन्तेय विद्वानसिनिबोधत॥"

(the State only to be preserved by Dharma-under the Rule of Law.)

These perceptions of the Rule of Law were echoed by ancient thinkers in the West. Aristotle stated that "the true relation between Law and government is

secured by making the law sovereign and the government is servant. " Plato reiterated this in the "The Laws", and Cicero said: "There exists a supreme and permanent law, to which all human order, if it is to have any truth or validity, must conform."

The comment of Sir Edward Coke on the House of Lords' Amendment to the Petition of Rights in 1628 comes to mind: "Magna Carta is such a fellow that he will have no sovereign!"

Later, many thinkers including Augustine, Austin, Fortesque and others further developed this view-point.

The Rule of Law in our ancient thought was strictly co-related with the purpose of securing social well being. Kautilya in his Arthasastra has said:

"प्रजासुखे सुखं राज्ञः प्रजानां च हिते हितम्।
नात्मप्रियं हितं राजः प्रजानांतु प्रियं हितम्॥"

- Kautilya, Arthasastra, 1-9-39.

(In the happiness of his populace is the king's happiness, in their welfare, his own. His good is not that which pleases him, but that which pleases his people.)

The Markandeya Purana expresses the purpose of Dharma as:

"सर्वलोकप्रियो नित्यमुवाचैदहर्निशम्।
नन्दन्तु सर्व भूतानि स्त्रिद्यन्तु विजनेष्वपि॥
स्वस्त्यस्तु सर्वभुतेषु निरातंकानि सन्तु च।
मा व्याधिरतु भूतानामाधयोन भवन्तु च॥
मैत्रीमशेषभूतानि तुष्यन्तु सकले जने।
शिवमस्तु द्विजातीनां प्रीतिरस्तु परस्परम्॥

(Ch. 188, Verse 12-17)

(That all persons may be happy, may express each other's happiness, that there may be welfare of all, all being free from fear and disease; cherish good feelings and sense of brotherhood, unity and friendship)

It is this stress on the identification of Dharma with Truth and social-well-being, Duty and Service that impelled Yudhisthira to express his own ambition, as Dharmaraja, in the words:

"न त्वहं कामये राज्यं न स्वर्ग न पुनर्भवम्।
कामयो दुःख तप्तानां प्राणिनां आर्तनाशनम्॥"

(I seek no kingdoms nor heavenly pleasure or personal salvation, since to relieve humanity from its manifold pains and distresses is the supreme objective of mankind).

It is in this context that the phrase धर्म विजय 'Victory of Dharma' could be understood, as employed by the Mauryan Emperor, Ashoka, in his rock edict at Kalsi which proclaimed his achievement in terms of the moral and ethical imperatives of Dharma, and exemplified the ancient dictum: "यतो धर्मस्ततो जयः" (where there is Law, there is Victory).

The ancient juristic thinkers who laid down the detailed laws of procedure in judicial matters : Brahaspati, Yagnavalkya, Narada and a galaxy of other brilliant minds made contributions in this connection. Narada declared the four stages in relation to a case in terms of the connection of the case to the whole system of the law, the bearing of the specific remedies and the essence of adjudication. He speaks of different kinds of proof, of the laws of evidence, examination of witnesses, restraints that may be placed on defendants (These correspond with such modern processes as attachment or arrest before judgment and temporary injunction), Narada also classified the decrees a court may make, the make-up of a judicial mind, the psychology of a plaintiff, et al. Narada refers to the four types of answers that a defendant may put after a plaintiff has submitted his claim or charge. These included a denial, a confession, a special plea or a plea of previous judgment (the last corresponding to the concept of Precedent in modern jurisprudence).

The Katyavan Smriti represents a high point of ancient Indian jurisprudence. Among other matters it refers to the four stages of legal proceedings: The plaint (पूर्व पक्ष), the reply (उत्तर) the stage of deliberation as to burden of proof (पृत्य कलित), and of adducing of proof (क्रियापद). He refers to the method of consideration of the evidence by the court and the declaration of the judgment and order. The Law of Evidence similarly was developed, attention being paid to the quality and character of documents and witnesses for determining the evidentiary value. The specialized nature of the work involved in making a cogent presentation of the case, including assemblage of precedents, interpretation of law and rules, and utilization of various available devices to secure justice, makes it clear that such matters were handled by experts who had made the study of law their special profession.

I have recalled aspects of this great heritage that belongs to all of us, not with a view to our looking back for the sake of glory, but towards drawing lessons and guidance with a view to the future. It is noteworthy that the wisdom of the ancients, the doctrines and concepts of jurisprudence, the system of laws, the rules and procedural features, could succeed only so long as the essential purpose of Dharma and the determination to uphold Dharma was maintained in the country. Not just law or doctrine or philosophy but a climate of public opinion and resolution to uphold law, is necessary if the benefits of the Rule of Law are to accrue to Society. That is why the statement "Dharmo Rakshati Rakshitah" which occurs in the fifteenth verse of the eighth Chapter of the Manu Smriti, and which is the motto of your University, is so meaningful and relevant; "Dharmo Rakshati Rakshitah": "who shelters and defends the law, the law defends and shelters."

Distortions and deficiencies in public outlook, beliefs, and way of life accounted for the decay and demolition of our ancient systems of jurisprudence.

A pragmatic political thinker such as Kautilya, with his accent on expediency and material advantage had declared:

"आत्मवतत्सर्वभूतेषु यः पश्यति स पणिडतः।"

(In his Chanakya Shastra: "He who sees all beings as one may be deemed learned"). A cardinal principle, regarding the strength of the State being derived from a sense of oneness amongst its people, was thus recognized and stated by that expert practitioner in the art of governance. But what had happened in our country? The sense of oneness had been ruined and, contrary to Dharma and the laws, its place was taken by all manner of differentiation of the people in moribund, weakening divisions of castes and sub-castes, complicated social prejudices, unjust subordination, greedy exploitation, inhuman regimens. The sum of all these was the obscuring of the pristine purity and strength of basic dictates of our ancient culture and our eventual reduction into bondage.

Following centuries of decline and eclipse of indigenous legal structures and traditions, a stage had been reached in our country which is well reflected by a comment by Lord Macaulay during the Second Reading of the Charter Bill, later enacted as the Charter Act, 1833. Macaulay had said: :"I believe that no country ever stood so much in need of a code of law as India, and I believe also that there never was a country in which the want might so easily be supplied."

With British rule came British laws and jurisprudence and the association with the Anglo-Saxon constitutional tradition stemming from the Magna Carta of 1215 and Roman concepts, axioms, and doctrines. To our good fortune, some of these reiterated certain principles innate to our own tradition. Of the essence of this stream of thinking was the concept of Equality before the Law. Sir Ivor Jennings has referred to this as follows: "Equality before the law means that among equals law should be equal and should be equally administered, that like should be treated alike."

The Magna Carta provided the leading ideas for constitutional governance. It ensured security of the person and decreed that no man may be deprived of his established privileges without a lawful judgment or otherwise than according to law.

Lord Bryce drew comparisons between the adoption of many branches of English law as the law in force in India, and the manner in which Roman Law had become the law of countries within the Roman empire.

W.S. Holdsworth later commented: "We may expect to see that the needs of India may produce modifications in English rules of law which, with the help of technical reasoning of the common law, will produce new development of common law principles." Indeed for over a hundred years it is precisely this that happened.

In the modern period our great national leaders, most of whom were trained

in law, naturally strove to build in India a polity sustained by law in which the rights of the human beings, the role of the State and the imperatives of India's special socio-cultural and economic characteristics could properly be addressed. The importance of our struggle for freedom may be better appreciated in the historical perspective of the struggle for human rights. In 1895, the Swaraj Bill referred to various rights of the individual among which were specially: Right to Freedom of Speech and Expression, Right to Equality and the Right to Vote. Following the Montague - Chelmsford Report, the Indian National Congress demanded that the Government of India Act should embody provisions relating to human rights. Later, in 1927, the Congress at its Madras Session resolved that the Constitution of India must contain a declaration of fundamental human rights, The Motilal Nehru Committee in 1928 expressed the continued importance attached by the Indian people to fundamental rights. At the Session of the Indian National Congress at Karachi on March 29, 1931, the famous resolution on fundamental rights was adopted - having been moved by the Father of the Nation, Mahatma Gandhi. This resolution was moved so that the masses might appreciate the goals of freedom. It was also stated that any Constitution that might be adopted should include provisions for fundamental rights. The fundamental rights were listed and included the following:

1- *(i) Freedom of association and combination;*

(ii) Freedom of speech and press;

(iii) Freedom of conscience and the free profession and practice of religion, subject to public order and morality;

(iv) No disability to attach to any person of religion, caste or creed in regard to public employment, office of power or honour and the exercise of any trade or calling;

(v) Equal rights and obligations of all citizens. No civic bar on account of sex;

(vi) Equal rights to all citizens of access to and use of public roads, public wells and all other places of public resort;

2- *Religious neutrality on the part of the State.*

3- *A living wage for industrial workers, limited hours of labour, healthy conditions of work, protection against the economic consequences of old age, sickness and unemployment.*

4- *Labour to be freed from serfdom or conditions bordering on serfdom.*

5- *Protection of women workers, and specially adequate provisions for leave during maternity period.*

6- *Prohibition against employment of children of school-going age in factories.*

7- Adult suffrage.

8- Free Primary education.

In moving the resolution on fundamental rights, Mahatma Gandhi also referred to the right to protection of the culture, language and scripts of the minority, abolition of all disabilities attaching to women in regard to public employment, office of power or honour, human rights in an industrial society and avoidance of sectarian prejudice by the State.

(Later, in 1944-45, the Tej Bahadur Sapru Committee reiterated the commitment of Congress and the people of India for enshrinement of human rights in our Constitution.)

The spontaneity and wide public acceptance with which such thinking concerning human rights was appreciated and adopted by the leading political figures of our country and by the masses, was a powerful factor in ensuring that the Constitution when it came into being, based itself on an emphatic articulation of essential human rights, and the Rule of Law.

Indeed the Constitution of India gave expression to certain concepts which have been part and parcel of our great national heritage of thought and wisdom that belongs not just to people of India but to all humanity. It is not surprising therefore that Professor Barker in his treatise on the "Principles of Political and Social Theory" reproduced the Preamble of our Consititution in his book saying that it seemed to him "to state in brief and pithy form the argument of much of this book; and it may accordingly serve as a keynote. I am all the more moved to quote it as I am proud that the people of India should begin their independent life by subscribing to the principles of a political tradition which we in the West call Western but which is now something more than Western."

The Preamble to the Constitution encapsulates the ideals and aspirations of the people. The solemn words of the declaration in the Preamble in our Constitution record the resolve of the people to constitute India into a Secular Democratic Republic and to secure to all its citizens: Justice, Liberty and Equality; and to promote amongst them all Fraternity. The fundamental rights guaranteed in Part-III of the Constitution confer certain justiciable socio-economic rights and the Directive Principles of State Policy enshrined in Part-IV of the Constitution lay down the socio-economic goals which the State must strive to attain. As Glanville Austine has observed in his book "The Indian Constitution : Cornerstone of a Nation",: "The Indian Constitution is first and foremost a social document. The goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution."

The Constitution places the pursuit of a Welfare State before the country. It has struck a balance between the rights and privileges of the citizen and the power of the State to impose restraints on the exercise and enjoyment of those rights in the interest of good Government and welfare of the State as a whole. It provides for corrective justice. The Constitution-makers led by Dr. Babasaheb Ambedkar who was Chairman of the Drafting Committee, had thus viewed, and rightly so, law as an instrument for social change.

Law is not a static body of rules but rather a living creature, continually forged and shaped to serve the needs of a community that itself is constantly changing. Adaptability, therefore, is truly a condition sine-qua-non of the continued existence of a legal system. Law synthesizes change and stability. The relation between Law and social change is reciprocal. As Justice Holmes has said: "The life of Law has not been logic; it has been experience. The felt necessities of the time.... have.... good deal more to do..... in determining the rules by which man should be governed."

That is why Pt. Jawaharlal Nehru while speaking on the Draft Constitution on November 8, 1948 had said: "The Constitution if it is out of touch with the people's life, aims and aspirations becomes rather empty; .... a Constitution should .... be flexible."

Later in May 1951 he had said: "A Constitution to be living must be growing; must be adaptable; must be flexible; must be changeable.... Therefore, it is desirable and a good thing for people to realise that this very fine Constitution that we have fashioned after years of labour is good in so far as it goes but as society changes, as conditions change we amend it in the proper way. It is not like the unalterable law of Medes and Persians that it cannot be changed, although the world around may change."

This approach corresponds perfectly with the incisive and telling comment of Thomas Jefferson that : "Each generation has a right to determine the law under which it lives; the earth belongs in usufruct to the living."

Law must therefore be a 'variable constant.' Law does not exist in a vacuum. It must remain ahead of socio-economic and political needs. The horizons of law are expanding with the growth of modern approaches in a variety of spheres. There are many stimuli of change when the objective is the building of a Welfare State. There is therefore a constant requirement of the spirit of enquiry and reform, with a view to maintaining integrity between the law and real social needs.

The great law teacher, Dean Roscoe Pound had stated the philosophy of Functional Jurisprudence which views law as an instrument of social change. W. Friedmann in his "Law in a Changing Society" has quoted Roscoe Pound as follows: "the sociological method consists in study of a legal system functionally, as a social instrument, as a part of social control, and study of its institutions, doctrines and precepts with respect to the social ends to be served. It presupposes

that law is a specialized agency of social control. .. While jurists have been at these tasks, a new social order has been building which makes new demands and presses upon the legal order with a multitude of unsatisfied desires. Once more we must build rather than merely improve; we must create rather than merely order and systematise and logically reconcile details... legal history is the record of a continually wider recognising and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding friction in human enjoyment of the goods of existence - in short, a continually more efficacious social engineering."

There is also the neo-realistic theory propounded by Lewellyn and Jerome Frank which treats with the propensity towards 'emotional hunch' - related to the instinctive preferences arising from personal background and experience. Subjective considerations come into play and affect the way issues are perceived. The path of Justice has to be kept clear of such hindrances. It has always to be borne in mind that Law really subsists on the basis of objective appreciation of Truth and Social Good.

All this places a tremendous demand on legal practitioners. There has to be a clear recognition of the connection between Law, Truth and Welfare. These are inseparable. These are not simply ideals or goals of altruistic endeavour. Within the larger concept of Dharma as outlined earlier, Law, Truth and human Well-being form a composite of practical value to society and to every individual.

The new entrants into the legal profession will find that Law is a hard task master. Meticulous application of mind is necessary towards gathering truth from the mass of data before one, sifting the grain from the chaff as it were, mastering relevant case law and organising a cogent, comprehensive, truthful, persuasive, and polished presentation of the case. Glossing over inconvenient facts or tutoring witnesses will not do. It helps in establishing oneself when one gains a reputation for upright adherence to the truth, the whole truth and nothing but the truth.

An unshakable commitment to Truth; the needs of Justice, and to Duty is not just altruistic. Such an approach is representative of practical wisdom - न्यायेन मार्गेन. Indeed a reputation for truthfulness will help the practitioner of law in his legal profession as well as in other dimensions of his entire life. The word of such a person always carries more weight with judges. Sharpness of mind and width and strength of intellect have their own utility, but right behaviour and a reputation for fidelity with truth have perhaps an even greater value. A sense of Service must rule and regulate the total approach of the advocate. Only then would he properly perform his rightful and appropriate duty under the aegis of Dharma. Always it would be important for the practitioner of law to bear in mind the ancient dictum from the Mahabharat:

"न धर्मफलमाप्नोति यो धर्म दोग्धुमिच्छति ।"

(Verse-6 Chapter-31) "The person desiring to milch the law cannot derive the real benefit of law."

I am reminded of the opinion expressed by Sir Grimwood Mears, Chief Justice of Allahabad High Court about Pt. Motilal Nehru. According to Mears, Motilal Nehru's position and distinction as a lawyer was due to "a profusion of gifts; knowledge came easily to him, and as an advocate he had art of presenting his case in its most attractive form. Every fact fell into its proper place in the narration of the story and was emphasized in just the right degree. He had an exquisite public speaking voice and a charm of manner which made it a pleasure to listen to him."

These are some of the characteristics that young advocate could cultivate with advantage, to establish himself or herself in the complex and challenging domain of Law.

Friends, I would like to mention with emphasis that the linkage between axioms of law and values and resolves that individuals hold in their hearts and minds, comprise a crucial internal element in an organised society. It is this element which reflects how abstract ideas determine the actual lives of the people. Members of the legal fraternity therefore have a position of far-reaching significance in the task of national reconstruction and the building of a better future for all. Judges and lawyers have a key role in properly and expeditiously responding to social needs and converting political will into legal form and tissue, of interpreting laws appropriately and in the human interest, as was said of Solon: "Whose sturdy shield protected every party. And gave to none an unfair victory."

I feel certain that the specialised environment that has been created in the National Law School of India University, and the instruction received here has equipped you to win laurels for your Alma Mater by the service that you render to the people attuned to our time-honoured concepts of Dharma and the Truth.

Let me conclude with some words from the 'Shikshawali' in the Taitraiya Upanishad, which has for ages strengthened our centres of education and contains invaluable advice to students passing out from an institute of learning:

Satyam Vada : Dharmam Chara;

Swadhyayanmaa Pramadaha:

Satyaa Na Pramaditavyam: Dharmaa Na Pramaditavyam:

Kusalaa Na Pramaditavyam: Bhutyai Na Pramaditavyam:

Swadhyaya Pravachanaabhyaam Na Pramaditavyam:

Aevamupasitavyam Aevamuchaitadupaasyam"

(Forever speak the truth, follow the Dharma,

Strive constantly towards true learning and progress,

Forever on the righteous way to welfare,

Teach the world as diligently as you learn:

Behave this way every day, Life-long, conducting yourself thus be creative and ascendant.)

I would like to thank you once again for your kind invitation to be with you at this function. I have expressed a few of the thoughts that were in my mind and which, based on my experiences, I felt may be useful to the young people here as they set out in their own lives, and to members of the Bench and of the Bar. Each should do what appeals to his or her own reason and good conscience and do so fearlessly, with faith in oneself and the Nation, and so serve to build a new India, a better world.

JAI HIND

(1994) 6 NLSJ 1

FROM INTERNATIONALISM TO GLOBALISATION: IMPLICATIONS OF DUNKEL DRAFT

*Dr. A. Jayagovind**

Socialism and internationalism - the key concepts of yesteryears - have been replaced by liberalisation and globalisation. This development is welcome in the sense that we should constantly review even our deeply-held beliefs in the light of changing circumstances. But it is equally necessary that in that process we do not throw away the baby with bath water. Dunkel Draft Text, with which the Government of India is confronted at present represents such a decisive shift both internally (i.e. from socialism to liberalisation) and internationally (i.e. from internationalism to globalisation); and it is the thrust of this paper that in our anxiety to move into the "brave new world", we should not lose sight of our vital national interests.

Socialism, shorn of its doctrinaire connotation, stands for the exercise of deliberate control over economic activities in the wider interest of the community. This is how it has been understood outside the erstwhile Community bloc. Our Constitutional mandate, as laid down in Article 39 (b) and (c), succinctly expresses this idea. It is submitted that in this wider sense (in contradistinction to its doctrinaire meaning), the governments all over the world, cutting across ideological barriers, have been socialist since Second World War. Ramsay Mac Donald, the Prime Minister of Britain in the early thirties, echoed this idea when he declared "we are all now Socialists".

Andrew Shonfield in his seminal work "Modern Capitalism: The Changing Balance of Public and Private Power"[1] has graphically described how capitalism has transformed itself from *laissez - faire* to unequivocal commitment to full employment since the early thirties of this century. It is this transformation which converted capitalism "from catalysmic failure of great prosperity of the post-War Western World."[2] He lists some of the distinctive features of this transformed capitalism as follows:

a) Vastly increased influence of the Public authorities on the management of economic system;

b) The use of public funds for public welfare on a rising scale;

c) Taming of violence of market place by large companies through skillful economic planning. Large range national plans.[3]

---

* Associate Professor, National Law School of India University, Bangalore.

1 Andrew Shonfield, Modern Capitalism: The Changing Balance of Public and Private Power (1968).

2 *Ibid* at 3.

3 *Ibid* at 66-67.

Andrew Shonfield on his part prefers to call this new ideology as "capitalism" albeit with the epithet "Modern".[4] But what he has stated above as the distinctive features of Modern Capitalism could be equally applied to Indian national ideology as well. Given our socio-economic backwardness, we have probably attempted more comprehensive national planning than what is normally obtained in a typical Western country. But the difference is one of degree (as could be witnessed between France and the U.S.A. as explained by Andrew Shonfield) and not of kind. Thus we can well use the expression "socialism" in the place of "Modern Capitalism".

Frederich Hayek, while conceding that planning (i.e. systematic governmental intervention in national economy) operates both in capitalist and socialist states, seeks to distinguish one from the other as follows: whereas socialist planning restricts individual rights and initiatives, regulations of a capitalist government seek to enhance them and essentially rely upon them.[5] This proposition can be well applied to a communist state, but in relation to a country like India, this will be misleading. Indian State, while assuring its commitment to basic human rights including right to property, has maintained that its mission is to make these rights meaningful to vast majority of population. One may question the particular strategy adopted by the Government, but as in communist countries, there was never any deliberate effort to suppress individual initiative. Even a measure like nationalisation of major banks was avowedly for directing the credit to small scale industries sector and other weaker sections of society. It has been generally acknowledged that whatever might be the deleterious impact of this measure, it did contribute to the growth of small-scale industries; and to this extent, it could be considered as the affirmation of individual rights and initiatives.

Internationalism, the basis of international economic organisation established at the end of Second World War, was the extension of the same idea of cooperation between sovereign states with a view to achieving this national objective of full employment coupled with economic stability. The "Bretton Woods System"[6] based on the troika namely the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IRDB) and the General Agreement on Tariffs and Trade (GATT), essentially represented this idea of internationalism. The system, while safeguarding the sovereign right of a state to follow an autonomous pattern of development, provided for inter-state cooperation in the area of commercial relations. In brief, the system sought to infuse the benefits of international commerce into national economic pursuits. To appreciate the significance of this concept, it is necessary to view it in proper historical perspective.

---

4 *Ibid* at 7.

5 Frederich Hayek, Road to Serfdom (1967).

6 Though GATT was not concluded at Bretton Woods Conference, the expression "Bretton Woods System" is popularly used to refer to post-war International Economic organisation in general.

From Laissez-Faire to Social-Market Economy

The Bretton Woods System, as established in 1945, was the reversal of the earlier ideal of international economic integration. The International Economic Order, as developed in 19th century and continued upto 1914, was based upon *laissez-faire* ideas of free market and gold standard. The unwritten rules of gold standard such as free convertibility of national currencies into gold and free movement of gold across national frontiers ensured free international payments system since the government, inflow and outflow of gold, consequent upon surplus and deficit in balance of payments, automatically led to inflation and deflation; and thereby national economy tended to correct itself.

The outbreak of First World War sounded the death-knell of the above economy, and thereafter economy became the integral part of economic management. When the Allied Nations gathered at Bretton Woods in 1945 to deliberate on the future economic order, the aim was not to procreate the old liberal order based on economic organisation in consonance with "social market economy". The problem before that international gathering was aptly summed up by Richard N. Cooper as follows:

> The central problem of international economic cooperation is how to keep the manifold benefits of expansive international economic intercourse free of crippling restrictions while at the same time preserving a maximum degree of freedom for each nation to pursue its legitimate economic objective.[7]

In brief, the problem was how to curtail the proclivity of government to restrict international transactions of economic externalities brought about by the international markets, and this process may go against government's commitment to maintain a welfare state. A completely unhindered international free trade is possible, provided there is a tight international planning which would effectively coordinate national economic policies in global interest and the adequate financial assistance to deficit countries (which may be characterised as super nationalism). But given the reality of international relations, this was not possible, and therefore, Bretton Woods Conference settled for a rather loose regime of international cooperation (which we have characterised here as internationalism), among sovereign states.

Internationalism, as envisaged by Bretton Woods system, signified inter-state cooperation in inter-national commercial sphere. While each state retains its economic sovereignty in the sense of right to pursue an autonomous pattern of economic management and development including the right to initiate appropriate measures to maintain internal and external stability, it also believes that international commerce would facilitate the realisation of national economic sovereignty and requirements of free trade, the former would prevail over the later. Both the IMF

---

7 R.N. Cooper, The Economics of Interdependence: Economic Policy in the Atlantic Community, 8 (1968).

and the GATT permit the imposition of restrictions on international trade to safeguard balance of payments position. This point may be illustrated by reference to the following propositions:

(a) Under the Fund Agreement, it is left to the determination of each member whether to make its currency convertible or not. In terms of Articles of Agreement, a state while joining the IMF may choose whether to opt for Article VIII status (i.e. the obligation to make its currency convertible) or for Article XIV status (i.e. to continue with restrictions on foreign exchange transactions).

(b) Even a member-state which has made its currency convertible can impose exchange restrictions, if it faces balance of payments problem. The IMF however has the authority to ensure that this right is not abused by the concerned member state.

(c) A member is entitled to use all economic measures including the change in exchange rate policy to tackle persistent balance of payments problem (i.e. "fundamental disequilibrium" in Fund's terminology). Keynes, who as British delegate played a leading role in the establishment of IMF, considered this as an important innovation introduced by the IMF in contrast to the earlier gold standard. As he put it in the course of British House of Lords debate on the Agreement,

> In fact the plan introduces an epoch-making innovation in an international instrument, for instead of maintaining the principle that the internal value of a national currency should conform to a prescribed, *de jure* external value, it provides that the external value should be altered if necessary so as to conform to whatever *de facto* internal value results from domestic policies which themselves shall be immune from the Fund.[8]

(d) A member facing balance of payments problem, is entitled to receive temporary financial assistance from the Fund. Further, a member running surplus in balance of payments continuously is required to table corrective measures to reduce the surplus, to this extent balance of payments adjustment is considered as a matter of international concern.

(e) Under the GATT, a member's sovereign right to use tariff as an effective instrument of economic policy is recognised. It may reduce tariff on incoming goods on reciprocal basis with its trading partners and the tariff rounds including the recent Uruguay Round were essentially intended for this purpose.

---

8 131, House of Lords Debate, 845 (23 May, 1944). The provision referred herein was incorporated into the Fund Agreement.

(f) Though quantitative restrictions are normally prohibited, a state is entitled to use them under the supervision of the GATT to meet a balance of payments crisis.

(g) Restrictions associated with intellectual property rights are considered as legitimate exceptions to GATT regime. These rights are treated separately under Paris Convention and it is left to the sovereign right of a state whether to subscribe to this convention, and even this convention laid down a few broad principles for inter-state cooperation in matters relating to intellectual property rights; and the organisation of intellectual property regime within a country is mostly left to the determination of the concerned government.

All the above characteristics conform to the concept of international cooperation between sovereign states. Even with regard to conditionalities associated with the IMF's financial assistance, there was no definite authority in the original Fund Agreement. In fact, the expressions used in the Fund Agreement such as sale, purchase and repurchase to refer to the Fund's financial assistance and the repayment thereof seem to support Keyne's point of view that the Fund's management took the view from the very beginning that it can impose conditions on the use of Funds resources so as to make such use temporary. In course of time, this decision paved the way for stand-by arrangements. With the sharpening of North-South divide, conditionalities embodied therein have assumed ideological overtones and become extremely controversial.

Liberalisation

The election of Ronald Regan as the President of the U.S.A. in 1980 was as much a milestone in international relations as the election of Franklin Roosevelt in 1932. The ideologies they represented had tremendous impact nationally as well as internationally. With the disintegration of communist bloc in Eastern Europe, the new trend, represented by President Reagan, is interpreted as the affirmation of the final triumph of market-ideology over all other ideologies. Liberalisation has become the new catch-word and it signifies the process of working out market-ideology in concrete situations. Under most of the circumstances, it has meant the rolling the state back from economic activities.

The process of liberalisation, when extended to international sphere, has come to known as globalisation. It aims at converting the world into one market wherein, theoretically speaking, both capital and labour should ,move freely. The role of governments would be that of municipal bodies providing only local services. In practice, however, globalisation as is understood at present seeks to facilitate the movements of only capital. The movement of labour is supposed to fall within the domain of immigration laws to be determined by respective states. This indicates corporations which seem to be orchestrating the moves in this regard. In terms of international relations, globalisation seeks to overturn internationalism

which upholds the authority of state over market. It is submitted that the proposed Dunkel Draft Text (DDT) seeks to usher in the process of liberalisation and globalisation.

DDT is the most ambitious international instrument ever conceived. Quite a large number of provisions of this complex documents aim at elaborating the existing provisions of the GATT relating to trade in goods. These provisions are generally welcome since they would tighten the existing regime. But it breaks new ground in relation of agriculture, investment measures, services and intellectual property rights. The thrust is to roll back the state in all these areas so as to facilitate the free play of market forces nationally as well as internationally.

Agriculture

Agriculture was kept outside the purview of the GATT as states all over the world tend to protect their agriculture. The DDT seeks to throw open the entire agriculture sector to market forces. It may be noted that it was the issue relating to liberalisation of trade in agricultural commodities which created deadlock in Uruguay Round between the U.S.A. and European bloc.

DDT seeks to realise its objective by two broad policy measures: (a) tariffication and (b) reduction of governmental support provided to agriculture operations. Tariffication means that a state should rely only on tariffs to safeguard its interests in a particular sector and it should completely give up the use of quantitative restrictions and other restrictive measures for this purpose. DDT requires member states to rely on tariffication in their agricultural sectors. For this purpose, to start with, all members are required to convert their existing restrictive measures into their tariff equivalents as per the method elaborated in Annex. 32 of the Chapter on Agriculture. These tariffs should be reduced starting from 1993 upto 1999 as prescribed in DDT. Even when there are no significant imports of agriculture commodities, minimum access opportunities shall be established as specified in Annex.2, Part B.

As far as governmental support to agriculture is concerned, DDT seeks to reduce by 20% government subsidies to promote export and also domestic support to agriculture in general (defined as "aggregate measure of support" in DDT). Article 9 (of the Text on Agriculture) lists six types of export subsidies which have to be phased out over a period of time as elaborated in the relevant provisions of DDT. The list includes subsidies contingent upon export performance, payments to reduce the costs of transportation and marketing, etc. Other export subsidies if any, not specifically mentioned in Article 9, should not be used in such a way as to circumvent the eradication commitments undertaken by a member. Even export credits, export credit guarantees and insurance programmes provided by a member, should be in conformity with international standards. It may be noted that the GATT also prohibits subsidies (to industrial exports) in a general way; but DDT measures are very precise and thorough-going in this regard.

Article 6 (of Text on Agriculture) lays down that domestic support to agriculture shall not exceed 5% of total value of production (10% for developing countries like India) in the case of product-specific support These domestic support measures would include all measures which have trade distortion effect or effects on production. Any measure which has the effects of providing price-support to producers definitely comes within the purview of the prohibition. All these measures, in so far as they exceed 5% limit (or 10% limit for developing countries), they shall be reduced over a period as specified in Annex.2 of Text on Agriculture. Only permissible domestic support measures are government service programmes such as research facilities, advisory services relating to pest control and other useful information, etc.

Paragraphs 3 and 4 of Annex.2 come down upon public stock-holding for food security purposes (i.e. public distribution system in Indian context). DDT requires that purchases and sales by governments in this connection shall be made at "no less than current domestic market price for the product and quality in question".

It is clear from the above that DDT drastically curtails state's authority over agriculture starting from production upto international marketing. Even public distribution system is not spared because of fear of market distortion. As the things stand now, the toughest opposition to the above provision comes from European community and Japan which view them as conspiracy hatched by American farm lobby. If accepted in the present form, these provisions will have serious impact on India as well, since our governments provide various support measures to agriculture by way of bench-mark price fixation, subsidized irrigation and power supplies, etc., which are forbidden by DDT. Many people claim that these measures will not add upto 10% of the value of total production as fixed by DDT at present. But even then, it should be a matter of serious concern to us that our agricultural policy should be dictated by a foreign body in the name of globalisation.

Removal of agricultural subsidies would push up commodity prices in developed countries and this would adversely hit developing countries which, taken as a group, are net importers of food grains. Some farmer lobbies in India, such as the one led by Sharad Joshi support DDT on the assumption that India can gain by exporting agricultural commodities. But once India is integrated into world commodity market, the prices of food grains within India are bound to go up in consonance with world commodity prices. The Government being hamstrung by various provisions of DDT as described above may find it very hard to ensure food security to weaker sections of the society.

Trade-Related Investment Measures (TRIMs)

These are intended to remove investment measures that distort or restrict international trade. DDT treats these measures as extensions of a member's obligations under Articles III (i.e. obligation to accord national treatment to imported goods) and XI (i.e. obligation not to impose quantitative restrictions on

goods coming into the country) of the GATT. The illustrative list of measures prohibited hereunder reads as follows:

(a) the requirement that an enterprise shall purchase or use only products of domestic origin or from domestic source;

(b) the requirement than an enterprise's purchase or use of imported products shall be limited to an amount related to the volume or value of local products it exports;

(c) the requirement that an enterprise shall export certain percentage of its local production or upto certain value.

All members are expected to report to the GATT, the TRIMs, which they have been imposing, within ninety days of entry into force of this decision and eliminate them within a period of next two years. A developing country like India can deviate from this obligation temporarily as provided in Article XVIII of the GATT.

The provisions relating to TRIMs drastically affects a state's authority to regulate investments, foreign as well as local, within its territory. In the aftermath of liberalization in India, many foreign enterprises such as Pepsi and Coke are allowed to operate in low priority consumer items with the hope that the part of the local production will be exported. One of the serious allegation against TNCs are that they indulge in transfer pricing, i.e. they tend to import their requirements from their sister units located in foreign countries at administrated prices with a view of defeating the local competition. The prohibitions relating to TRIMs leave the governments helpless in combating such situations. The Government of India has built up its industrial capacity over a period of time by assiduously supporting domestic concerns. It is one thing that our industries should stand up to foreign competition; but it is a totally different thing if the Government is helpless to counteract the machinations of foreign enterprises. Therefore, we should be extremely wary of these provisions.

Services

DDT seeks to treat services on par with goods and thereby extend the provisions of a GATT to cover services as well. The expression "service" is defined for this purpose as any service except services supplied in the exercise of governmental functions. And trade in service is defined as the supply of a service:

(a) from the territory of one Party into the territory of any other Party;

(b) in the territory of one Party to the service consumer of any other Party;

(c) through the presence of service providing entities of one Party in the territory of any other Party;

(d) by natural persons of one Party in the territory of any other Party.

It is clear from the above definition that trade in service includes the establishment of foreign enterprises in areas such as banking, insurance, telecommunications, etc., (which are specifically provided in the schedules to the Text on Services) in the national territory. It must be pointed out, however, that a state is not under an automatic obligation to provide free access to foreign companies offering services, but under Article XIX of the Text on Services, member states are expected to negotiate with each other in multilateral forum to reduce barriers to the movement of services cutting across national frontiers. The problem which a country like India, which has a fairly well-developed service with trade in goods, can face is that a developed country can force a country like India to allow free entry for its service enterprise in return for entry of Indian goods into its territory.

Under Article XVII of the Text on Services, a State must provide national treatment to services and services providers of any other member state. Payments in foreign exchange to foreign service providers shall not be restricted except in the case of serious balance of payments crisis. Any such restriction shall be in conformity with the Fund Agreement and shall be progressively phased with the improvement in balance of payments situation.

Article XVI of the Text on services describes the implications of undertaking a commitment in service sector. These implications would include, inter alia, that the concerned state shall not impose any limitation on the total number of persons employed, on the participation of foreign capital and on the kind of legal regime the concerned enterprise has to adopt. In other words, the permission to a particular service seems to preclude the state from prescribing any limit on its activities in the interest of foreign exchange.

According to Article XXI, a state which has undertaken commitment in regard to particular service cannot go back on it, unless it makes a compensatory adjustment with the party concerned. This would be applicable even when a state decides to give monopoly rights to a particular unit in an area wherein it has undertaken commitment.

The Annex to the Text on Services categorically states that this Agreement shall not apply to measures affecting natural persons seeking access to employment, nor shall it apply to measures regarding citizenship or residency rights. Thus labour per se is excluded from the scope of the agreement.

On the whole, the provisions seem to weigh heavily in favour of TNCs from developed countries. The main objection from developing countries' point of view is that they are forced to grant several concessions without any reciprocal advantage. Despite the exhortation in the Agreement that the developing countries should be encouraged to develop their capabilities in the service sector, DDT does precious little in this regard. Only definitive obligation upon the developed countries, as provided in Article IV, is to establish contact points to supply information regarding markets, availability of service technology, etc. This is far from the developing countries' expectation regarding some definitive commitments on transfer of technology.

Trade-Related Intellectual Property Rights (TRIPs)

The provisions relating to TRIPs have become the most controversial of all the provisions of DDT. This is mainly for two reasons;

(a) These provisions force countries like India to accept undertakings in an area to which they have been opposed all along. Since DDT requires to be accepted as a whole, any opposition to TRIPs push the country out of international trade regime.

(b) DDT goes much farther than what has been so far provided on conventions on intellectual property such as Paris Convention.

The Text on TRIPs covers copyrights, trade-marks and patents. In all these areas, TRIPs impose obligations additional to those imposed by international conventions so far. As far as patents are concerned, Article 27 of the Text provides that patents shall be available for any inventions, whether produce or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. In other words, a member cannot exclude a particular area from patentability, unless it is in conformity with Article 27 (3) providing for exceptions to patentability. Both product and process patents have to be conceded in all the areas covered by DDT. This provision goes much farther than Paris Convention on Intellectual Property Rights which allowed the State to determine the area of Patentability.

Only exceptions to patentability under Article 27 (3) are:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than microorganisms and essentially biological processes for the production of plants or animals other than non-parties shall provide for the protection of plant varieties either by patents or by an effective sui generis system.

As a result, Indian policy not to allow patents in agriculture and horticulture and to allow only process patents in food and pharmaceuticals will be affected. The implication of the second part of (b) above is not clear. The recent statement of the Government of India that it proposes to enact a legislation guaranteeing plant breeder's right show the uncertainty inherent in that formulation.

Under Article 33 of the Text, Patent protection shall not be less than for a period of twenty years from the date of filing. This also contravenes Indian policy to prescribe different periods ranging from 7 to 14 years for different kinds of products.

The authority of the Government of India to invoke the sanction of compulsory licensing under Indian Patent Act, 1970, would be considerably diluted under DDT. Under section 84 of Indian Patent Act, if the reasonable requirements of public with respect to the patented invention have not been satisfied or that the

patented invention is not available to the public at a reasonable price, the concerned patent may be compulsorily licensed by the Government. The reasonable requirements of public would include the supply to foreign markets as well. Article 31 of Dunkel Text on TRIMs on the other hand, does not make the non-working of patent per se a ground for governmental intervention. The government can hereunder intervene only if patent holder fails to license it on "reasonable commercial terms within a reasonable period of time". A patent holder may well use the standard of "reasonableness" to stall the governmental moves. Any such use should be predominantly for domestic market. In all cases of governmental intervention, patent holder should be paid adequate remuneration, taking into account the economic value of the authorization.

Drug and Pharmaceuticals industry which would be immediately affected by DDT has been rigorously campaigning against DDT. By and large, the academic and general public opinion in India strongly oppose the consequent dilution of State's authority over intellectual property rights.

Quo Vadis?

"It is not true that individuals possess a prescriptive natural liberty in their economic activities. The world is not so governed from above that private and social interest always coincide. It is not so managed here below that in practice they coincide. It is not a correct deduction from the Principles of Economics that enlightened self-interest always operates in the public interest. Nor is true that self-interest is generally enlightened; more often individuals acting separately to promote their own ends are too ignorant or too weak to attain even these. Experience does not show that individuals, when they make up a social unit, are always less clear-sighted than when they act separately",[9] wrote John Maynard Keynes, reputed to be the saviour of capitalism from the brink of disaster. But surprisingly what Keynes, and following him others as well, had decisively rejected years ago is being resurrected in the name of globalisation. States are asked to dismantle their protective and regulatory mechanisms in the hope that multinational corporations would usher in an era of prosperity all over the world. Uruguay Round clearly demonstrates to us that what we have in West today is not market economy in Adam Smith's sense, but the state is prepared to expose its weak economic spots to the blow of market forces. As a bloc, they fiercely protect their inefficient textile industry in blatant violation of GATT rules. Even under DDT, they have reluctantly agreed to remove restrictions in this area over a period of ten years, the longest period for similar methods thereunder.

It is nobody's case that socialism and internationalism have proved to be unalloyed success. The antidote of liberalization requires to be administered hereunder to reduce the rigidity developed into the system. But to quote Keynes from the very same essay, "we cannot settle on abstract grounds, but handle on

---

9 Keynes, Essays in Persuasion 112 (1963).

its merits in detail, what Burke termed one of the finest problems in legislation, namely, to determine what the State ought to take upon itself to direct by the public wisdom, and what it ought to direct by the public wisdom, and what it ought to leave, with as little interference as possible, to individual exertion".[10] In other words, liberalisation should proceed on the basis of pragmatic considerations. In Indian context, what was good in the fifties and sixties need not hold good in the nineties and we should have courage to review our economic strategy in the light of changing circumstances and take appropriate measures.

Globalisation should be based on the same pragmatic considerations. It is true that our sheltered economy should be exposed to external competition. But in the name of competition, the local industrial base should not be totally swept off. As was pointed out above, the huge TNCs can always count upon the backing of their government, and as against them, if our local industries complain about the absence of "level playing field", the issue should be seriously looked into.

Finally, it should be remembered that the big foreign companies are not global in the sense of world-wide share holding and they are global only in the sense of their area of operation. As a result, it is not logical to expect them to be as much concerned with the fate of host country as with their home country. The governments eager to open up their economy to multinationals should be selective in their policies.

It seems that DDT has already become a *fait accompli* and India probably will have no choice but to accept it. But it should still be possible for India to manoeuvre within the space available and safeguard its national interests.

---

10 *Ibid* at 112-113.

(1994) 6 NLSJ 13

THE PHILOSOPHICAL FOUNDATIONS OF NINETEENTH-CENTURY GERMAN JURISPRUDENCE: THE HISTORICAL SCHOOL OF LAW AND LEGAL POSITIVISM

*Gerhard Dilcher**

Since the Middle Ages, German jurisprudence has stood in the shadow of the legal accomplishments of other European nations. The Italians founded medieval legal science with the School of Bologna, which rediscovered the Corpus Iuris Civilis in the twelfth century and completed its methodology. In the fifteenth and sixteenth centuries the French competed successfully with Italians and surpassed them with the development of a modern, humanistic methodology, the Mos Gallicus. In the seventeenth and eighteenth centuries the Dutch broadened traditional jurisprudence to a natural and international law - the name Hugo Grotius stands for this - and to a modern, but historically founded "elegant" jurisprudence. Since the seventeenth century there have been a number of great German jurists, for example Samuel Pufendorf, and in the eighteenth century Germans such as Christian Wolff took part in the development of a rational law of reason, which formed the basis of later codifications of private law. German jurisprudence did not reach an internationally leading position, however, until the first half of the nineteenth century with the founding of the Historical School, which is inseparably bound to the name of its founder, Friedrich Carl von Savigny. Savigny's works have been internationally noted, received and translated. Attention and influences were not limited to Savigny's work: the entire German legal science received throughout the nineteenth century until the First World War international consideration and took up a leading position in legal developments throughout Europe. Lines of influence can be traced in the German speaking countries Austria and Switzerland, in Italy, France, England and Scandinavia. The German Historical School of Law supplanted to a large extent the influence of the French Ecole de l' Exégèse, which was based on the great civil codification, the Code civil of 1804. At the end of the nineteenth century and the beginning of the twentieth century many countries, including Japan, China, Greece and Turkey, looked less to France as an example than to the German Civil and Commercial Codes or their relatives, the Swiss codifications. German law gained considerably on prestige in Europe through its Historical School of Law, and the causes for this shall be examined in the following.

As a frame for the development of German jurisprudence we must of course keep in mind the political and constitutional conditions in Germany. These form a background, not a basis, for nineteenth-century German legal development. This was different in France, where politics and legal culture were more closely linked. In France, the Revolution of 1789 eliminated the feudal system with a

* Professor, Johann Wolfgang Goethe - Universitat Frankfurt am Main

single blow and created a modern nation-state, which then under Napoleon proceeded to a comprehensive codification. The great codifications of the first decades of the nineteenth century formed the basis from then on for the development of legal culture in France.

In Germany the development was more gradual. The Holy Roman Empire of the German Nation, essentially a creation of the Middle Ages, provided the political context for German life until it broke apart in 1806 under the attack of revolutionary France. The Holy Roman Empire of the German Nation had in its basic laws a constitutional frame, with the Emperor, the Imperial Diet and, perhaps most importantly, the two highest imperial courts, the Imperial Camerla Tribunal and the Imperial Aulic Council, as institutions of legal protection. Legal scholars at the universities interpreted and taught the many different laws of the particular states, countries and cities, as well as Roman law, which was the common law of the Empire. Especially the Göttingen University in the Principality of Hanover developed in the late eighteenth century a legal science dealing in a very exact historical analysis with Roman law, German private law and imperial constitutional law. The most important professors of the Göttingen School were Gustav Hugo for Roman law and Stephan Putter for German law and imperial constitutional law. I shall return later to this school of though its importance for the development of the Historical School.

In Germany, the Holy Roman Empire of the German Nation broke apart under the influence of the French Revolution and Napoleon in 1806 through the abdication of Kaiser Franz II, but a revolution, then or later after the collapse of Napoleonic rule from 1813 to 1815, never took place. Instead, the princes of the German territorial states initiated social and administrative reforms with the help of their bureaucrats, who were legally educated noblemen or burghers. These reforms brought the Germans to the conviction that a revolution with its devastating consequences was superfluous. As early as in the late eighteenth century, Prussia, which was next to Austria the leading German state, introduced reforms of courts, procedure and legal education, as well as a comprehensive legal codification, the Prussian Law Code of 1794. The Germans were of the opinion, that their path to modern society and modern law did not lead through a revolution, but through organic reforms. England was an example for the Germans of such a development. The carriers of legal reforms were the princes, their ministers and bureaucrats. However these princes were bound to the old aristocracy and consequently to the feudal system. For this reason the danger was constant, that reform projects would not be carried through or would be swept aside in periods of restorative politics.

From decade to decade, however, the interest of the German bourgeoisie in the continuation of reforms grew. These were developing at the same time into a new social class. This class was not nearly as well defined as the French or English middle class, particularly not in the economic sense. For German bourgeoise, money, property and economic strength were less constituting factors than

cultivated education and an intellectual culture based on classical German literature of the late eighteenth century, particularly that of Lessing, Herder, Goethe and Schiller, and the humanities, which were intensively expanding since the turn of the century. This emerging bourgeoise found its class identity and consciousness as well as its political role in culture, education and science. The class of burghers understood its political role as a party of progress, as a party of liberalism as well as a factor of national unity in spite of the separation of Germany in principalities, which were bound together politically only loosely by the German Confederation. The term "organic" characterizes this evolutionary historical principle.

The German Confederation, which was included by the Austrian Chancellor Metternich at the Congress of Vienna in a European balance of power plan with the main powers England, France, and Russia, achieved its purpose until the middle of the century, to promote European peace and stability after the devastating Napolenoic wars. But because of its loose politcal form it did not have the power to introduce uniform laws in the states of the confederation. This was a great impediment for economic development and industrialization, which was just beginning in Germany. The law still contained many rules and definitions from the feudal system which were of little use in a liberal bourgeois society. The German bourgeoisie was interested in both legal unity and the developing law of modern, liberal industrial society. This interest, along with the more political questions of a constitution and the creation of a nation-state, grew among the German bourgeoisie. These political demands became obvious in the Revolution of 1848 and in the first German national parliament in the Paulskirche in Frankfurt in 1848 and 1849. They found their fulfilment in the foundation of the German Empire in 1871 under Prussian rule and Bismarck's leadership. A unified law was created for the first time under this Empire, crowned by the enactment of the German Civil Code of the First of January 1900. Until then, German legal scholarship was challenged with the task of unification and modernization of all areas of private law. This great task and its fulfillment by German jurisprudence gained through its high quality international renown.

This closes the basic historical constellation. I shall now trace the founding substance, method and theory which contributed to the fulfillment of this task.

Exactly this question of the formation of a future civil law for Germany became the subject of the most famous legal-political controversy of the German language in 1814, after the defeat of Napoleon and before the new German order of the Congress of Vienna. In two legal pamphlets, which were read and discussed not only by jurists, but by a broader educated bourgeois public as well, disputed two of the most well-known young German professors. One, Thibaut, was from Western Germany near the French border and a law professor at the famous University of Heidelberg. The other, Savigny, was a professor at the new university in the Prussian capital Berlin, which was founded in 1810 based on the ideas of the humanistic reformer Wilhelm von Humboldt. Both authors agreed,

that in light of the political situation of several separate German states and the legal needs of society a legal reform was necessary. Their answers as to the vehicle and the means of the reform were however quite different. Thibaut criticized in his paper "On the Necessity of a Civil Law for Germany" the existing legal condition of an unclear mixture of old Roman case law and German law. He saw the solution in the creation of a German national code, which could be written in two to four years on the basis of the French Civil Code. Such a code could provide regulation for the growing economic relations as well as a basis for "civil happiness". Thibaut's solution strikes one as being modern. It could have founded an exegetic legal school similar to that of France, but failed due to the lack of political backing from the German princes for a codification.

Very different was the solution presented by Savigny in his pamphlet, "On the Vocation of Our Time for Legislation and Legal Scholarship ", which advocates entrusting legal scholarship with the task of legal reform. Savigny's proposal was politically more realistic and his argumentation was more profound. He begins "On the Vocation of Our Time" with a study of the beginnings of all law. "Law", he writes, "does not lead an isolated existence, but forms an expression of all powers and activities of a particular people and is as much a product of the people as language, customs and constitution. It develops in an organic connection with the nature and character of the people."[4] Savigny and others later referred to this connection as being based on the "Volksgeist", the spirit of a people. In this sense law for Savigny was "life itself, seen from a particular angle." He goes on in the pamphlet to describe the evolution of law, as we would say in modern terms. With the progress of culture the areas of activities specialize and with them professions and their subjects. A class of jurists emerges, in whose hands law becomes a science. Along with the connection to culture as the political element of law, law develops through science a technical element. This legal technique can be administered only by trained jurists.

In Germany and in the European Continent however, in contrast to England whose quite different development Savigny assessed positively,in the very moment of legal specialization Roman law was adopted. It represents the material of the activity of European jurists necessarily, because the classic Roman jurists of Antiquity developed legal technique and juristical terminology to a high state of perfection. Savigny compares this perfection of terms, rules and methods on the one hand to mathematics (jurisprudence as "arithemetic of terms") on the other hand to the role of grammar as the normative frame for a language. If therefore in Germany, Roman law and not ancient German law was developed further, then this was not a coincidence, but had a deeper historical reason. Savigny ignores the fact that Roman law did not stem from the Volksleben and Volksgeist. For him the jurists are the legitimate organ of the people for the development of law. Savigny did not examine this split between Volksleben and jurisprudence, and because of this contradiction in his analysis he has been criticized on this point. Here lies the paradox between the foundation of law in the Volksleben and Volksgeist and Savigny's "specialists' dogma", that the jurist, without further legitimation than

his expertise, is authorized to form and develop the law. Because Savigny, who was politically conservative, held a distance to democratic ideas and the constitutional movement, he did not consider the participation of the people through parliamentary representation.

From this point of view Savigny criticizes in "On the Vocation of Our Time" the idea of codification in general. He attributes it to the rationalism of the eighteenth century, the Age of Enlightenment, which wanted to rule by legal commands of the state. This was for Savigny in contradiction to the organic correlation between law and the "silently working forces" that change it. This constant organic change would have been much better represented by a customary law, as carried out in earlier times by the people, and in the modern era by jurist. Jurists for Savigny were only legal scholars, the leading professors at the German universities like himself, a talented young nobleman of the old Reich. His version was therefore politically better founded than that of Thibaut., There was no more uniform jurisdiction in Germany, which could have worked toward legal development and unity. The German universities, however, did exist. These were carried and attended by the cultural unity of the educated burghers. When one views the development of law through science from this angle, then one sees a call on the leading representatives of the educated burghers on legal science, to develop a uniform and modern law for the German people. This assignment was fulfilled by the German universities of the nineteenth century, because the drafting of the German Civil Code and the other great codifications was achieved less through parliamentary debates than through qualified legislation commissions, which transformed the textbooks of German professors into law form.

This work of German legal scholarship was not possible through legal technique alone, as in an exegetical school, but through a profound conscience on the philosophical and methodological foundations of jurisprudence. These were developed above all by Savigny and were adopted by his school. This school shall be the subject of the following study. Savigny himself referred to his approach as the founding of a Historical School, was the name has remained until this day. Thibaut protested in vain that his view was called unhistorical. Historical was at the time a positive description, and Savigny was capable of bringing it into connection with his teachings. That this term was well-founded, is proved by the fact that Savigny propagated a tenet of development, of evolution of law with the essential reason that law is capable of adapting to change in history. That is why he saw law as a part of life itself and therefore of historically changing society.

The material and method of law were for Savigny historical. The material of Roman law was a historical "given" for European jurisprudence, as collected inthe Code of Justinian in the 6th century A.D. and readapted by the Roman legal school of Bologana in the twelfth century. He accepted as well the historical material of ancient German law, which was developed in the Middle Ages and since then along with Roman law represented an important factor in German legal life -even though Savigny did not see the same standard of perfection of organization

and technique in German law. Savigny's method of ascertaining the meaning of a legal norm was historical as well. He purposely did not use the science of the past era of the eighteenth century, but instead went back to the birthdate of the norm, the Antiquity of the classical Roman jurists. He sought the meaning of a norm in its origins. This demanded a great measure of historical knowledge on the one hand and a hermeneutical and methodical education on the other. Savigny presupposed both for the scientifically educated jurists of his time and with them extremely high standards, which corresponded however to the new scientific standards of the nineteenth-century German academically educated bourgeoisie. He placed the jurist in particular in terms of education and science on the same level with the classical scholars of Antiquity, which enjoyed high prestige in the period of Neohumanism in Germany, but also with the philologians and theologians of the blossoming German universities. He presumed a very different type of jurist than the purely schoolmasterly educated law student of the humanistic sciences, as issued from the university reforms of Wilhelm von Humboldt in Prussia. This harmony with the other humanities and the prestige they possessed among the educated bourgeoisie, could not be founded on the basis of an exegetical school. This formed the main basis for the social status of the jurists of the German bourgeoisie and for the agreement of the academics in the most important educational matters at the universities. In this sense it was important for the unity of the middle class in general.

The jurisprudence Savigny founded was not based on the historical component alone, but as Savigny especially in his early methodological teachings in 1804 expressed it, on a philosophical component as well. This philosophical basis must not be forgotten because it forms a main element in Savigny's legal conception and in his methodological work on the draft of a new civil law, as elaborated in his great masterwork, "System des heutigen Römischen Rechts" ("System of Contemporary Roman Law"). This philosophical element meant that Savigny did not simply reproduce Roman law, but created a means for its organisation and reformation. What exactly did philosophical mean for Savigny and on what philosophy did he lean?

In an early statement Savigny expressed the wish to become a Kant of jurisprudence. Kant was however not the founder of Historism, of a historical school, but of a systematical philosophy. In his ethics as in his legal theory, Kant places in the center of his considerations the person and his claim to freedom, which finds its limit only in the freedom of another, which is to be respected equally. The idea of the person and his freedom was Savigny's systematical point of departure for the organisation of Roman law. Roman law was well adapted for this, because the person of the Roman citizen (civis romanus) is the initial point of its legal order. Savigny eliminated large sections of Roman law which did not correspond to this principle, as seemed appropriate for the nineteenth-century liberal bourgeois society. "The person and his will" were for him the starting point of a legal order, and with it the basic equality of the individual, free expression of the will, contractual and testamentary freedom and transferability

of property. The development of a special feature of German civil law, the summarizations of general rules based on the person, his declarations of intention and the formation of contracts stemmed from this approach. Savigny formulated in the first volume of his "System of Contemporary Roman Law" general rules of civil law, at a level of abstraction previously unknown by Roman law. They formed since then an official part of the German Roman civil law textbooks in the nineteenth century, were adopted in the "General Section", the first book of the German Civil Code, and have been the subject of German science and study to the present day, which for this reason allots particular emphasis to the general principles of civil law. This tendency of German science toward the development of abstract principles, which then are adjusted by means of compromise to particular legal problems, has been praised and criticized by scholars of other countries. The transition from the division of civil law into the institutions of Justinian, "personae, res, actiones", which the French Code civil still follows, to the division into the five books, "General Section, Law of Obligations, Property, Family Law, Law of Succession", which the German Civil Code follows, was initiated by the Roman law textbooks of the Historical School. This is a more differentiated subdivision, which is functionally oriented and allows sharper analytic divisions. The apparentness of connected legal rules is however often broken up.

We have thus far seen in Savigny several, to some extent contradictory, working methods and thoughts. Savigny can be seen under many different aspects, as a legal historian of the Romantic period, as an empirically working hemeneut, and a legal dogmatist and systematist with broad legal and political influence. Savigny's concept of the evolution of law is based on the term "Volk", "people", as founded by Herder and developed in the Romantic period, on the idea that law originates in history rather than in systematic, rationalistic natural law. This legal systematology seems to have been drawn from Kant's freedom ethics and from the value system of bourgeois liberalism. While Savigny rejects the systematic thinking of natural law and the law of reason, he praises on the other hand the method and terminology of the Roman jurists and develops his own system. Which influences and examples led him in doing so?

Savigny was interested since his youth in the many new movements in German literature and philosophy and read contemporary classic German literature, especially Goethe, as well as the philosophical Romantics such as the Brothers Schlegal. He had friendly contact with young literary Romantics such as Achim von Arnim and the Brentanos, with whom he was related through his marriage with Gunda Brentano. He confidently took up his own role in the context of the modern neohumanistic founding of the University of Berlin under the auspices of Wilhelm von Humboldt, and he followed, as may be seen in remarks, reviews and letters, the development of a general and political philosophy. These many references have found a large number of interpretations in the scholarly literature on Savigny. This is why there is no unified opinion as to whether Savigny's many different intellectual activities were disparate, only unified in the personality of

the jurist himself, or if these were "fragments of a great confession" (Goethe) with a single philosophy at their base. A new and difficult-to-read book by the young legal historian Joachim Rückert reconstructs behind Savigny's many writings a metaphysical world view iwth an objective and idealistic philosophy, which he pursues to the basic questions of morality and law, people and state and the construction of legal terms. This would mean, that neither Kant's critical philosophy nor historism in the sense of historical relativism forms the basis of Savigny's thought, but the understanding of the meaning and essence of appearances, in which apparent contradictions disappear. In this essence behind appearances and terms, Savigny finds the already mentioned objectivity and truth. Savigny's obvious distance to Hegel and his school, as shown best by the critique of the Hegel scholar and jurist Gans, would prove to be a competition between two different ways of thoughts of an objective idealism; in any case Savigny's thought has nothing to do with Hegel's dialectical development of reason in the course of world history. Savingny's conception of objective truth is much more static, and thus he finds a similar conception in the terminology of the Roman lawyers. The Hegel student Karl Marx, who heard Savigny in 'Berlin, described Savigny's orientation on the present when he said, that Savigny wanted to sail to the source and not on the sea.

Savigny stands as a jurist with a very broad literary and philosophical education as well as a great legal talent as the founder of the Historical School of Law. From this broad education flow the many different aspects of his work that compose its richness and influence. This intellectual breadth moulds his language as well, which in many respects reminds one of Goethe's. It stands far above a legal jargon and was able to convince not only the jurist, but the educated burgher as well, of the value and niveau of this legal science with its composed argumentation and many learned associations.

Important as well for the development of nineteenth century legal science was another branch of the Historical School. With Savigny, a member of the Göttingen School came to Berlin as a professor of law, Karl Friedrich Eichhorn. Eichhorn worked together with Savigny as a fellow founder of the Journal for Historical Jurisprudence of 1815, which was a consequences of Savigny's "On the Vocation of Our Time for Legislation and Legal Scholarship", and represented the programme of the school. Eichhorn was a Germanist, in contrast to the Romanist Savigny, and as such a representative of German law. He also developed a historical, dogmatic and formative view of law. Eichhorn lacked however Savingny's philosophical basis. He remained an advocate of historical pragmatism, but founded nonetheless a teaching tradition, which lies in the presentation of historical development, the constitution and its legal sources in a textbook of German legal history, and in the dogmatic construction of the figures of German law in a textbook of German private law.

With the School of the Germanists, the scientific work on the German legal heritage was included in the legal science of the Historical School along with

Roman law. It was not to be overlooked that the work of the Germanists better coincided with the theory of the "Volksgeist". Legal sources were studied here, from the earliest times of the Germanic tribes to the present, which stemmed in a continuity from the social foundations of German society and its development. The idea of law as a particular aspect of social life and thus a historically submitted to change, could also be better pursued in German law than in Roman, which was viewed more as the static tradition of a class of educated jurists. German law differed from Roman law in its structures and basic principles as well. German law is always associated with a certain group of people from which it stems, often as it was discussed and written down in a meeting; in the older tribunal representative bodies, in manors and towns, in cities and guilds, in the curia of the tenants or in the councils of the estates of the old Reich or of the territorial states. The principle of a community and its law, the connection of law to the social as well as political and constitutional relations is contained in the sources of German law, whereas Roman law is abstracted from all this and focuses on individual, isolated legal conflicts. German law tended more toward a politically and sociologically founded legal science, which is sketched in Savigny's theoretical reasoning. In this sense the Germanists were a legitimate branch of the Historical School and felt themselves as such. Jacob and Wilhelm Grimm, law students of savigny and his lifelong friends along with the Romantics Brentano and von Arnim, were not only occupied with folk tables, sayings, mythology and philology. Jacob Grimm remained in contact with law as a Germanist and wrote "Rechtsaltertümer" ("Ancient legal Monuments"), a classical work of legal history, and edited "Weistümer", a collection of sources of village and folk law.

The legal Germanists necessarily had contact with the arising national movement and tried to win this movement for German history and historiography, with which the Germanists as legal and constitutional historians were personally and professionally closely bound. The Germanists identified strongly with the political goals of bourgeois liberalism through their interest in the old German freedom of participation of the people in political decisions and legislation in the tribunals and folk meetings and in the constitutions of the estates. This liberalism was "organically grown" German through its development in history. The Romanists were less politically active and saw their task as purely legal, in cooperation with legislation commissions. The Germanists, however, entered the political arena, often as political speakers and representatives in the diets of the land, in Germanist Congresses of the pre-revolutionary years 1846 and 1847 and in the Frankfurt Parliament of the Revolution of 1848. They separated themselves from Savigny's rejection of a codification and demanded national legislation toward unity. Their goal was a political solution to the legal development on the basis of the dogmatic and political striving of the legal scholars. From the middle of the century until the passing of the Civil Code and beyond, a fruitful discussion between the Germanists and Romanists flourished. The Germanist and later representative in the Frankfurt Parliament, Georg Beseler, polemised in his book,

"Law of the People and Law of the Jurists", in 1843 against the Savigny student Puchta ("Customary Law", 1828) and demands a greater proximity of law and legislation to the people. The above-mentioned Germanist Congresses under the direction of Jacob Grimm demanded not only a parliamentary legislation, but also juries and lay judges as in England. The last great nineteenth century Germanist, Otto von Gierke, criticized the strongly Roman tendencies in the Civil Code and called for a more German language and thought. That the structures, values and principles of German law are quite different from those of Roman law, is well shown by Gierke's lectures and political formation and legal dogma. This call of the Germanists for a legal regulation for the contemporary societal developments corresponded to that of the Historical School. The Germanists possessed many rich materials in the areas of commercial, corporate, securities, exchange, patent and mining law from German sources, especially from medieval city laws. These legal materials were of great importance for the development of law in a modern industrial society, but were scarcely present in Roman law. The method of the Historical School provided the opportunity to solve modern problems with legal tools of the Middle Ages.

The Historical School of Law, founded by Savigny on the basis of the older Göttingen School, and its two branches, the Romanists and the Germanists, spans a broad area of Roman and German legal sources, which were worked out through historical, hermeneutical and terminological, systematological methods to solve arising legal problems in the developing bourgeois industrial society. These sources were broader and more differentiated, but also more difficult to work out than a codification, such as that of the French Ecole de l' exégèse and similar schools. The theoretical, methodological and philosophical basis of the historical method was broad, profound and full of connections to all the other developing sciences, but in its breadth was full of contradictions as well. My thesis is, that this breadth and contradiction was productive for German legal science until the end of the century and beyond, although since the mid-century a methodological narrowing book over in the form of legal positivism and conceptual jurisprudence. This narrowing is represented by the works of the Savigny student Puchta, the great Romanist Jhering in his earlier period, the Germanist Gerber and the constitutional jurist Laband.

This new development can only be shortly characterized here. Legal positivism and conceptual jurisprudence removed the historical and sociological dimension from the legal dogmatic work of the jurist. One consequence was the rise of an independent science of history of law instead of Savigny's proclaimed historical legal science, in which historical and philosophical, systematological and terminological work was united. Under this new stream of thought, the work of the jurist was understood mainly as dogmatic and terminological. It won however through this limitation on constructive power and juristic exactitude. This was the proclaimed goal of the legal positivism and conceptual jurisprudence and corresponded to the rule of law, in which the citizen possesses the greatest possible security over

legal means and the judge is strictly held on the interpretation of statutes. This narrowed conception of legal work is shown in the often-cited formulation of the great Romanist Windscheid in his speech of 1864, "Ethical, political or economical questions are not the business of the jurist as such", that is, not the duty of the jurist who applies the law, but that of the legislator who creates it. This limitation of the duties of the jurist was universally accepted as progress toward greater exactitude in legal method in late nineteenth-century German jurisprudence. However the broader approach of the Historical School remained in many respects fruitful. The normal jurist was freed of the task of having to combine dogmatic, historical and philosophical work. The leading minds in legal science transferred this task to other differentiated areas in light of the new problems of a fully developed, national German bourgeois society, and the leading minds in legal science consisted not only of elite law professors, but of judges of high courts, members of legalisation commissions and high ministerial bureaucrats. The original concept of the Historical School, which was to combine law with history and philosophy in a single education, which would have enabled jurists to structure law in the future, remained the tenet of this elite group and brought German legislation, legal and cultural politics around 1900 to a zenith, which was seen as an international example by many.

The span of this development shall be traced briefly here through a number of great names. Rudolf von Jhering led the conceptual method to a pinnacle and analysed with great exactitude its basis on historical experience and the benefits of exact terminology. He superceded however in his later work conceptual jurisprudence, criticized its shortcomings ad pursued instead a realistic analysis of legal interests, which opened the path to a jurisprudence of interests as well as to the sociological method of the future. Scholarly research has well shown, that Jhering's concept of law in its sociological foundation and in the connection between interest and law resembles closely that of Karl Marx. The previously mentioned Germanist Otto von Gierke criticized legal positivism in constitutional law as a negation of the political dimension and political dimension and political theory beyond the constitution. Gierke emphasized in his critique of codification the importance in private law of an ethical, sociological and legal-political analysis and underlined the limited ability of Roman legal institutions to solve modern problems. The legal institutions he developed on the basis of ancient German law were broader and closer to the needs of contemporary society than the Roman institutions. Gierke's institutions have influenced greatly the legal developments of the twentieth century in private law and labour law. His theory of corporations was cornerstone in the political concept of pluralistic society. Theodor Mommsen, a young scholar active in the Revolution of 1848, edited the publication of the Corpus Juris Civilis and oraganised scientific projects on the level of government-sponsored projects and institutes. In doing so, he created for Wilhelmine Germany an example of modern scientific planning and organisation, which was of particular importance in the sciences. At the same time he helped form the consciousness of the educated burghers through literary achievements

such as his Roman public law and his Roman history, which brought him the Nobel prize for literature. In closing, I would like to mention MaxWeber, who as a student of Mommsen and a true pupil of the Historical School began his studies with works on Roman legal history, commercial law of the Middle Ages and historical empirical research on the Prussian agrarian constitution in support of reform legislation. On this basis he went on to found the sociology of law, a theoretically based national economical theory, political science and a modern theory of science.

In this analysis, I have concentrated my view on the German development and thus have neglected international relations, which consist of a constant give and take. My goal in doing so was to show, that the unique challenge of a difficult national situation was answered by an interdisciplinary expansion of legal science and that this expansion had fruitful implications not only for the legal development itself, but for the sciences as a whole and for the status and influence of German lawyers.

THE HUMAN RIGHTS OF INDIGENOUS AUSTRALIANS[1]

*Dr. Kamal Puri**

1. Background

Indigenous peoples are entitled to community respect for their human rights. Human rights involve relationships among individuals, and between individuals and the State.[2] Human rights can be most comprehensively protected through adequate legislation, an independent judiciary and the establishment of autonomous institutions. In addition, effective educational campaigns, taking due account of the cultural and traditional aspects can be carried out at national and local levels to raise public awareness regarding the protection and promotion of human rights.

The two organizations which are actively involved in the setting and implementing of standards designed to ensure respect for human rights of indigenous peoples are the United Nations and the International Labour Organization. Since its establishment, the United Nations has recognized that protection of the rights of indigenous peoples is an essential part of human rights and a legitimate concern of the international community.[3] A turning point came with the release of a comprehensive report prepared at the behest of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[4]

There are several international declarations that set universal human rights standards. However, ratification of such instruments by Australia although significant, is simply not enough. It is an executive act which has no direct legal effect upon domestic law. It is trite knowledge that the rights and obligations contained in the international instruments are not incorporated in Australian law unless and until the laws provide for all of the legal powers and institutions necessary to ensure their effective realization.[5] As was stated succinctly by

---

* Associate Professor of Law, The University of Queensland, Brisban,, Australia.

1 This is an abbreviated version of the address delivered by the author to the International Commission of Jurists (Swedish Divsion) in Stockhom on 20 August 1993.

2 The Human Rights and Equal Opportunity Commission Act 1986 defines "human rights" in a broad manner, stating that "human rights" mean the rights and freedoms recognised in the International Covenant on Civil and Political Rights 1966 and other international instruments (section 3). These include right to self-determination, right to life, right to liberty and security of the person, right to liberty of movement, right to equality, right to privacy, right to freedom of thought, conscience and religion, right to freedom of association, right to equal opportunity and right to enjoy one's culture. *See generally*, D.J. Harris Cases and Materials on International Law (4th ed., 1991).

3 "The world community has long acknowledged that the distinct cultures and languages of indigenous peoples form part of the cultural heritage of mankind and deserve protection". *See*, Human Rights: The Rights of Indigenous Peoples United Nation Fact Sheet No.9 (1990)

4 Study of the Problem of Discrimination against Indigenous Populations E/CN.4/1986/7 (5 vols). In this report, Mr. Jose R Martinez Cobo, Special Rapporteur, suggested national and international measures for eliminating discrimination.

5 *Dietrich v R* (1992) 109 ALR 385 at 391, citing *Broadley v Commonwealth* (1973) 128 CLR 557, 582; *Simsek v MacPhee* (1982) 148 CLR 636, 641; *Kioa v West* (1985) 159 CLR 550, 570-571.

Gibbs CJ in *Koowarta v Bjelke Peterson* - "[T]reaties when made are not self-executing; they do not give rights to or impose duties on members of the Australian Community unless their provisions are given effect by statue"[6] Furthermore, because of the federal structure of Australia, many matters referred to in international treaties relate to areas of legislative responsibility constitutionally allocated to the States and Territories. Consequently, domestic implementation of the instruments becomes difficult because of such constitutional constraints flowing from federalism.[7]

In 1986, the Australian Law Reform Commission concluded that "in a number of respects present Australian law or its administration fail to respect fully the rights of Aboriginal people. Thus the non-recognition of Aboriginal marriages, and the excessive intervention by child welfare agencies in Aboriginal families that has been a feature of welfare practice in Australia, constitute a failure to respect Aboriginal family life. Aspects of police interrogation and court procedure have sometimes led in effect to Aboriginal defendants being compelled to confess guilt. The need to respect the human rights and cultural identity of Aboriginal people supports the case for appropriate forms of recognition of Aboriginal customary laws."[8] More recently, a Joint Committee of the Commonwealth Foreign Affairs, Defence and Trade has observed: "The most significant human rights problem in Australia remains the condition of the Australian Aborigines. On the whole our failure to ratify various articles of the international conventions or our failure to comply with aspects of international human rights obligations involves the conditions of the Aboriginal people.... Rectifying these omissions would be an act of faith in our seriousness in trying to deal with the most difficult human rights problem in this country.[9]

2. World's oldest Living Culture

Out of the estimated 15000 cultures remaining on earth, Australian Aborigines represent the world's oldest living culture. Scientific data has established that Aborigines have occupied Australia for more than 40,000 years. In 1981, the Commonwealth Department of Aboriginal Affairs estimated that, out of Australia's

---

6 (1982) 153 CLR., at 193.

7 *See,* Aboriginal and Torres Strait Islander Social Justice Commission's First Report (AGPS Canberra 1993) at 86-87. However, note that the High Court has given a broad interpretation to the external affairs power contained in section 51(xxix) of the Australian Constitution 1900 in the context of a Commonwealth statute implementing Australia's treaty obligations. *See Koowarta v Bjelke Peterson*.Supra n. 6 and *Tasmanian Dam Case* (1983) 57 ALJR 450.

8 Australian Law Reform Commission's Report: *"The Recognition of Aboriginal Customary Laws"* Para 193(AGPS 1986). *See also,* P. Ford, "Australia's Human Rights Record and the United Nations Human Rights Committee," *Australian International Law News* 38 (1989) *See generally,* (B Hocking ed., 1988) International Law and Aboriginal Human Rights .

9 A Review of Australia's Efforts to Promote and Protect Human Rights (AGPS 1992) Parliamentary Paper no 514, December 1992, at 60.

population of 16 million, there were about 168,000 Aborigines, representing 1.1 percent of the total populating living in Australia. Contrast this figure with the estimated population of Aborigines in Australia at the time of European settlement in 1788, between a half and one million. While the population of the world has increased at an exponential rate, the Aboriginal population has suffered a reverse in its population trend. It is horrendous to realise that, in the first hundred years of British settlement in Australia, only 60,000 of an estimated 500,000 to one million Aborigines survived the devasation caused by racial conflicts, introduced disease and alcohol.

3. Who is An Aborigine?

The term "Aborigine" is normally taken to mean a person of Aboriginal descent identifying as an Aborigine and recognised as such.[10] Physical similarities, a common history, a common religion or spiritual beliefs, and a common culture are factors that create a sense of identity amongst members of a race. As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities an indication is given of their Aboriginality.[11] Recently, the High Court of Australia has stated that "Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people."[12] The criteria commonly used for judging are those adopted by the Department of Aboriginal Affairs, viz descent, self-identification, and community acceptance.[13]

Although Aborigines have a long history, it was not until 1770 that the first European observations of Aboriginal Civilization and its rich cultural store were made. In that year, the legendary sailor, Captain Cook, laid claim on behalf of the British sovereign to the land that was later to be called Australia. Cook's diary recorded his impressions of the native people in the following words:

> Being wholly unacquainted not only with the superfluous but the necessary conveniences so much sought after in Europe, they are happy in not knowing the use of them. They live in a tranquillity not

---

10 There is some controversy as to whether "Aborigine" or "Aboriginal" is preferable. However, there appears to be some preference for the expression "Aboriginal people" to the word "Aboriginal". *See*,H McRae, G Nettheim and L Bearoft, Aboriginal Legal Issues: Commentary and Materials (1991) at vii. Note that Torres Strait Islanders, who are also indigenous inhabitants of parts of Australia, like, Aborigines, have been greatly affected by European settlement. *See further,* Australian Law Reform Commission's Field Report no 6 *The Torres Strait Islands* (1979).

11 *See, Commonwealth v Tesmania* (1983) 46 ALR 625 at 792-793. A "Maori" is defined under section 2 of the Maori Affairs Act 1953 as "a person of the Maori race of New Zeland; and includes any descendant of such a person".

12 Mabo v The State of Queensland (1992) 66 ALJR 408, 435 (per Brennan J).

13 *See, Supra* n.8 at 68.

> disturbed by the inequality of condition: the Earth and Sea of their own accord furnishes them with all things necessary for life, they covet not magnificent houses, household stuff and similar; they live in a warm and fine climate and enjoy a very wholesome air.[14]

A telling illustration of the change in attitude during the first hundred years of European settlement is provided by the observations of Captain Wharton FRS who described Aborigines as "wild beasts to be extirpated."[15]

From the commencement of British settlement in 1788 until very recently, little respect has been shown by the laws of the Commonwealth, six States and two Territories of Australia for the rich Aboriginal culture and their proprietary rights in land as well as intellectual property, and their human rights. Despite their ancient occupation of Australia and elaborate cultural heritage, Aborigines have been treated as unequals and aliens in their own country.[16] The economic and political realities have remained masked for a long time by a view of Aborigines as primitive, if not sub-human. This view revealed an underlying disregard for the Aboriginal race and their basic human rights.[17]

However, legal developments in the past 20 to 25 years display changing attitudes, accompanied by the growth of political awareness, cultural pride and political organisations on the part of Aboriginal people. It is only in recent years that attempts have been made to acknowledge and rectify past injustices, for example, Aborigines did not become entitled to vote at federal elections until 1962.[18]

---

14 Reproduced from Fact Sheet on Australia *Aboriginal Culture* (Department of Foreign Affairs and Trade March 1990).

15 From the Log Book transcribed by Captain Wharton in 1893, cited in *Mabo v The State of Queensland* , supra n. 12 at 450 (per Deane and Gaudron JJ).

16 J.P. Evans, "The critical issues posed for domestic legal systems is the concept of self-determination relating to indigenous minority group and the most appropriate course for resolving them" 3 *Ngulaig* (1990) at 1 alleges: "Dispossessed Aborigines as one of the most visible 'deviant' groups in white colonial society, had been socially and environmentally recast from a sovereign into an alien status and capacity by the destructive processes of Western colonization".

17 *See,* P Dudgeon and D Oxenham,"The Complexity of Aboriginal Diversity: Identity and Kindredness" 1 *Ngulaig* (1990) at 3: "To Anglo-Europeans, Aborigines have been and still are perceived as savage, dirty, worthless, pitiful and animalistic, 'sons of ham' and therefore not party to divine creation". This is a damning criticism, but regrettably, true account of some Anglo-Europeans.

18 The Commonwealth Electoral Act 1962 omitted section 39(6) of the principal Act (Commonwealth Electoral Act 1918) which required a State voting qualification for Aborigines, thus giving them the right to enrol for Federal elections. The 1962 Act was designed to give an "Aboriginal native of Australia" the right to enrol and vote as an elector of the Commonwealth. It should also be noted that as a result of a national referendum in 1967, the Commonwealth of Australia Constitution Act 1900 was amended in two respects, viz. section 51 (xxvi) was amended so as to give commonwealth power to legislate in respect of Aborigines in the States, and section 127 was repealed so that Aborigines could henceforth be counted in reckoning the population of Australia, and of its States and Territories. Section 127 before its repeal by the Constitution Alteration (Aboriginals) 1967, provided as follows: "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."

4. The Settled/Conquered Colony [19]

British colonisers treated Australia as terra nullius - a land without owners, without a system of government and no recognizable commerce. With the colonization of Australia after 1788, a new legal regime was imposed based on the common law. Australia was treated for the purposes of its acquisition and the application of English law, as a settled colony, that is, one uninhabited by a recognised sovereign or by a people with recognizable institutions and laws. No treaties were concluded with Aboriginal groups, and no arrangements were made with them to acquire their land, or to regulate dealings between them and the colonists. They were treated as individuals not as groups or communities.

Aboriginal people were therefore fully subjected to English law.[20] This law did not recognise Aboriginal customary laws nor, as a consequence the Aboriginal peoples right of self-determination. This stance was reaffirmed in the *Milirrupum v Nabalco Pty Ltd.*[21] case in which a group of Aborigines sued a mining company and the Commonwealth. The Aborigines claimed relief in relation to the possession and enjoyment of areas of land owned by them under customary laws. Blackburn J of the Northern Territory Supreme Court decided that Aborigines had no legal claim to the land since all relevant English law came into operation in the colony from the date of settlement.[22]

5. Mabo v The State of Queensland[23]

This view that Aboriginal rights were completely terminated by the act of annexation was unequivocally rejected in the recent decision of the High Court in *Mabo*. In this path-breaking judgment, the highest court of the land recognised Aboriginal native title, which the court ruled had not been extinguished by white colonisation.

---

19 *Supra* n.8

20 *R v Murrell* (1836) Legge 72; *R v Wedge* [1976] 1 NSWLR 581.

21 (1971) 17 FLR 141 (the *Gove Land Rights* case).

22 *But see, Delgammkw v British Columbia* [1991] 3 WWR 97; (1991) 79 DLR (4th) 185 and *Calder v Attorney-General of British Columbia* [1973] SCR 313; (1973) 34 DLR (3d) 145. In *Calder* the Supreme Court of Canada held that Aboriginal title can survive British acquisition of sovereignty. In *Cooper v Stuari* (1889) 14 AC 286, the Judicial Committee of the Privy Council said that the introduction of the common law to the new colony was not on a wholesale basis: only so much of it as was relevant was introduced. It follows that as per the doctrine of continuity, rights which existed prior to colonization continued through the act of colonization. *See also, Johnson v McIntosh* (1823) 8 Weaton 543; 5 Law Ed (2d) 681, where Marshall J recognised that prior to the creation of any treaties, the aboriginal title did exist in the original occupiers.

23 *Supra* n. 12. The Full Court of the High Court handed down this very lengthy decision on 3 June 1992. It consists of four different judgements. The Court comprised of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. this part of the paper containing a comment on *Mabo* formed part of a paper, entitled "The Demise of Terra Nullius in Australia" which the author delivered at International Association for the Advancement of Teaching and Researching in Intellectual Property (ATRIP) Congress at WIPO Headquarters in Geneva, June 29 - July 1, 1992.

The High Court by a majority of 6 to 1 (Dawson J dissenting) incontrovertibly recognized the prior legal occupation by Aborigines of the Murray Islands in the Torres Strait. As a result, the Meriam people, who were in occupation of the Islands for generations before the first European contact, were granted occupation use and enjoyment of their native lands in accordance with their indigenous laws or customs. This landmark ruling has established a major precedent for future land rights and arguable intellectual property and human rights cases.[24]

The decision in *Mabo* is significant for all Aboriginal people because the High Court for the first time has examined (and rejected) the validity of two fundamental propositions which had been endorsed by long established authority and used as a basis of the real property law in Australia for more than one hundred and fifty years

(i) that the territory of Australia was, in 1788, terra nullius in the sense of "unoccupied or uninhabited" for legal purposes; and

(ii) that full legal and beneficial ownership of all the lands of this continent was vested in the Crown, unaffected by any claims of the Aboriginal inhabitants.[25]

Nevertheless the High Court took the view that these positions, which have provided a legal basis for and justification of the dispossession of Aborigines, were no longer valid.[26] The Court further observed: "The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of and retreat from, those past injustices."[27]

6. *Sources of Australia's Human Rights Obligations*

The three general sources of what may loosely be termed Australia's "human rights" obligations are:

i) International instruments;

ii) Domestic legislation; and

iii) The common law and more specifically, the extent to which it recognises international jurisprudence on the subject.

---

24 The inadequacy of the present intellectual property regime, especially copyright law, for the protection of Aboriginal Folklore is well-established. *See Report of the Working Party on the Protection of Aboriginal Folklore* Department of Home Affairs and the Environment (Canberra 1981). For an analysis of this and related issues, *see* K Puri *Australian Aboriginal People and THeir Folklore* NGULAIG Monograph 9, Aboriginal and Torres Strait Islander Studies Unit, The University of Queensland (Brisbane 1992).

25 *Supra* n.12 at 451 (per Deanne and Gaudron JJ).

26 The application of the doctrine of *terra nullius* to Australia has also been strongly criticised in H Reynolds, The Law of the Land (1987).

27 *Supra* n.12 at 451 (per Deane and Gaudron JJ).

(i) International Instruments

A number of international instruments govern Australia's human rights obligations. The following four are the most significant instruments:

A. *International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).*

Australia ratifed this document on 10 December 1975 and the Covenant became operational within the country on 10 March 1976. The explanatory memorandum attached to the ICESCR's instrument of ratification stated that "Legalisation is not necessary for Australia to meet its international obligations under the Covenant". The implementation of this agreement is overseen by the United Nations Committee on Economic, Social and Cultural Rights.

B. *International Covenant on Civil and Political Rights 1966 (ICCPR).*

This Covenant came into force on 23 March 1976. Australia signed the Covenant on 18 December 1972 and ratified it on 13 August 1980.[28] The ICCPR is now contained in Schedule 2 to the Human Rights and Equal Opportunity Commission Act, 1986. However, inclusion of the ICCPR does not appear to make it part of Australian municipal law, nor does it create any justiciable rights for individuals.[29]

The Human Rights Committee of the United Nations oversees the implementation of this agreement.[30] The *First Optional Protocol* under this Covenant was issued in December 1966, and provides a right of individual petition to the United Nations Human Rights Committee.

Australia ratified this Protocol on 25 September 1991, it being effective from 25 December 1991.[31] Australia's accession makes it possible for individuals within Australia who consider that any of their human rights as set out in the ICCPR have been violated or infringed, to take their case to the United Nations Human Rights Committee. Although the Committee's recommendations or "views"[32]

---

28 *See generally,* G Triggs "Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?" 31 *International & Comparative Law Quarterly* 278. (1982).

29 *See, Dietrich v R Supra* n.5 at 434 (per Tohey J), *Re Mathtieson and Department of Employment Education and Training* (1990) 20 ALD 253 and *ReJane* (1988) 12 NSWLR 558.

30 The Human Rights Committee was set up in 1976 under the ICCPR. This Committee is distinct from the United Nations Human Rights Commission which was established in 1946 to receive complaints of gross violations of human rights. The Commission's jurisdiction is much wider than the Human Rights Committee. Unlike the latter, it can address alleged violations of rights under the other human rights conventions. The Commission consists of over 43 political representatives of United Nations members. Supra n. 2 at 602.

31 It may noted that Australia has also ratified the *Second Optional Protocol* to the ICCPR, with Article 1 (1) providing that "No one within the jurisdiction of a State party to the present Protocol shall be executed". The *Second Optional Protocol* commenced in Australia on 11 July (1991); *See, Australian Treaty Series*, Nos 19 and 39 (1991).

32 Articles 5 (4) ICCPR.

are not legally enforceable in a domestic jurisdiction, any adverse findings against a member state does carry considerable moral pressure. As one commentator has put it, "Many states shy away from adverse publicity of their human rights record."[33]

The rules of the Human Rights Committee require such a person to establish to the satisfaction of the Committee that all available domestic remedies were exhausted, or that the relevant legal processes had been unreasonably prolonged.[34] It also needs to be established that the individual had been a victim of an abuse of human rights. Acts which violate human rights must be attributed to a government agency since only the state has obligations under the ICCPR.[35]

Australia's accession to the *First Optional Protocol* emphasises the importance accorded by the federal government to the protection of human rights and it so conviction that human rights performance of Australian governments at all levels should be fully open to international scrutiny.[36]

C. *International Convention on the Elimination of all Forms of Racial Discrimination 1969.*

Australia signed the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD) on 13 October 1966. Ratification took place on 30 September 1975.[37] On the basis of CERD, the Commonwealth Parliament enacted the Racial Discrimination Act 1975. The implementation of this agreement is overseen by the United Nations Committee on the Elimination of Racial Discrimination.[38]

D. *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

---

33 *See,* K Eastman, "Human Rights Remedies: A Guide" 17 *Alternative Law Journal* 169 at 171 (1992).

34 For a good historical account, *see,* A A Trindade "Exhaustion of Local Remedies Under the UN Covenant on Civil and Political Rights and its Optional Protocol", 28 *International and Comparative Law Quarterly* 734 (1974). *See further,* J Davidson, "The Procedure and Practice of the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights", 4 *Canterbury Law Review* 337 (1971) and H Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" 18, *Melb Univ. Law Review* 428 (1991).

35 *See, Supra* n.33 and *supra* n.7.

36 However, note that Canada and New Zealand have provided individuals with the right to petition under this Protocol since 1976 and 1989, respectively.

36 A Copy of the text of this Convention is set out in the Schedule to the Racial Discrimination Act 1975 (Cth.)

38 *See further, Supra* n.7 at 103-105.

The convention was adopted by the General Assembly of the United Nations on 10 December 1984. It was signed by Australia on 10 December 1985. Ratification took place on 8 August 1989. A copy of the English text of the Convention is set out in the Schedule to the Crimes(Torture) Act, 1988 (Cth) which was enacted to give effect to certain provisions of the Convention.

In late 1992, the Commonwealth Government made a declaration under Article 22 of the Convention to provide a right of individual petition to the Committee Against Torture in accordance with Recommendation 333 of the Royal Commission into Aboriginal Deaths in Custody.[39]

(ii) Domestic Legislation

When states ratify a human rights instrument, they either incorporate its provisions directly into their domestic legislation or undertake to comply in other ways with the obligations contained therein. As a result, universal human rights standards and norms find their expression in the domestic laws of most countries today. In Australia, four Commonwealth statutes are specifically designed to protect and promote human rights.

Racial Discrimination Act 1975

It has been noted above that the Racial Discrimination Act was enacted pursuant to the *International Convention on the Elimination of All Forms of Racial Discrimination*. The major objectives of this Act are (1) to promote the equality before the law of all persons regardless of their race, colour or national or ethnic origin and (2) to make discrimination against people on the basis of their race, colour or national or ethnic origin unlawful.

Section 9(1) of the Racial Discrimination Act is a general provision rendering unlawful the impairment of a person's rights and basic freedoms on the basis of their race, colour or national or ethnic origin in accordance with Article 1 of CERD. However, the Act does not fully implement CERD. Australia qualified its ratification by declaring that it was not in a position to treat as offences all the matters covered in Article 4(a) of the Convention in which member states undertake to "declare an offence punishable by law all dissemination of ideas

---

39 *See, 3 Aboriginal Deaths in Custody - Response by Governments to the Royal Commission* (AGPS 1992) at 1269. The Royal Commission was set up jointly by the Commonwealth, the States and the Northern Territory on 16 October 1987 in response to concern that deaths in custody of Aboriginal and Torres Strait Islander people were too common and public explanation too evasive. The Royal Commission's published two reports - an interim report (December 1988) and the final report (April 1991.) In eleven volumes and around 5000 pages, the reports looked into the circumstances of the (99) deaths, action taken by authorities following the deaths and underlying causes, including social, cultural and legal factors. The Royal Commission made 339 recommendations covering reform of law and justice systems and measures to address endemic Aboriginal and Torres Strait Islander disadvantage. The Commonwealth, State and Territory Governments have responded to each of the 339 recommendations of the Royal Commission in the above mentioned document in Volumes 1-4.

based on racial superiority or hatred, incitement to racial discrimination". It is heartening to note that compliance with this article is currently being addressed by the introduction of a Commonwealth Bill for legislation to prohibit racial vilification.

Human Rights and Equal Opportunity Commission Act 1986

Five international instruments dealing with human rights are found within the Schedule to this Act.[40] The Act establishes and empowers the Human Rights and Equal Opportunity Commission to deal with specific instances of abuse of human rights as well as having a broad policy formulating function. The Commission also examines federal laws[41] and international instruments[42] to ensure that they do not contain anything inconsistent with human rights.

Sex Discrimination Act 1984

The Act gives force to Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women*. Its major objectives are (i) to promote equality between men and women; (ii)to eliminate discrimination on the basis of sex, marital status or pregnancy; and (iii)to eliminate sexual harassment at work and in educational institutions.

Privacy Act 1988

The Act give effect to the *Organisation for Economic Co-operation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. The Act makes provision to protect the privacy of individuals in line with Australia's undertakings under the *International Covenant on Civil and Political Rights*. Article 17 of this Covenant requires each member State to adopt such legislative measures as may be necessary to give effect to the right of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.

Although Australia's legislative reforms in protecting and promoting human rights have a good track record (for example, political rights for women were

---

40 *See*, Schedules 1-5 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth.) These legal instruments, to which Australia is a party, are: (i) the *International Covenant on Civil and Political Rights*; (ii) the *Discrimination (Employment and Occupation) Convention 1958 (International Labour Organisation Convention III);* (iii) *the 111 Declaration of the Rights of the Child 1959;* (iv) *the Declaration on the Rights of Mentally Retarded Persons 1971; and (v) the Declaration on the Rights of Disabled Persons 1975.*

41 *See,* Section 11 (f), (j) and (k). Human Rights and Equal Opportunity Commission Act 1986 (Cth.)

42 Section 11 (1) (m) requires the Commission: "....to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination".

recognised soon after independence in 1902), its "white Australia" immigration policy has been condemned in most parts of the world. The Australian government as well as the general public were largely unaware of the plight of Aboriginal human rights until 1974. At the opening of Parliament, Aboriginal people engaged in a strong demonstration, protesting against their deplorable situation. This resulted in an increased awareness which led to the enactment of several pieces of legislation both at federal and state levels, including the Race Discrimination Act 1975 and the Human Rights and Equal Opportunity Commission Act 1986. There has also been a noticeable development towards an attitude of "multiculturism" in the country.

Nevertheless, Australia's poor record regarding the protection of Aboriginal human rights was again drawn to the world's attention in January 1988 when thousands gathered in Sydney to protest against Australia's celebration of the bicentennial of the arrival of its first white settlers. Boycotting the festivities, the Aborigines pointed out that for them the two hundred year period had been one of annihilation, dispossession, and increasing poverty. They had become outcasts in their own home, living on reservations or in urban slums, suffering infant mortality three times the national average and earning half the national average wage.

These protestations have had a positive result in the sense that government policies now increasingly recognise the special needs of Aborigines to retain their own culture, customs, traditions and life-styles. The Commonwealth government has taken a number of significant measures which seek to provide protection for Aboriginal cultural heritage, eg., the Australian Heritage Commission Act, 1975 which protects places associated with the Aboriginal history, culture and beliefs; the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 to protect significant Aboriginal sacred sites and objects, the Museum of Australia Act, 1980, the Protection of Movable Cultural Heritage Act, 1986. Several States have followed suit and enacted legislation to safeguard and preserve the Aboriginal culture.[43]

(iii) Common Law Recognition

One particularly relevant facet of the *Mabo* decision is the Court's reference to human rights as enshrined in the international treaties and the likely effect these will have on the future of Australia's indigenous peoples. Brennan J made a few references to the way in which the common law should adapt itself to human rights principles. Thus his Honour stated:[44]

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International

---

43 The prevailing opinion still appears to be that any concessions to Aboriginal claims are a matter of benevolent charity, however, rather than rights governed by the international human rights instruments Australia has already ratified." RL Barsh "Indigenous Policy in Australia and North America" *International Law and Aboriginal Human Rights* 99 (B. Hocking ed. 1988)

44 *Supra* n.12 at 422, (with Mason CJ and McHugh J concurring).

> Covenant on Civil and Political Rights... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports ...[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

In *Dietrich v R* , Brennan J put forward his view in even stronger terms. While referring to Aricle 14(3)(d) of the International Covenant on Civil and Political Rights and the influence which that provion has on the development of the common law, his Honour stated, "Indeed, it is incongruous that Australia should adhere to the Covenant containing that provision unless Australian courts recognise the entitlement and Australian governments provide the resources required to carry that entitlement into effect. But the courts cannot, independently of the Legislature and the Executive, legitimately declare an entitlement to legal aid."[45] In other post *Mabo* decisions, Kirby P of the New South Wales Court of Appeal emphasised that regard should be had to the human rights principles in deciding cases in domestic courts.[46]

7. Draft Declaration on the Rights of Indigenous People

The United Nations is presently in the process of drafting the *Declaration on the Rights of Indigenous Peoples*. It is based on the perception of indigenous peoples, distinctive cultural values and political situation as previously free peoples. Currently, with the limited exception of International Labour Organization Resolution 169 and the *Convention on the Rights of the Child*, no international instrument refers specifically to the rights of indigenous peoples. Once the draft is finally approved by the Working Group on Indigenous Populations, it will go through various committees and ultimately to the United Nations General Assembly for adoption. The key principle of the current text of the Draft Declaration is the concept of self-determination.[47]

8. Relationship of Australian Domestic Law to International Human Rights

It remains unclear whether the ratification by Australia of various human rights instruments could be deemed to incorporate in the Australian common law

45 *Supra* n.5 at 404.

46 *See R v Stephen Lorne Astill* (25 August 1992) Unreported Supreme Court of NSW Criminal Division, No CA 060477 of 1991; *R v George Stephen Greer* (14 August 1992) Unreported Supreme Court of NSW Court of Criminal Appeal, No 60495 of 1989; *Chow v Director of Public Prosecutions* (4 September 1992) Unreported Supreme Court of NSW Court of Appeal, No CA 40318 of 1992, and *Director of Public Prosecutions v Saxon* (27 August 1992) Unreported NSW Court of Appeal. It should be noted that the Hon Justice Kirby, President of the NSW Court of Appeal is now the Chairman of the Executive Committee of the International Court of Justice, Geneva.

47 *See,Aboriginal and Torres Strait Islander Social Justice Commission's First Report* and *supra* n.7 at 110-113. The current text of the Draft Declaration is reproduced in Appendix 7 of the above-mentioned report.

48 *See, Supra* n.28 at 289.

the universal human rights standards and norms, even though such provisions have not been adopted into the domestic laws.[48] In *Bradely v Commonwealth of Australia*[49] reliance was sought to be placed unsuccessfully by a party on the resolutions of the Security Council of the United Nations arguing that the Charter of the United Nations Act, 1945(Cth) provided that "the Charter of the United Nations (a copy of which is set out in the schedule to this Act) is approved". The High Court stated: "That provision does not make the Charter itself binding on individuals within Australia as part of the law of the Commonwealth."

Again, in *Jabanardi v R*,[50] the Supreme Court of Northern Territory pointed out that unless an international declaration is made part of the municipal law of Australia it does not have the force of law; it has political force only. It is for the legislature to convert the terms of the international instrument into domestic law cognizable by the courts.[51] In this case, the applicant was found to be unfit to plead to the charge of murder by reason of his inability to comprehend the nature of the charge. He was therefore ordered to be detained in custody for an indefinite period. The applicant's counsel argued that the passing of the Human Rights Commission Act, 1981 (Cth) was a legislative recognition or approval of the *International Covenant on Civil and Political Rights 1966* and declarations which made up the schedules to that Act. In his obiter remarks, Nader J seemed to regard that as legislative recognition. However, his Honour observed that the Act does not make that covenant or those declarations directly applicable as laws of Commonwealth. Further, the Human Rights Commission Act binds the Crown in the right of the Commonwealth but not in the right of the States or of the Northern Territory.[52]

This matter was debated at some length by the High Court of Australia in a recent case of *Dietrich v R*,[53] although the Court did not consider it necessary to make any conclusive pronouncement. The case involved an applicant who had been convicted and sentenced to imprisonment for seven years for committing the offence of importing into Australia a trafficable quantity of heroin in contravention of the section 233B(1)(b) of the Customs Act 1901 (Cth). The applicant applied for special leave to appeal to the High Court, claiming that his trial had miscarried by virtue of the fact he was unrepresented by counsel throughout the entire course of the trial. The High Court, by a majority decision (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting) ordered a new trial holding that the trial judge had erred in refusing to grant adjournment, postponement or stay until legal representation was available to the indigent accused, who through no fault of his was unable to obtain legal representation. Further, the Court quashed the conviction of the accused on the ground that there had been a miscarriage of justice in that the accused had been convicted without a fair trial.

---

49 (1973) 128 CLR 557.

50 (1983) 22 NTR 1.

51 *Ibid* at 21.

52 *Ibid.*

53 (1992)109 ALR 385.

The applicant relied primarily on the explication of the right to a fair trial in the various international instruments, particularly, Article 14 of the *International Covenant on Civil and Political Rights* (the ICCPR).[54] However, although Australia is a party to this instrument,[55] the High Court was quick to point out that the Commonwealth Parliament had not yet passed any specific legislation to give effect to this particular provision.[56] Although counsel accepted that the ICCPR does not form part of Australian domestic law, he submitted that the common law of Australia should be developed in a way which recognises the existence and enforceability of rights provided for in international covenants to which Australia is a party. Reliance was placed on Kirby P's statement in *Jago v District Court of New South Wales*[57] that, where the inherited common law is uncertain, Australian judges may look to an international treaty which Australia has ratified as an aid to the explication and development of the common law.

Reference was also made to the position in England where, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations.[58] "English courts may also have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law."[59] The majority of the High Court in *Dietrich*, while firmly supporting this "common-sense approach",[60] pointed out that in the case in hand the court was not being asked to resolve uncertainty or ambiguity in domestic law but to declare that a right which had hitherto never been recognised should now be taken to exist. Dawson J, who delivered a dissenting opinion, while agreeing with the majority in regard to the construction of ambiguous *domestic legislation*, was not sure about extending that approach to the resolution of uncertainty in the common law.[61]

---

54 Article 14 (3) relevantly provides "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:.... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay it."

55 Reference was also made to Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and to the relevant Canadian and United States' provisions guaranteeing certain rights to the accused.

56 *Supra* n.5 at 391. However, Mason CJ and McHugh J made the observation that "it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee (by acceding to the *First Optional Protocol* to the ICCPR) without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law, but such an approach is clearly permissible." (*idem*).

57 (1988) 12 NSWLR 558, at 569.

58 *Supra* n.5 at 392, citing *R v Home Secretary; Exparte Brind* [1991] 1 AC 696, 747-748.

59 *Ibid.* The High Court made reference to *Derbyshire Country Council v Times Newspapers Ltd* [1992] 3 WLR 28, 44.

60 *Ibid* at 392 (per Mason CJ and McHugh J) ; at 434 (per TooheyJ).

61 *Ibid* at 426.

Be that as it may, the High Court held that it was unnecessary to consider that question in this case because to extend to the common law the principle which underlies Article 14(3)(d) of the ICCPR would *not* be to resolve ambiguity or uncertainty but to effect a fundamental change.[62] Furthermore, in the Court's view Article 14(3)(d) of the ICCPR did not support the absolute right to have access to legal assistance; the right is expressed to arise "in any case where the interests of justice so require".[63]

There are decisions of Australian courts where principles of customary international law have been incorporated into the domestic law so far as these were not inconsistent with any applicable statute law or with any binding precedent.[64] However, the consensus of judicial opinion seems to suggest that, while it is open to have regard to such instruments as an aid to determining what the common law is in the event of doubt, eg. the existence of a particular right, they are not by their terms incorporated into Australian domestic law. It is, nevertheless, permissible and useful to have regard to them in considering the exercise of discretion.[65]

9. Enforceability

To what extent are any provisions such as those in the *International Covenant on Civil and Political Rights* enforceable? Obviously, those provisions in the *Convention on the Elimination of All Forms of Racial Discrimination* are rendered enforceable by the Racial Discrimination Act, 1975(Cth). It has been strongly argued in some cases that the Human Rights and Equal Opportunity Act, 1986 impliedly incorporates the provisions of the various international covenants into Australian law, particularly since five of those covenants have been appended to the Act in Schedules 1-5 and also because the Commission has been given an intervener function under the Act. However, an authoritative ruling on this point is still awaited.

There is however, a mandatory reporting procedure under Article 40(1) of the *International Covenant on Civil and Political Rights* 1966 whereby every five years each signatory State is obliged to submit to the Human Rights Committee a report on its own human rights situation. Mention may also be made of Article 41 which provides for an inter-State complaint procedure although this is rarely used for reasons of diplomacy. Finally, as already stated, there is also the procedure for individual complaints to the Human Rights Committee under the *First Optional Protocol* of the *International Covenant on Civil and Political Rights 1966*. It should be noted that this mechanism has not been invoked as yet in the Australian context. However, in the *Lovelace* case, a reference from

---

62 *Ibid* at 426.

63 *Ibid* at 425 (per Dawson J).

64 *See, eg, Chow Hung v R* (1949) 77 CLR 449, 477-479; *Polites v Commonwealth* (1945) 70 CLR 60, 80-81.

65 *See, Kioa v West* (1985) 159 CLR 550, 570, 630.

Canada, the Human Rights Committee observed that Article 27 of the Covenant did impose some positive duties on State parties to acknowledge the cultural rights of its citizens as individauls.[66]

10. Conclusion

The *United Nations Universal Declaration of Human Rights* affirms the principle of the unacceptability of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, and that this applies to indigenous peoples of the world. Every State which is a party to the international covenants on human rights has the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights.[67] Although no legally enforceable sanctions are yet available against an offending state, persuasion, exposure, public criticism and in extreme cases, isolation, do have a strong moral force. More importantly the fact that each member state now accepts that is own nationals can have recourse outside the domestic jurisdiction shows clearly that the protection of human rights is now within the domain of international law.

Australia's accession to the *First Optional Protocol* combined with the Law Reform Commission's report into *The Recognition of Aboriginal Customary Laws*[68] the report of the *Royal Commission into Aboriginal Deaths in Custody*[69] and the *Mabo* and *Dietrich* findings in 1992 all indicate the importance that the Australian government has placed on the various international agreements and an intention to abide by them in its domestic activities. Especially in the case of indigenous peoples of Australia, these also reveal a desire for reconciliation and to remedy the past wrongs. Australia is morally bound to accord its indigenous peoples the universal human rights provided for under the Conventions. It is suggested that the common law in Australia should develop in a way which protects standards of human rights which are broadly accepted by the Australian executive and legislative arms of government and by the Australian community. Side by side, Australia should adopt a domestic bill of rights to bring its law under the discipline of international human rights jurisprudence.

---

66 *Report of the Human Rights Committee*, GAOR 36th Sess, Supp No 40 (A/36/40), Annex XVIII, 166. For discussion, see The Recognition of Aboriginal Customary Laws Note 8 above, at para 176 etseq. Article 27 of the *International Covenant on Civil and Political Rights 1966* provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

67 These principles have been reiterated recently by the World Conference on Human Rights Vienna, 14-25 June 1993.

68 *Supra* n.8.

69 *See, Supra* n.8.

Undoubtedly, the protection and promotion of Aboriginal human rights, including a grant of the right of self determination,[70] will contribute to Australia's international prestige, and provide a basis for national pride. Enormous social and economic benefits will also emerge out of this, but most importantly, this will make the original inhabitants of this vast island continent feel at home in their own home. History is a witness to shameful miseries inflicted on this culturally profound and non-violent race in the past two centuries. It will be sad if non-Aboriginal Australians are not able to recognise the universal human rights of the indigenous peoples, if, for no other reason, then at least as a gesture of repentance for the wrongs of the past.

Finally, although the injustices of the past can perhaps never be compensated for in monetary terms, present development do manifest commitment which, if maintained, is likely to lead to a brighter future. In such a future there would be no need to question whether the indigenous peoples of this country were being afforded their basic human rights. There would be no graphic discrepancies in the statistics of law and justice, health, housing, education, employment, etc, to suggest otherwise.

---

70 It is significant to note that both international covenants, viz *International Covenant on Economic, Social and Cultural Rights* and *International Covenant on Civil and Political Rights* contain the same wording in Article 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *See generally*, R L Barsh "Indigenous Peoples and the Right to Self-determination in International Law" *International Law and Aboriginal Human Rights* (Law Book Co 1988)68-82; P Ditton "Self Determination' or 'Self Management'?"*Australian International Law News 3* (1990).

(1994) 6 NLSJ 42

CUSTODIAL DEATHS IN INDIA: A CRITICAL INQUIRY INTO LAW, PROCEDURE AND PRACTICE

P. Srikrishna Deva Rao *

Amnesty International's Report on 'Torture, Rape and Deaths in Custody in India' highlighted the continuing practice of torture by police and para-military forces. It evoked varied reactions from government, media, Human rights groups and raised a controversial debate in National and International circles. Nonetheless, Amnesty report has brought once again the issue of police abuse into the forefront of public attention.

The beating of Rodney King in Los Angeles,[1] Jhon Pat in Australia[2] or blindings of under trials in Bhagalpur or encounter deaths or killings of civilians by the Provincial Armed Constabulary in Meerut and scores of other incidents demonstrate the increasing lawlessness in the law enforcement. But the question is as long as we treat the police abuse as a series of isolated incidents or as a regrettable by-product of the war on crime or Extremism, these practices will continue.

The lack of information and data on the incidents of excessive force and other forms of police abuse is a significant barrier to both legal and political reform. In fact, there are no real estimates of custodial deaths in India or anywhere in the world due to obvious reasons. A little systematic data exists where ever human rights groups are active. Without any credible information on the scope and pervasiveness of the problem, the public is left with the impression that the abuses are more aberrational than systemic. Even the manifestation of indifference to documented abuses by the state and fostering the official violence through social, political and legal structures reinforces the patterns of unlawfulness.

The real questions that emerge from this are how far are the institutions, structures, programmes, policies and principles we have developed to regulate and control the police behaviour sufficiently sensitive towards containing the police violence? Why have the principles of accountability and organisational control failed to apply the basic percepts to law enforcement officials? This has brought the whole issue of policing within the legitimate political debate as a necessary precondition for a long term and a broader popular democratic critique of police.

---

* Faculty Member, National Law School, Bangalore

This article is a part of M.Phil work submitted to National Law School, 1993.

1 The beating of Rodney King by Los Angels police in 1991 and the controversial acquittal of the officers involved focussed attention on the problem of police abuse and demonstrated the continuing existence of the practices.

2 Death of a sixteen- year old aboriginal youth, John Pat in Roeburne, Western Australia in 1983 and later acquittal of five policemen charged with the death led to the formation of committee to defend Black Rights which spearheaded the campaign for the Royal Commission of aboriginal deaths in custody in Australia.

Social background

The increasing pattern of police abuse has to be analysed in the light of the social background of custodial violence in India.

The forty six years of democracy have brought little benefit to the marginalised sections of society whose survival was threatened by the failure of the trickle-down theory of government planning from mid 1960's. This led them to engage in violent struggles to assert their legitimate rights. Since seventies, there have been various grass root level social movements claiming for more autonomy and social justice. This discontent was manifested in wide-spread protests culminating in full fledged struggles. The state began to resort to more and more wideranging and fierce forms of suppression by using police and para-military forces as a 'whipping boy'. The continuous use of police and para-military forces to suppress the dissent to maintain order and resolving social conflicts led to the erosion of legitimacy of state.

With this, the ordinary citizens and particularly the poor strata are exposed more to police than to the politicians who seem to have withdrawn from the earlier role of mediating conflicts by handing them over to police as a means of last resort. Due to this, the police image has declined sharply as custodians of order and instead given place to one of a "barbaric, brutal and bloody-thirsty lot." This is reflected in tremendous growth in governmental expenditure on police. (See Table 1).

Table-1
Governmental Expenditure on Police

Year	Combined budgetary transactions (RS)
1951	587.3 million
1961	1.075 billion
1971	3.89 billion
1985	13.76 billion

Source: P.R. Rajagopal, *Violence & Response : A critique of the Indian Criminal Justice system.* (1988) 20-21.

The Table-1 shows the 23 times increase of the total police Budget during the period from 1951-85. What is alarming is the pattern of state's response in the face of its inability of enforce social control. A vast coercive apparatus has been built up by the state which instead of strengthening the legitimacy tends to erode it even further.

The authoritarian character of the state has manifested itself also in a host of legislations like Terrorist Act, National Security Act, Maintenance of Internal Security Act, Armed Forces Special Powers Act and Disturbed Areas Act. These

have provided the police a powerful array of new law enforcement measures to make arrests, conduct searches without warrant and to shoot and kill. In the net result, it authorised increasing invasive practices of police in the name of 'law and order', maintenance of security of state and integrity.

Gravity of the Problem

The custodial crimes are qualitatively different from other crimes due to the fact that what happens in police station is not open to public scrutiny. The denial of open accessibility to the police station fuels the demand to bring every day police operations under popular democratic control.

The police are charged with particular public responsibilities and equipped with considerable public resources and extensive powers to manage and coerce the lives of others in their care or custody. Whenever the state takes a person into its custody, then it is responsible for the care, well-being and guardianship of that person. If that person dies, then the state has failed to meet its responsibility. The circumstances surrounding death should be inquired into not just for apportioning blame to the individuals, but for identifying the diverse factors contributing to such deaths.

Conceptualising custodial death

Custody is not defined either in substantive or procedural laws. Dictionary meaning of custody is - care, guardianship and safe-keeping. It is in vogue to identify a police station or premises of any station house as 'custody'. But it lacks the real meaning of the term 'custody'. The terms 'arrest' and 'custody' are not synonymous, as are commonly understood. It is true that in every arrest, there is custody, but not vice-versa. Custody begins, however, at the initial point of detention when the police uses its authority to restrain a suspect or an accused from moving on his way.

Custodial death can be interpreted narrowly as death of a person in a police lock-up. But sometimes, death takes place outside the premises of a police station, in a hospital or on streets, but technically in the custody of police. As David Biles has rightly argued there are highly complex dilemmas inherent in the different aspects of the definition.[3] The definition of custodial death should include:

1. All cases where a person dies of whatever the cause while in police custody, whether the custody is lawful or not, regardless of the actual location of death. Thus, a person dies in a hospital but is still technically in the custody of police at the time of death.
2. It would also include the cases where the deceased was out of custody at the time of death, but where the death may have resulted from injuries

---

3 David Biles "Deaths in Custody : Nature and Scope of the Problem", *Criminology Australia*, 7 (1991)

sustained during the period of custody. For instance, if the detenue was seriously ill and released a few days before the death.

3. Where a person dies having escaped from police custody. If such a person is killed in the act of escaping it would clearly be a death in custody. But, it would be more difficult to classify the case, if the person had been an escapee for a long period of time. In fact, there is a consistent argument by civil liberties groups in India that the 'encounter' death is also a custodial death.

Causative Factors

Police brutality does not occur due to some overzealous police officers nor is it an individual aberration. It is a larger question that goes beyond the Criminal Justice administration. As succinctly observed by Upendra Baxi "What is truly striking about India is the lack of respect for rule of law, not just by the people but those who make and enforce them."[4] Therefore to understand reasons for police behaviour requires consideration of the broadest features of social structure and fundamental analysis of the determinants, nature and consequences. A probe into police abuse has to begin with an analysis of nature, culture, and how and why the torture is institutionalised in the police process.

Police brutality is often a consequence of a larger problem of criminalisation of politics. The excessive use of force is a product of police culture that rationalises physical abuse as appropriate punishment for persons who are viewed as trouble-makers or deviants.

The lack of proper legal restraints on police powers to regulate and control is one of the main reason for continuous police abuse. The police are quite sophisticated in exploiting the many loopholes created by the legislature and court's constitutional remedies jurisprudence. The police abuse is catalysed when the authority of police is being questioned or defied or when their power and position is threatened. The police may use force on detenues due to displeasure, ill-will, insult, vendetta or to demoralise the offender or to teach them a lesson or to curry favour of politicians.

Police Sub-culture

The police develops a distinct working personality and an occupational culture different from other professions called the police 'sub-culture' which has been evolved to manage the stress of their roles. The frustration in police job performance is characterised by factors such as negative public image, stress of work without fixed hours of job or holidays, bad living conditions, personal isolation leads police to be prone to violence. Considerable theoretical scholarship on police agencies have reported the frustration and strain as the main factor in

---

4 Upendra Baxi, 'Crisis of Indian legal system' 6 (1982).

explaing police deviance. But, torture cannot be justified under any circumstance. The human rights groups argue that it is a calculated assault on human dignity to subject a person to torture. Once it is justified and allowed, it will be used against increasing proportion of the population.

Custodial Trauma

The arrest and detention in police custody creates a psychological impact on the detenues. The anxiety, fear and stress of being arrested and detained causes a mental pressure or trauma on the detainee. The suspect or accused will come into the police station obviously in a state of shock and it varies enormously from person to person with respect to their capacity to cope with the situation.

The detainee is under tremendous psychological strain during interrogation due to low mental and physical condition. A person will not die in custody of police only due to torture. As Balagopal explains : "the inability of the victim to defend himself, the state of demoralization induced by indefinite confinement, in an ill-ventilated and stinking lock-up far removed from the sight of the world, the lowered resistance caused by poor and meagre food and the insanitary conditions of incarceration makes the person prone to easy death."[5]

The process of interrogation and surrounding circumstances in custody affects the mind of the arrested person which influences him to crumble. It builds up a kind of pressure on the mental state of the person interrogated. When it crosses the limits of a mere pressure of fact building on the mind and gets in to the domain of physical pressure on the weak bodily health of the victim, it results in death. If third-degree methods are applied in this half-starved, unhygenic existence added to the fear, demoralisation and lack of medical attention, it leads to easy death of a person in police custody.

Police and Legal Frame work

Civilised standards of every Justice system accord certain basic rights to the accused. The law does not permit torture. The torture by police is violative of the right to life and personal liberty under Article 21 of the Constitution. The Constitution, Criminal Procedure Code, Indian Evidence Act, Indian Penal Code and the Police Act explicitly guarantee safeguards of Human rights. Article 22 (2) of the Constitution and sections 56 and 57 CrPC guarantee the right to be produced before the magistrate immediately and within 24 hours. The delay in no case shall exceed 24 hours exclusive of the time necessary for the journey from the place of the arrest to the court. These provisions also provide that the police arresting with or without warrant to inform the arrested person without delay the grounds of arrest. It enables the accused to apply for bail or to present defence against the prosecution.

---

5 K. Balagopal, "Deaths in police custody: some Anatomical considerations", 21 *Economic & Political Weekly* 1924 (1986)

The right to bail arises from the moment an individual is arrested and detained. 'Bail is a right and Jail is an exception' in all Bailable offences.[6] The Constitution and Code of Criminal Procedure recognise the right of every arrested person to consult a legal councel of his choice.[7] The Supreme Court has recognised right to remain silent during custodial interrogation.[8] Even the state is under a constitutional mandate under Article 21 to provide free legal aid to an indigent person. This right can be claimed even when the accused is produced for the first time before the magistrate.[9]

Article 20 (2) of the Constitution ensures protection from prosecution for the similar offence twice. The fundamental right to criminal justice is the right to have the benefit of presumption of innocence in his favour till the guilt is proved under Section 101 of Evidence Act. Section 100 (3) (4) (6) and (7) provides sanctity and privacy of a citizen's home against illegal search and seizure. Section 54 CrPC gives the accused the right to have medical examination in case of complaints of torture by police. It is also the duty of the magistrate to inform the arrested person about the right to have himself medically examined.

The law does not recognise confession made to police as evidence. The protection against 'involuntary' confessions of any kind are contained in the constitutional provision against self-incrimination under Article 20(3). Section 162 of Code of Criminal Procedure, sections 24, 25 and 26 of Evidence Act and sections 330 and 331 of Indian Penal Code and section 29 of Police Act, treat it as an offence. One of the important safeguards in case of illegal arrest is the writ of *Habeas Corpus* under Article 32 to Supreme Court or under Article 226 to approach the High court. Section 97 code of Criminal Procedure also provides the power to search for the person in illegal detention.

All the safeguards are provided by law. But police flout every one of them by a simple trick - they do not ever record the arrest, do not ever produce him before a magistrate until the required information has been taken from him. Thereafter they produce him before the magistrate misrepresenting that he was arrested less than 24 hours ago to follow the 'quaint ritual' of judging the guilt by the magistrate.

Procedure for investigation

The public have substantial interest and suspicion with regard to custodial deaths because of the fact that the death has occurred in the facades of police station and the immense chances of the facts being suppressed. Therefore, there lies a heavy burden on the investigation to unravel the mysteries to present an

---

6 *See*, Sections 50 (2), 436, Code of Criminal Procedure, 1976.

7 *See*, Article 22 (1), Constitution of India Sec. from 303 and 304 Code of Criminal Procedure, 1976

8 *Nandini Satpathy v. P.L. Dani*, 1978 Cri LJ 968

9 *See Khatri v. State of Bihar*, 1981, Cri LJ, 470; *Sheela Barse*, AIR 1983 SC 378 ; *Sukhdas v. Arunachal Pradesh*, 1986 Cri LJ 1084.

objective, impartial and effective inquiry for determining the circumstances and persons responsible for custodial deaths.

Since the death has occurred in the custody of the police, in order to instill confidence in public mind, the enquiry process is entrusted to a coroner or a magistrate regarding him as independent, impartial, distinct and different from police.

Inquest

The inquest is made in case of all unnatural deaths and it is mandatory in case of custodial deaths. Two types of procedures are followed for inquest in India. One is by a magistrate under section 176 Code of Criminal Procedure and the other by coroner appointed under Coroners Act in the city of Bombay and Calcutta.

Inquest is a preliminary on the spot enquiry to record the findings as to the apparent cause of death. It is the public examination of the thoroughness or otherwise of police investigation and an independent check on the opinion of the police. The fact that an inquest is mandatory in all cases of custodial deaths speaks of its significance within the investigatory procedure.

Inquest is supposed to be an open forum and to be publicly held. But there are allegations that there was little or no information given concerning dates of inquest, place and details to interested parties.

It is the mandatory duty of station house officer to inform immediately the death of a person in police custody to the concerned Sub-Divisional Magistrate, District Magistrate and his official superiors. The station house officer has to register an FIR under section 174 IPC after the incident and the accusation against police officials present at that time and send the information to the Executive Magistrate. The executive magistrate has to inspect the body and examine the police station and record statements of accused police officers. The relatives of deceased, friends, and human rights groups are to be informed about the inquest and their statements are to be recorded.

After the inquest, the body is to be sent to the doctor for post-mortem examination. If the post-mortem reveals that the death is due to injuries sustained during police custody, the executive magistrate can issue arrest warrants to concerned police officers and file the complaint under section 302 Indian Penal Code before concerned magistrate for taking cognisance. If no prima-facie case is disclosed, the executive magistrate will submit a report to the district magistrate.

The law is not exhaustive in explaining the procedure for inquest, examination of witnesses, access to information and is silent in other matters unlike the Corners Act. The law is uncertain as to what the executive magistrate has to do after inquest, leaving scope for different interpretations.

Inquest by Coroner

The Coroner is an English institution which originated in 1194 in England. The duty of Coroner is to hold inquest in all unnatural deaths including deaths in police custody and the object of the inquiry is to satisfy public conscience that an unnatural death was not hushed up. The person having not less than 10 years holding of judicial office or practise as advocate or solicitor of the High Court shall be eligible to be appointed as a Coroner.

The Coroner performs mainly three functions :

a) Investigative b) Judicial and c) Administrative. The investigative duty includes the inquiry into the manner and circumstances of death, the administrative duty is of empanelling the jury and conducting the inquest and the judicial duty is of examining the witnesses, conducting the preliminary inquiry and summarising the verdict.

If the Coroner is satisfied as to the cause of death and if a post-mortem examination is in his opinion not necessary, then the coroner may authorize the body to be disposed of. If the coroner is satisfied that the police were in no way responsible, he often records the finding without further inquiry. This broad and discretionary powers of coroner without any public accountability can therefore result in abuse, defeating the very object of public justice.

But the provision for juries at inquests is one of the most enduring and endearing feature of the coronial system. It is a significant check on the coronial process, a means of ensuring that both police and coroner adequately perform their functions. If the jury finds that death of deceased person was occasioned by an act which amounts to an offence under law, the matter is forwarded to Commissioner of police. The coroner can issue warrant for apprehension of the person alleged to have caused death and send him forthwith to a magistrate empowered to conduct trial.

Evidence in custodial deaths

It is very difficult to ascertain the person who is directly responsible for custodial death, because the eye-witnesses to the death are either policemen or the co-detenues, who are naturally unwilling to testify.

As rightly pointed out by Justice Chandrachud in *Ramsagar Yadav's* case,[10] "Police officials alone no one else can give evidence regards to the circumstances in which a person in their custody comes to receive injuries while in custody. Bound by ties of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put gloss upon facts and pervert the truth. The result is that persons on whom atrocities are perpetuated by the police in sanctum sanctorum of the police station are left without any evidence to prove who the offenders are". This situation results in such a paucity of evidence that the guilty often escape.

10 *State of UP v Ramsagar Yadav*, AIR 1985 SC 416.

The Supreme Court also observed in *Gauri Shankar Sharma's* case[11] that "it is generally difficult in cases of custodial death to secure evidence against policemen responsible for resorting to third-degree methods, since they were incharge of the police station records which they do not find it difficult to manipulate the case." This fact is also observed by Justice A.D.V Reddy subsequent to the Judicial inquiry appointed to investigate into the death of Narasimha in Andhra Pradesh. The Commission observed that "a whole lot of records, entries in the diary, crime diary, punchanamas, FIR, arrest card, entry in sentry relief book, requisition to take the culprit to hospital, everything was fabricated to support their case."[12]

The Supreme Court while convicting the accused for life imprisonment in *Bhagwan Singh* case[13] observed that, "if a person is in the police custody, then what has happened to him is peculiarly within the knowledge of police officials who have taken him into custody. When the other evidence is convincing enough to establish that the deceased died because of injuries inflicted by accused, the circumstances would only lead to an irresistible inference that the police personnel who caused this death must also have caused disappearance of the body". A similar observation was made by Justice Sri Ramulu, while investigating into death of A. Prabhakar Rao in Andhra Pradesh, "if a person dies in police station, the circumstance itself is sufficient to create a reasonable suspicion and when death is of a young and healthy person in a matter of few hours of arrest, in the absence of explanation by police regarding death of the person with injuries on his body, there is all the more justification to presume that the police are responsible or having something to do with death."[14]

Recognising the difficulty of getting evidence, Justice Chandrachund had pleaded for amendment of law relating to burden of proof in case of custodial deaths in *Ramsagar Yadav* case. In response to the Supreme Court judgment the Law Commission of India submitted its 113th report on 'Injuries in Police Custody' in 1985 and recommended for insertion of section 114 -B into Indian Evidence Act to place the burden of proof on policemen. But, unfortunately, nine years have passed since the Supreme Court judgment and Law Commission's recommendations and the legislature has slept over both.

The real question is, is it necessary for an amendment in Evidence Act to enable the court to presume that the police men, in whose custody the death has occurred, were responsible for that death? Justice Sri Ramulu has rightly observed that, "though there is no law for the present that a presumption shall be drawn against the police that they should be held responsible for custodial death, yet, the

---

11 *Gauri Shankar Sharma v State of UP* AIR 1990 SC 709 . *See also, Sate of West Bengal v Sunil Biswas,* 1990 Cri LJ 2093.

12 Report of the Commission of Inquiry into the death of U. Narasimha in the police custody at Sanjeeva Reddy Nagar Police station, (1986).

13 *Bhagawan Singh v State of Punjab,* JT 1992 (3) SC 216.

14 Report of the Commission of enquiry in to the death of A. Prabhakar Rao in the police custody of Chirala of AP (1985).

circumstances which lead to death of the deceased who was in the custody of the police, being within the special knowledge of the police, it is for the police to prove that they are innocent and not responsible for the death."[15]

Even the Police Manual holds the officer in-charge of a police station personally responsible for the safe custody of all prisoners brought to the station. Before detaining a person in the lock-up, he is required to examine the person of the prisoner, preferably in the presence of two independent witnesses, to see whether the arrested person has on his person any injuries. If on such examination, he finds that there are injuries on the arrested person, a full description thereof shall be entered into the station diary in the presence of the witnesses. Section 29 of the Police Act makes any wilful breach of these regulations and employment of third-degree methods to cause personal violence to a person in custody punishable with fine or imprisonment.

As rightly argued by Gouse, "the court can presume that the policemen in-charge of a police station are responsible for the custodial death, if, it is proved that the person arrested was in sound health at the time of arrest, he was in police custody until his death and the death took place in police custody. All these circumstantial evidence considered in the light of Police regulations and Manual and Section 29 of the Police Act, is enough to raise such a presumption."[16]

Role of Executive Magistrate

The legislature with an intention to find out the truth in custodial deaths made it mandatory for Executive magistrate to conduct inquest. This duty was entrusted to him as he was considered to be an impartial and independent person who could justly ascertain the cause of death. But there is a consistent allegation against Executive Magistrate that the police wield much influence and pressure over him to ensure that the report is in their favour. In many instances, the courts have disbelieved the inquest report of Executive magistrate and ordered enquiries for further investigation by CBI.

In *Bharat Bhushan*[17] case, the Delhi High Court held that the inquest report was far from satisfactory and hence directed the CBI to conduct the investigation again. *Kashmiri Devi* case[18] revealed the haphazard manner in which investigation was conducted with a view to shield the guilty members of Delhi police and there fore CBI was enlisted to conduct a proper investigation. In *Mohanlal Sharma* case[19], the Supreme Court observed that the SDM had 'overlooked various aspects and quite a few features of evidence whose significance had not been fully

---

15 Report of Commission of Inquiry into death of M. Anjaiah in the police custody of Thungathiarthi of A.P. (1986)

16 Mohammed Ghouse, "State lawlessness and constitution of India: A study of custodial deaths", Comparative Constitutional Law 270 (Mahendra P. Singh ed., 1989).

17 *Bharat Bhushan v State of Delhi*, 1986 Cri LJ 1624.

18 *Kashmiri Devi v Delhi Administration*, AIR 1988 SC 1323.

19 *Mohan Lal Sharma v State of UP* (1989) 2 SCC 600.

appreciated'. Therefore, doubts arise as to the real independence, impartiality and fairness of inquest report of Executive magistrates.

Role of Doctor

The Medical report is the most substantial and significant evidence of scientific examination which can assist in the identification and prosecution of guilty. The post-mortem report can only provide an impartial and independent evidence on the nature of injuries. If he suppresses the material facts, it is a great harm to humanity.

The Supreme Court and many judicial inquiries have clearly established the 'conspiracy of silence' on the part of the doctor in suppressing the facts of death which goes against medical ethics and the international instrument on Principles of Medical Ethics in the Protection of Detainees Against Torture, 1982 and Tokyo Declaration of World Medical Association, 1975.

Justice Muktadhar passed scathing remarks against doctors in the famous *Rameejabee* case, where a woman was raped in the police station and her husband was tortured to death in Hyderabad. Justice Muktadhar observed: "It is extremely regrettable to note that the officers of department of forensic medicine who are supposed to perform their duties with the utmost dedication and service to humanity could stoop down to such depths to help and save the skins of some who have openly committed henious crimes by taking advantage of the authority, position and helplessness of the victim. It is sad to note that a department which has been established to bring out the truth is manned by officers of questionable integrity who could suppress or distort the truth to accommodate criminals. The earlier the Forensic Science department gets rid of such officers the better it will be for Indian citizens."[20]

Custodial Violence: Judicial Approaches and Responses

The Constitution of India is the product of two conflicting cultures. One representing the founding fathers normative concern for political liberties and for creating a liberal political democracy and the limits to arbitrary powers, and the other reflecting the new concerns of the state for unity, security and administrative efficiency. While the former laid the establishment of a constitutional state, the latter resulted in setting up an authoritarian state like the earlier colonial rule.[21]

The true test of the legal system's commitment to Constitutional constraints is how the state and courts responded to the systemic deviations from constitutional

---

20 Report of the Commission of Inquiry into detention of Rameejabee and death of Ahmed Hussain in Hyderabad, p. 102.

21 Amal Ray, "From Constitutionalism to Authoritarian System of Government: Interaction between Politics and Constitution of India", *Journal of Common Wealth & Comparative Politics* (1990).

norms.It was contended that the ideology of constitutionalism had disappeared both structurally and functionally during the emergency. It gravely alarmed people who realised for the first time that democracy could be subverted and constitutional provisions could be used arbitrarily but "legally" against citizens. There is a visible transformation of the role of court in post-emergency period with a new role perception and a new judicial function. A new constitutionalism burst forth from the court in post-emergency era resulting in constitutionalisation of criminal process. Judicial activism is an almost inevitable consequence of the failure of other agencies of law to assume responsibility for regulating police practices.

The post-emergency era gave two important positive contributions to Indian democratic process. One is the public interest litigation and other the emergence of civil liberties movement in India. The former is to increase the legitimacy of judicial process and the latter an alternate movement for protection of Human rights outside the court.

Constitutionalisation of Criminal process:

Maneka Gandhi's case[22] blazed a new trend. Article 21 of the Constitution which was a 'lifeless incantation of the right to life and personal liberty' was given a new or dynamic meaning by Supreme Court in *Maneka*. It resulted in the outburst of due process decisions converting much of Article21 into a regime of positive rights. Supreme Court for the first time took the view that Aticle 21 gives protection not only against executive action, but also against legislation.

Another trend setter in criminal jurisprudence is *Nandini* case[23] through which Supreme Court wanted to make the police more sensitive to humanity and to respect the dignity of the individual.

Sheela Barse's case[24] could have enlarged and enriched *Nandini Sathapathy's* case but, surprisingly, the court did not refer to it, nor right to consult a lawyer during custodial interrogation. The court however did lay down in this case some important guidelines for effective measure to prevent custodial violence.

Judicial Policing of police

"Torture or killing of a person in police custody is, to put it mildly, illegal. But the real question is: When gold rusts, what can iron do? Who can police the police? Because of the system of linkages, the accountability of police to the political process is purely notional. So, the question arises whether courts can police the police?"[25] Of late, the courts have taken up the responsibility and it is reflected in many judicial decisions.

---

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

23 *Nandini Satpathy v P.L. Dani* 1978 Cri. LJ, 968.

24 *Sheela Barse v State of Maharastra* AIR 1983 SC 378.

25 *Supra* n. 16.

Venugopal's case [26] is supposed to be the first case that came up before the Supreme Court in 1964 on custodial deaths. In this case, the deceased Arige Ramana was taken into custody for interrogation of stolen property. About three days later he was found lying dead in the outskirts of village. The trial court convicted the respondents and awarded a sentence of five years and later, on appeal, the High Court acquitted them. The Supreme Court restored the trial court order.

Ram Sagar Yadav case[27] is a gruesome story of extorting illegal gratification from Brijlal in connection with a complaint which was filed against him for cattle trespass. The police had succeeded in obtaining a sum of Rs.100/- from Brijlal with an assurance that no steps will be taken against him in that complaint. But, when the police further demanded money for hushing up the case, the deceased refused to pay and instead sent a complaint to Superintendent of police. Being incensed by the complaint, the police brought Brijlal without any charge to 'teach a proper lesson'. Just after two hours of arrest, he was brought to court for remand in a badly injured condition.

Brijlal had no injuries when he was arrested, but when he was sent to remand, he had about 19 injuries on his body. The trial court convicted the police under section 304 of Indian Penal Code. A single judge of Allahabad High Court, however, allowed the appeal. Later, Supreme Court reversed the High Court order, criticised its reasoning and expressed regret that the sessions judge instead of convicting them under section 302 of the Penal Code had convicted the respondents under section 304 resulting in 'undue liberality in favour of undeserving culprits like respondent police'.

These judicial decisions reflect on a humanist constitutional order and give a message that an undue liberality cannot be granted for those who use their authority and power for oppressing innocent citizens. But, in *Maiku*[28], the Supreme Court very narrowly interpreted section 147 and section 149 of Penal Code by acquitting the police. The case arose out of conviction of trial court under section 304 of Penal Code later on High Court partly altered it from section 304 to section 325. Bharat, the deceased was arrested in connection with a burglary. Later on interrogation revealed of committing another murder and he volunteered to get the dead body recovered. When police party was taking him towards the place, he attempted to runaway. The police apprehended him, overpowered him after beating him up and he died on the spot.

The magisterial enquiry revealed that the police story was false and deceased was beaten to death. The Supreme Court accepted that the deceased had some injuries by hard blunt weapon on his body, but it is not clear under what circumstances it happened and how the appellant was connected to it. But the

---

26 *State of AP v Venugopal* AIR 1964 SC 33.

27 *Ram Sagar Yadav v State of UP* AIR 1985 SC 416.

28 *Maiku v State of UP* 1989 Cri LJ 860.

narrow interpretation of Supreme Court in this case was a step in the wrong direction. It is unfortunate of supreme Court's stand on justifying the use of unlawful force by police which it considered as lawful as it was used in the course of a lawful object of investigatory powers conferred on police by law.

In *Gauri Shanker Sharma's* case[29] observing that "death in police custody must be viewed seriously, for otherwise it will help to take a stride in the direction of police raj. It must be curbed with a heavy hand and the punishment should be such as would deter others from indulging in such behaviour."

Bhagawan singh's case[30] is a disturbing story of brutal torture of deceased by the Central Intelligence Agency, a special wing of Punjab police. The deceased was interrogated for smuggling narcotic powder along with others. It was alleged that he was brutally tortured and dead body was taken in a car and was thrown in to the river. The SP while conducting investigation found the walls of interrogation room stained with blood but could not trace the dead body.

The Supreme Court gave a very liberal interpretation of presumption of death on the basis of evidence of injured witnesses and circumstantial evidence that the police personnel who caused death must also have caused disappearance of body. This case holds that presumption is permissible even without an amendment of law.

Sunil Biswas's case[31] demonstrates the extent of inhuman torture and degrading treatment meted out to a prisoner in police custody resulting in death. The trial judge accepted the prosecution case that the deceased was mercilessly assaulted and died as a result of it. But, the judge was of the opinion that, prosecution could not prove by unimpeachable evidence beyond reasonable doubt the involvement of police in the assault and accordingly acquitted all accused. High Court on appeal convicted the accused for seven years pointing out the difficulty in securing the evidence against police as they are in-charge of police station records which they can easily manipulate.

Compensatory Jurisprudence

Whenever the state takes a person into custody, the state is responsible for the case, well-being and guardianship of that person. If any thing happens to that person, it is the failure of the state to meet that responsibility. The state has the legal duty of not only protecting the rights of citizens, but also the social duty to compensate for illegal arrest, torture or death. This is based on the contract between the state and the citizen a breach of which occurs when the state fails to protect the citizen from criminal injury. The compensation is seen as a "tangible expression of the state's sympathy and concern for those who, though no fault of their own, suffer unjustifiable invasions on their personal integrity."[32]

---

29 *Gauri Shankar Sharma v State of UP* AIR 1990 SC 709.

30 *Bhagwan Singh and Uttam Chand v State of Punjab* JT 1992 (3) SC 216.

31 *State of West Bengal v Sunil Biswas* 1990 Cri LJ 2093.

32 Veitch E. and Miers, "Association of the Law of Tort" 38 *Modern Law Review* 139 (1975).

When the state itself violates human rights, then it is not only liable for criminal prosecution, but also to compensate for its misconduct. The first known case of compensation for state lawlessness was the famous Jallianwala Bagh case in 1919. The Hunter commission which investigated into Jallianwala Bagh massacre by General Dyer on April 13, 1919, held that the shooting was unjustified and awarded compensation of Rs. 2,000 each to relatives of those who are killed.

The question of state liability to compensate for the infringement of fundamental rights in independent India was first time raised before the Supreme Court in *Khatri*[33] and *Veenasethi*[34]. The Supreme Court refused to order compensation by exercising the writ jurisdiction under Art. 32 of the Constitution in the above two cases. The court was not prepared to forge new tools or devise new remedies until *Rudul Shah* in 1983. *Rudul Shah* heralded a new era of compensatory Jurisprudence in Indian legal history. The Supreme Court maintained that "its refusal to pass order of compensation in favour of the petitioner will be doing mere lip-service to fundamental right to liberty which the state government has so grossly violated."[35] The principle laid down in *Rudul Shah* was applied in *Oraon*,[36] *Sebastian M. Hongrary*[37] , *Bhim Singh*[38] and many other cases.

Sebastian M. Hongray is the first case of awarding compensation in case of custodial death. In this case, two persons were taken into army custody had apparently been killed and were not produced before the court in a Habeas Corpus writ. The Supreme Court awarded compensation of one lakh each to the widows.

Supreme Court in *PUDR v. State of Bihar*[39] for the first time attempted to evolve a 'working principle' for awarding compensation to victims of police atrocities, but which is indeed not a good working principle. In this case, 21 persons including children died and many more injured in Arwal, Bihar due to unwarranted police firing. The court awarded compensation of Rs. 20,000 for death and Rs. 5,000 for injuries.

The Supreme Court awarded compensation for the first time to encounter victims in *R.S. Sodhi* case.[40] *Rajan case*[41] is a trend setter in compensatory jurisprudence. *Challa Ramakonda Reddy*[42] is yet another land mark case where the Andhra Pradesh High Court awarded Rs. 1,44,000 to the family of the detainue who died in judicial remand due to attack by bombs by the opposite party.

---

33 *Khatri v State of Bihar*, AIR 1981 SC 928.

34 *Veena Sethi v State of Bihar* AIR 1983 SC 339.

35 *Rudul Shah v State of Bihar* AIR 1983 SC 1086.

36 *Oraon v State of Bihar* (Unreported).

37 *Sebastian M. Hongray v Union of India* AIR 1984 SC 571.

38 *Bhim Singh v State of Jammu & Kashmir* AIR 1986 SC 494.

39 AIR 1987 SC 355.

40 *R.S. Sodhi, PUCL v State of UP* 1991 (2) SCALE 463.

41 *Eechara Warrier v State of Kerala* (Unreported).

42 *Ch. Ramakonda Reddy v State of AP* AIR 1989 AP 235.

The courts in India have awarded compensation to relatives victims in custodial deaths in many cases.[43] These cases illustrate a positive trend of the judicial policy for compensating victims of custodial deaths. Now, it is a well settled law that for death of a person in police custody, the state should pay the compensation. But the question unresolved is who is to pay the compensation: the delinquent police official responsible for death or the state? If it is proved that the police officer is responsible for the death of a person in police custody, then he should be made personally liable and the compensation should be recovered from the salary of police but not from the public exchequer.

The rationale and conceptual basis for award of compensation is also not settled. The lack of guidelines, rules or legislation for award of compensation left the matter to the varying discretion of the individual judges. In all the above cases, the courts awarded compensation without any basis or principles for quantifying the amount.

Priorities for Prevention

The fundamental duty of the democratic state is to effectively guard against the excesses of the executive with appropriate mechanisms of public accountability. It is more so in case of police as they are armed with nearly total powers over the detenues in their custody. These powers must be in compliance with proper legal restraints.

The state has done very little to reform the legal system to detect, prosecute and punish the persons responsible for these crimes. The procedure for investigation in to these crimes is totally perfunctory. The recommendation of National Police Commission for a manadatory Judicial Inquiry by a District Sessions Judge and recommendation of 113th report of Law Commission for amendment of burden of proof in case of custodial death, has not become the law.

The Law Commission of India's recent working paper on 'custodial crimes' has raised some pertinent issues with a view to review the custodial interrogation methods and practices. It sought to subject the police to meaningful restraints and to democratise the existing policing powers.

The main issues in custodial violence could be broadly classified under six heads:

1. Law of Arrest: The fact of arrest, detention in custody and interrogation creates a psychological pressure and depression. The shock of sudden arrest, removal from home and family, indefinite detention and coercive and oppressive atmosphere of interrogation creates physical trauma in the detenues. The lack of proper safeguards and accountability against the wide powers of arrest in cognisable

---

43 *See, Shaheli v Commissioner of Police* AIR 1990 SC; *PUDR v Commissioner of Police*(1989) 4 SCC 730; *Rajalakshmi v UT of Pondicherry* 1992 SCC (Cri) 524; *Luithukla v Rishcang* AIR 1989 NOC 182; *Lalitha v DUP, Madras* 1989 Cri. LJ 1732.

crimes is the main cause of concern. If these powers are not exercised properly, it leads to abuse. Therefore, proper accountability is to be built against the powers of arrest in the police process.

Some of the following measures would be able to provide effective checks to balance the exercise of police power like : (a) Intimation of arrest; (b) Documentation of arrest; (c) Review of decision of arrest at police station; (d) Access to third-party like family, friends and legal counsel (e) Central checking team of vigilance staff and (f) Lay-visiting of police stations.

2. Rights to Medical Examination at Police station: It should be made manadatory upon the police in the first place to arrange for a medical examination as soon as possible after a person is taken into custody. No interrogation should take place till after the medical examination.

3. Burden of proof: It is very difficult to ascertain the person who is directly responsible for the custodial death, because of lack of independent eye-witnesses except policemen or co-prisoners. Recognising this difficulty in getting evidence, the then Chief Justice,Cchandrachud pleaded for amendment of law relating to burden of proof. In response to this Law Commission submitted a report recommending for insertion of section 114-B into the Indian Evidence Act to place burden of proof on policemen. It should be accepted and necessary amendments should be brought in law of evidence.

4. Procedure for Investigation: The public have substantial interest and suspicion in custodial deaths due to the fact that the death has occurred in the facades of the police station and immense chances of the facts being suppressed. Therefore, a heavy burden lies on investigative machinery to present an impartial, fair and effective inquiry for determining the circumstances and persons responsible for custodial death.

To install confidence in public mind in the inquiry process the following measures can be adopted. (a) The inquest should be conducted by a Judicial Magistrate rather than an Executive Magistrate. (b) There should be a manadatory judicial inquiry into all incidents of custodial death by a District Sessions judge. The relatives of victims, human rights groups be informed of inquiry and the right to participate and represent.. The legal aid should be provided to relatives of victims to present their evidence. The report of inquest is to be made public and a copy should be provided to relatives of victim and human rights groups. (c) If there is any manipulation in the post-mortem report by forensic expert a stringent action should be taken against him. (d) The post-mortem report should be given within 24 hours of death and a copy should be provided to relatives of victims and human rights groups. The victims relatives and human rights groups right to be present at the post-mortem examination is to be recognised. If the report is in dispute, the right to Post-Mortem by independent panel of doctors should be recognised.

5. Seperate investigation machinery: There is a greater need to establish a seperate, independent agency to conduct investigation into all custodial deaths. This agency, immediately after a report of death should investigate and submit a report within a month.

6. Immunity from prosecution: The sections 197 and 107 of Criminal Procedure Code provides that any act committed by a public servant in discharge of his official duty is protected from prosecution with sanction of government. If prima facie case is made out in the judicial inquiry, there is no need for waiting to get sanction from government. Therefore, sections 197 and 107 of Criminal Procedure Code should be amended with an addition like 'except in cases of custodial crimes'.

7. Compensation: An interim compensation could be provided to relatives of victims if prima facie case is made out. The amount of compensation should be collected from the salary of the individual guilty but not from state exchequer. A new and a comprehensive legislation should be enacted providing some guidelines for award of compensation.

Conclusion

Custodial violence can be prevented only if we institutionalise human rights standards in the police process and this can be achieved only when we change the fundamental aspects of police culture. The most important factor for prevention is organisational accountability. All other remedies will ultimately fail if it is not accompanied by a system of training and supervision of use of force.

PLEA FOR STATE LAW UNIVERSITIES AND OTHER REFORMS IN LEGAL EDUCATION

*Justice M. Jagannadha Rao**

Today, it appears that there are 84 Indian Universities which award Bachelor's degree in Law. It is said there are 464 Law Colleges in all. To the existing number of lawyers who are about 6 lakhs, we are adding roughly 2 lakhs every year. There are about 5,500 Bar Associations throughout the country. We have the second largest number of lawyers in the world, next only to the U.S.A. There is, therefore, every need to properly take care of the standards of legal education in all these 464 Law Colleges and those which may come up in future.

Decline in Standards

The decline in standards of legal education in England was noted and lamented by Lord Bryce as long ago as 1893 in his lectures.[1] In America too, the standards declined after the Revolution in the teaching as well as in the profession.[1a] Standards in Canada in legal education too declined from time to time in 'quality and quantity'.[2] Thanks to various reformatory steps taken in those countries, the position there is much different today.

In our country, Dr. Radhakrishnan observed that 'our colleges of law do not hold a place of high esteem either at home or abroad, nor has law become an area of profound scholarship and enlightened research'.[3] The Law Commission (1958) presided by Sri M.C. Setalvad said:

> *"In the period of about ten years which has elapsed since the publication of the Radhakrishnan Commission, the position in regard to legal education in this country has, it appears, definitely deteriorated."*[4]

In 1968, Prof. P.K. Tripathi said that 'no laborious investigation or profound research is required to establish that things have been far from satisfactory here in the field of legal education and research'.[5] During the period since then, the decline has been steeper. The Upendra Baxi Committee observed in 1989 that the bulk of law colleges suffer from lack of full time teachers, virtual absence of libraries, staggering emoluments, absentee students, mass copying at examinations,

---

* Chief Justice, High Court of Kerala.

1 2 Studies in History & Jurisprudence at 517.

1a E. Allan Fransworth An Introduction to the Legal System of the United States, (2nd ed. 1988).

2 *Report of the Committee on Legal Research*, 34 Can. Ba. Rev. 1000-01 (1956)

3 *1 Report of the University Education Commission*, 257.

4 *14 Law Commission Report* (1958) Vol. 1, Ch. 25 at 522.

5 *10 Journal of the Indian Law Institute* (1968) 483.

inadequate physical and financial resources and in most cases, law colleges are neither recepients of Government grant-in-aid nor the UGC funding.[6]

It must, therefore, be accepted that before and after 1961, when the Advocates Act, 1961 came in, there has been a clear downward trend in the quality of legal education in our country. Perhaps, much argument or material is not required in proof of what we have today. We can see the present with our own eyes.

A question is asked as to how, in spite of these adverse circumstances, the country has been able to produce some of the greatest lawyers and Judges. The Setalvad Law Commission answered referring to these great men that 'their achievements probably arise from their own intellectual brilliance and capacity rather than to the education received by them at the Universities'.[7]

Legal Education Commercialised

It is rather surprising that even in 1958 the Setalvad Law Commission expressed that legal education had become a 'profit making industry', that there is hardly even a pretence of teaching and the situation is 'chaotic'.[8] Between 1958 and 1993, one cannot but say that the chaos continues in its worst forms with all the ills noticed in 1989 by the Upendra Baxi Committee[9]. Justice Ahmadi of the Supreme Court too observed recently in 1992 that by and large, the law colleges have no proper infrastructure, teaching and other facilities or specifications. Today, students can live hundreds of miles away from colleges, get full attendance and degrees too. In *Unnikrishnan J.P. v State of A.P.*[11] the Supreme Court has observed that imparting education cannot amount to 'trade' or 'business' within Article 19(1)(g) of the Constitution of India. Education 'cannot be allowed to be converted into commerce'. Nor can the persons who want to treat it as 'occupation' be allowed to treat it as a business or commercial activity. Imparting education, the Supreme Court held, cannot be a 'profession' within Article 19(1)(g).

Recent Proliferation of Sub-standard Law Colleges

One wonders how recently there is a tremendous spurt in the number of new sub-standard law colleges. I am told reliably that there are at least 22 colleges in Hyderabad city alone. Law colleges in equally large number are established in small local areas and and spread over the length and breadth of the country. Colleges are established in small towns or some district headquarters and some lawyers who have neither professional practice nor teaching experience are employed just to satisfy the minimal requirements under the rules. Students

---

6 *Report of Curriculum Development Committee*, (UGC 1989) at 4 (1.13).

7 *Supra* n. 4.

8 *Ibid.*

9 *Supra* n. 6.

10 Repairing Cracks in Legal Education - Lecture given at Jodhpur, (1989).

11 JT 1993(1) SC 474.

reside hundres of miles away and need not attend classes. In classes with, say, a hundred students, sometimes hardly five or six remain. The spectacle of students not attending classes and teachers not taking classes is the normal phenomenon.

Reasons for spurt in such Colleges

Establishment of law colleges is easy because no laboratories or workshops are necessary as in the case of engineering colleges. There is at least a requirement that medical colleges must be attached to hospitals with a standard number of beds. Expenditure in establishing law colleges is comparatively less. Colleges can be established in sheds and there can be a show of a temporary library to satisfy an inspection team of the Bar Council of India. The Managements are mainly interested in making their profit after meeting the expenses.

The last graduate can get admission

The Bar Council of India perhaps believes that there is nothing wrong in permitting, in any local area, as many law colleges as may perhaps take in, the last graduate in the rank list or the last successful candidate at the common entrance examination, available in any local area. If 22 law colleges exist for Hyderabad city alone, a large number having been sanctioned recently, the expectation of the promoters is that they can take in even the last student who is successful in the common entrance examination. In fact, some of them had admitted students who had not appeared at or even pased the common entrance examination and then, the students moved the Court, obviously at the instance of managements, saying that such admissions were not violative of the law. In some instances, the successful students at the examination have been ousted for by that time the college had its admissions complete (see *P. Venkateswara Rao v Osmania Univesity, Hyderabad*).[12]

It may be that the State Governments of the Universities issue orders for the mere asking of it, for starting new law colleges, but the Bar Council of India has to apply its mind and exercise its powers independently as it has a duty to maintain standards of legal education.

Standards of Education : The Bar Council and the UGC

It will be noticed that the Bar Council of India as well UGC have the duty to lay down and improve the standards of legal education. Both the Bar Council of India and the UGC have the powers of inspection.

Under the Advocates Act, 1961, one of the functions of the Bar Council of India (see S.7(h)) is to 'promote legal education and to lay down *standards of such education'* in consultation with the Universities in India imparting such education and the State Bar Council. Section 27(1)(c)(iii) and (iiia) refer to the 3 year/5 year courses of study. The Bar Council of India may make rules under section 49(d) in regard to '*the standards of legal education* to be observed by Universities

12 AIR 1990 AP 346.

in India and the *inspection* of Universities for that purpose'. Rules have been made in part IV of the Bar Council of India Rules, 1965, dealing with the 'standards of legal education and recognition of degrees in law for admission as advocate'. The University Grants Commision Act, 1956 specifies in section 12 that it is the general duty of the UGC ' in consultation with Universities or other bodies to take all such steps for promotion and maintenance of standards of teaching, examination and research in Universities'. Under section 2(d), the UGC may recommend to any University, the measures necessary for the improvement of University education and advise the University upon the action to be taken for the purpose of implementing such recommendations. Under section 12(e), the UGC may advise any authority, if such advise is asked for, on the establishment of a new University or a proposal connected with expansion of the activities of any University. Section 13 of the UGC Act provides for inspection for ascertaining financial needs of a University or its standards of teaching, examination and research and for causing an inspection of any department and for recommending to the University the action that the UGC requires it to take as a result of inspection.

The respectives roles of the Bar Council of India and the UGC

The respectives roles of the Bar Council of India and the UGC have to be properly understood. The UGC Act 1956, is made by Parliament in exercise of the legislative powers under Entry 66 of List I: 'Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions' (see *Premchand Jain v R.K. Chabbra*[13]). The Advocates Act, 1961 is also a law made by Parliament under Entries 77, 78 of List I which deal with the 'persons entitled to practise before the Supreme Court' and 'persons entitled to practise before the High Courts'. The State Legislatures have passed various statutes in relation to establishment of Universities or other bodies for the purpose of regulating education, in exercise of their legislative powers (previously under List II) under List III Entry 25 (after 1976) which deals with 'Education, including technical education, medical education and Universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I, vocational and technical training of labour'. The State Legislature can also make laws under Entry 26 List III in respect of 'legal, medical and other professions'.

As held by the Supreme Court in *O.N. Mohindroo v Bar Council, Delhi* [14], the Advocates Act, 1961 is passed by virtue of the powers under Entries 77 and 78 of List I which entries carve out the area relating to 'persons entitled to practise before the Supreme Court and the High Courts', out of the legislative powers of the State in entries 25 and 26 of List III.

Adverting to the role of the UGC, the Supreme Court said in *Osmania University Teachers Association v State of A.P.*[15] as follows:

---

13 AIR 1984 SC 981

14 AIR 1968 SC 888

15 AIR 1987 SC 2034

> *"The UGC has, therefore a greater role to play in shaping academic life of the country. It shall not falter or fail in its duty to maintain a high standard in the Universities. Democracy depends for its very life on a high standard of general, vocational and professional education. It is hoped that the UGC will duly discharge its responsibility to the Nation and play an increasing role to bring about the needed transformation in the academic life of the Universities."*

Bar Council only prescribes minimal standards - Universities can prescribe higher standards.

The Bar Council of India, while fixing standards of legal education under S.7(h) of the Advocates Act, 1961 can fix the minimal standards at the entry point and also at the enrolment point. It can fix the requirements at the entry point and say that a University degree is necessary *(The Bar Council of India v Gundimeda Kesavaramayya*[16]). Such minimal requirements fixed by the Bar Council at the entry point are binding on the Universities. But nothing prevents the University from prescribing a higher condition of eligibility *(Sobhana Kumar S. v The Mangalore University).*[17] Similar view has been taken in regard to the corresponding powers of the Medical Council of India under the Indian Medical Council Act, 1956. The Allahabad High Court has held that the Ordinances of a University can prescribe higher standards while the Medical Council prescribes only the minimum standards *(Kum. Darsha Ahuja v University of Agra.)*[18]

Judiciary and Bar must have a say, apart from Universities and Bar Council of India

If therefore, the Bar Council and consequently its Legal Education Committee have only to prescribe the minimal standards and the Universities can prescribe higher standards, it is obvious that the Bar Council cannot be said to be exclusively in charge of the standards of legal education, but is only in charge of prescribing minimum standards. Even that it has to do in consultation with Universities.

In as much as the law student enters the legal profession and may also get into the subordinate judiciary or the higher judiciary, it is necessary that the judiciary and the legal profession must necessarily have a say in the standards of legal education. The Setalvad Law Commission in 1958 quoted the words of a former member of the UPSC to the effect that 'half-baked lawyers, who do not know even the elements of law and who are let loose upon society as drones and parasites' are flooding the country.[19] These students are now let loose on the courts. That is why the judiciary and profession must have a say when the Legal Education Committee of the Bar Council of India lays down the standards of legal education.

---

16 AIR 1972 AP 206

17 AIR 1985 Kar. 223

18 AIR 1982 All. 359

19 *Supra* n. 4

Bar Council of India Rules and the Committee

Rule 4 of Chapter III of the Bar Council of India Rules provides that there shall be a Legal Education Committee. Rule 6 says that the procedure for election thereto is by secret ballot as per rules. Others are co-opted members. Under Rule 8, the Committee shall have the following powers and duties:

a) to make its recommendations to the Council for laying down the standards of legal education for the Universities, b) to visit and inspect Universities and report the results to the Council, ..., d)(i) to recommend to the Council for recognition of any degree in law of any University in the territory of India under S.24(1)(c)(iii) of the Act; and (ii) to recommend the discontinuance of any recognition already made by the Council.

Rule 2(iv) of Chapter VI requires communication to all State Bar Councils the 'decisions of the Council relating to recognition of degrees referred to in Section 24(1) (c)(iii)(iiia)(iv) of the Act' and nothing else, so far as the standards, the norms for recognition or the inspection reports, the periodic reports as to compliance with directives in the reports.

Infirmities of the Legal Education Committee of the Bar Council of India

If the judiciary, the UGC and the Universities and the legal profession do not take interest or are not consulted in the matter of laying down standards of legal education and in the norms for granting recognition and as to the norms of the inspection, it must be assumed that these bodies have abdicated their responsibilities and surrendered themselves to the Bar Council of India, nay, its Legal Education Committee. The responsibility for the continuous decline, at any rate, from 1961 must, therefore, be borne by the Bar Council of India, as stated by Sri F.S. Nariman in his valedictory speech on March 14, 1993.[20] But, there is no purpose in finding fault with the Bar Council of India. The fault also lies with the judiciary, the UGC and the legal profession in abdicating their responsibilities and in remaining wholly complacent or silent spectators to the decline of standards in the colleges. These bodies must realise that by slow or rapid erosion, the very foundations of the judiciary and the legal profession and, therefore, of the rule of law and democracy will be in jeopardy.

Professor Upendra Baxi and 11 other professors of great repute were Chairman and members of a Committee constituted under the auspices of the UGC in 1989. In their report (1989), they had this to say to the Legal Education Committee of the BCI:

> *'Under the (Bar Council of India) BCI Rules, while existing affiliated law colleges have to satisfy the minimum norms prescribed by it, no new law college can obtain recognition unless the BCI inspection*

20 Seminar on Legal Education at Bangalore under the auspices of the Bar Association of India.

team certifies compliance with standards. Neither the monitoring of standards reports for existing colleges nor compliance reports in case of new institutions are published; no one knows the constitution of inspection committees (usually elected members of the BCI, accompanied by a law-teacher member of the committee), the standards actually applied for accreditation, the difficulties experienced by the BCI in insistence on these standards or the bases of formulation and reformulation of standards. There is no five-year audit of the success or failure of the BCI in securing compliance ....."

"In crucial areas, the BCI has not emerged as a strong professional organisation fully able to discharge its statutory responsibilities to promote standards of legal education. Quite notably, it has not been able to assume moral leadership over constituent units from which it is composed; the State Bar Councils....."

"..... The BCI, at any rate, does not perform its statutory role in ways which distinctly promote forces of change and innovation in legal education."[21]

They have also stated:

"The community of law-teachers has usually no access to information concerning who the academic members of the (legal education) committee and panel are, what agenda are discussed, and the quality or representative deliberation. The result is an overall alienation on the part of large majority of law teachers with both these bodies, a result that has substantially impeded action on recommendation of both these bodies, even as they emanate, finally, in terms of the directives of the BCI (Bar Council of India) or the UGC."[22]

This is indeed unfortunate. If the norms fixed, the names of the academicians, their inspection reports etc. are not available for scrutiny, there is no knowing how the committees are functioning.

Nature of defects in Law Colleges

Cases of colleges admitting students even before the formalities for establishing the college are completed are many.[23] Students who have not passed the common entrance examination are admitted by several private law colleges. Colleges are established in temporary buildings with tin or absestoes roof. There is no adequate furniture. There is no library as required. Make-shift arrangements are made with law book sellers for making a show of existence of a library. Books

---

21 *Report of the Curriculum Development Centre in Law* (UGC) at 8 (1989).

22 *Ibid* at 63-65.

23 *P. Venkateswara Rao v Osmania University, Hyderabad,* AIR 1990 AP 346.

are later returned to the book sellers for good. The students do not attend classes regularly. Hardly 5 to 6 are present in a class. Several staff members do not take up their allotted quota of classes. Notes are given in cyclostyled sheets for the students to have short cuts. Several students would have never known the names of standard text-books even of Indian origin let alone of England. Students are allowed to live hundreds of miles away, and sometimes in another state and get their attendance. A student can secure a degree by attending the college only thrice - once at the time of admission, once when he gets the hall-tickets for the examination and finally at the time of the examination. Then they are ready for being ushered into the law courts, not necessarily in the lowest court but even in the highest court at Delhi. What is stated above is the normal situation. The good colleges are the exceptions.

The National Law School, Bangalore

In the midst of this decline, it is heartening that the Bar Council of India Trust with the help of the Karnataka State has established the National Law School of India University with a 5 year course. Today, it almost the best institute in the country comparable to other good institutions in other countries.

Reforms did not always start with Bar Council of India (2 year to 3 year Course)

Dr. C.D. Deshmukh, the then Vice Chancellor appointed on April 20, 1963, a Committee ' to study the problem of legal education in the University of Delhi and recommend the lines of re-organisation'.[24] The Committee was headed by Chief Justice P.B. Gajendragadkar and included Members of Parliament, the Bar and the teaching professions in India and in United States of America. The Committee also obtained, at first in writing and later through oral discussion, the views of 'fifteen representative persons' on the basis of a questionnaire and two working papers circulated earlier for this purpose. After due deliberation, the Committee made recommendations of far reaching import calculated to revolutionise the methods of teaching and examination at the law school, and to set the school on the road to achieving the dream of international excellence. Important steps were then taken to implement the spirit and the recommendations of the Gajendragadkar Report by the Law School in Delhi.[25] The two-year course became a three-year course on semester basis with compulsory/optional papers.

Later Dr. D.S. Kothari, Chairman, UGC appointed in 1969 a sub-committee on Legal Education headed by none else than Dr. P.B. Gajendragadkar, formerly Chief Justice of India and the author of the 1964 Report (for Delhi University) for reorganising the system in all law colleges. This Committee, which had a three-year term, made important recommendations, which were later accepted and

24 *See*, P.K. Tripathi "In the quest for better legal education", *Journal of the Indian Law Institute*, 469 at 484 (1968).

25 *Report of the Committee on the Reorganisation of Legal Education in the University of Delhi* (1964).

adopted by the Bar Council of India.[26] As a result, the number of required subjects was reduced to ten (rather than eighteen in the Delhi University) and the Universities were left free to add to the list of optionals listed by the Bar Council. Also, rigid prescriptions in regard to minimum hours of class-room instruction, working days in the year, maximum number of students in a class were made and qualifications of teachers were relaxed and a workable degree of flexibility introduced. The Committee of 1969 headed by Chief Justice Gajendragadkar was composed entirely of law-teachers. It was during this period that the Bar Council of India switched over from the two-year course to the three-year course.[27]

Reform I: Cases for a continuous body to monitor legal education and recommend to Bar Council of India

The problem of taking the revolution to all the law schools in the country is a staggering one. Yet a beginning has to be made somewhere. In a modest but determined way it was started on April 5, 1968 when, at a meeting held under the Chairmanship of Chief Justice Hidayatullah and attended by Judges, lawyers, Ministers of the Union Government, representatives of the Ford Foundation and the International Legal Centre, legal educators, government officials and legal researchers, it was decided to found a society to be named the 'Council for Advancement of Legal Education.

The details were to be worked out. The meeting was attended by Dr. Douglas Ensminger, representative of the Ford Foundation in India, and Dr. John Howard and Mr. Peider Konz of the International Legal Centre, New York.

But, today, the Legal Education Committee of the Bar Council which consists of members of the Bar Council and a few academicians, does not have the assistance or guidance of any committee of the stature of the Gajendragadkar Committee or the Council for Advancement of Legal Education established, at one time, by Chief Justice Hidayatullah, Judges, Senior Law Officers, Vice Chancellors, UGC members and top-most academicians have to guide the Legal Education Committee. The UGC too cannot absolve itself of its responsibility in maintaining the standards of legal education and it must give funds to the Universities for the purpose of legal education. The Upendra Baxi Committee (1989) has stated that so far no UGC funds are given for the purpose of legal education. Similar societies or bodies to help and guide legal education were repeatedly tried in all countries.[28]

Therefore, it will be for the Chief Justice of India, as the head of the Judiciary to revive the 'Council for Advancement of Legal Education', appoint members thereto from various fields and bring about sufficient outside control over the Bar

---

26 *Supra* n. 24. *See also,* Russel B. Sunshine & Arthur L. Berney 'Basic Legal Education in India', *Journal of the Indian Law Institute,* p. 39 at 40 (1970) .

27 Resolution of 1966.

28 *See,* L.C.B. Gower, "English Legal Training", 13 *Modern Law Review* 137 (1950).

Council of India and its Legal Education Committees. The UGC is statutorily authorised to consult other bodies for the purpose of maintaining the standards of legal education. The Legal Education Committee of the Bar Council of India should have proper and effective guidance for, as had been pointed out earlier, it can only lay down minimum standards and there is no bar for the UGC or the Universities to lay down higher standards on the basis of any recommendations made by Committees appointed by the UGC, such as the two Committees chaired by Chief Justice P.B. Gajendragadkar.

Reform II : Plea for a single Law University in each State

If there are today 84 Universities and 464 Law Colleges in the country, it will be difficult to introduce reforms by amending various statutes made by the Legislatures which have established the Universities and also to amend the various statues of the Universities. It will be, in my humble view, easier to handle a smaller number of universities in the country on the basis of one Law University for each State. Introduction of new norms, procedures and management systems will be easy if there is a single Law University in each State. Rationalisation and harmonising of the system will also be easy. Weeding out or derecognising some colleges (by resort to Section 21 of the General Clauses Act) can be resorted to by the Bar Council of India which has power to grant recognition. It must, by implication, have the power to de-recognise a single Law College. There is no need to de-recognize the degrees granted to all law colleges in any particular University for the sake of taking action against a single college.

Today, in several States, colleges imparting particular professional education, have been brought under a single University. We have, in some States, a Medical University, a Technological University, an Agricultural university and so on and so forth. Having regard to the need for urgent and drastic reforms, it will be convenient to bring all law colleges in a State under a single University. The UGC, the Bar Council, the Judiciary, the Legal Profession and the Academicians must examine this proposal. I do not find any difficulty in implementing the same as in the case of medical, engineering or agriculture (and veterinary) sciences.

Reform III : Common entrance examination

There must be a common entrance examination for entry into each law college and this system has been legally upheld and is in vogue in several Universities already. This will help in eliminating the differential standards in various Universities.

Reform IV : 5 year/3 year course

The Bar Council of India had suggested a 5 year course and advised the closure of 3 year study altogether. This was not fully implemented. Some Universities have opted for 5 year and some for 3 year. The Rajasthan University is, it appears, reverting back to 3 year course. Parents and students too are not all

for abolition of 3 year course. Therefore, both courses could stay. Suitable changes in the syllabi has to be made to conform to both types of courses.

Reform V : Method of teaching - Less marks for theory and more marks for Practical questions

The Setalvad Law Commission in 1958 pointed out that students today cram their memory with cheap guides and other small devices.[29] The so-called teaching imparted at institutions of this character is followed by law examinations held by the Universities, many of which are mere tests of memory and poor ones at that - which the students manage to pass by cramming short summaries or catechisms published by enterprising publishers. Full time class study has been, in point of fact, reduced to an unwholesome type of distance-education, students living hundreds of miles away and yet getting required attendance. Teaching standards and methods must change.

With a view to compel students to attend classes, no other system of compulsion can succeed than one which makes the student feel that if he does not attend the classes he will fail in the examination. Cramming the memory can be minimised and copying totally excluded by adopting a practical oriented system of teaching and examination. The marks at each semester available for each subject must be such that the theory marks are limited to 40% and the practical part having the remaining 60% with a separate minimum for the theory and practical in each subject. This is the pattern in medicine and perhaps engineering too. There must be a National Question Bank not only to cater to the case-method but also to the problem-method and this system will not only improve attendance and thereby the quality but may also soon eliminate sub-standard colleges which are not able to impart this system of teaching.

That brings one to the case-method and the problem-method. Today, in the field of legal education, all over the world, these two systems have come to stay and it is unfortunate that except perhaps in Delhi, Bangalore, National Law School of India University and a few other colleges, this system has not been introduced.

***Reform VI :* (A) Case-method**

The introduction of the case-method came with the publication in 1871 by Prof. Christopher Columbus Langdell.[30] His principal achievement as professor and later dean was the introduction of the case-method of instruction. There are collection of judgements of the superior courts, for use of students. He had concluded that the shortest and best way of mastering the few basic principles on which he thought the law to be based was by studying the opinions in which they

---

29 *Supra* n. 4 at 253.

30 C.C. Langdell (1826-1896) was a New York lawyer who became professor of Law at Harvard Law School in 1870.

were embodied. The students are to study the cases before the class starts and the professors/students have discussions in the class. A class may contain even 100 students as in U.S.A. but this system is still adopted as suitable.

> *"So it is that the American Law student still finds the case method the basic pattern in most large classes, which may number over a hundred students, and is expected to spend two hours reading case-books in preparation for each hour of most of twelve to fifteen hours of class per week."*[31]

The case-method system has undergone considerable modification since the publication in 1914 of Redlich's famous Report on it for the Carnegie Institute. Prof. Laski had also commended this method.[32] In England, though the case-method is followed, the case-books are not published as in USA in large numbers, but it is a teacher's own individual collection. Dr. Kahn Freund has attributed the differing outlooks of the Continental and English lawyer to the fact that the former is trained in the University to rely on abstract principles of logic while the latter is trained in the school of experience to treat each case on its merits.[33] The case-method is a system "forged between the hammer and anvil of opposing counsel in the cause of the trial of actual controversies in court."[33-A]

Prof. P.K. Tripathi has referred to this system in detail,[34] as suitable in India too. This method stirs up the thinking process.

(B) Problem-method

Critics of the case-method have suggested the problem-method also to be part of the curriculum. The case-method involves decided cases whereas the problem-method deals with hypothetical problems. This method has the advantage of approximating and stimulating legal practice, presenting a realistic challenge to the students' mind and mitigate the rigour of compartmentalisation. The Notre Dame School, Ohio Law University and several other schools have adopted it. Its proponents are Prof. Carl Llevellyn and Judge Jerome Frank.[35]

(C) Other methods

Moot courts have now, of course, become part of programmes in most law colleges and the tremendous interest shown by the students in these is a clear indication of the real interests of the students. *Mock trials* are also conducted in some Universities such as the National Law School of India University. Legal

---

31 *See*, E. Allan Farmsworth, An introduction to the Legal System of the United States (1988).

32 *Supra* n. 28 at 187.

33 *Ibid* at 188.

33-A *Ibid.*

34 This method has also been referred to by Justice Ahmadi of the Supreme Court in his Jodhpur Lecture (1992).

35 *See, supra* n.24

clinics, legal aid programmes involving law students will also generate genuine interest in the subject and its practical applications.

Reform VII : Legal ethics etc. to be compulsory subjects

There can be no doubt that legal ethics, etiquette and judicial ethics must be a compulsory subject in all Universities perhaps requiring higher minimum pass marks than all other subjects.

Conclusion

The main conclusions are that the standards of legal education have declined fast, there is undue proliferation of law colleges on account of the commercialisation of legal education, that the Bar Council of India and its Legal Aid Committee lay down only minimum standards and the UGC and the Universities can require higher and better standards to be obtained. The other proposal is to have a single Law University in each State bringing within its purview all the law colleges in the State. Further, the examination system must be revamped by having a common entrance examination. The semester system must prescribe more marks for practical-oriented problems based on case-method and problem method and lesser marks for theory. There should be a separate minimum for theory and practical questions in each subject. The case-method and the problem-method should be rigorously introduced so as to improve the quality. This would automatically eliminate absenteeism and result in winding up of sub-standard colleges. The Bar Council of India and the UGC must conduct inspections, periodically monitor the standards and publish their reports. The Bar Council of India and the UGC must work in co-ordination. They must be guided by a 'National Council for Advancement of Legal Education' presided over by the Chief Justice of India and other judges, academicians, lawyers, senior law officers, UGC members etc. and should continously aid the Bar Council of India and the UGC to maintain superior standards. The UGC must give substantial aid to law colleges and Law Universities. The Legal Education Committee of the Bar Council must be suitably revamped by taking in the nominees recommended by the Chief Justice of India and by the UGC. It must not recommend recognition to a college merely because of orders of the State Government or the University. It must de-recognise colleges (by resort to S.21 of the General Clauses Act) which are sub-standard. Professional ethics, etiquette and judicial ethics must form a compulsory subject in legal education.

I hope and trust that the Bar Council of India, the UGC, the Bar Associations and the Judiciary will come forward to revolutionise the present system of legal education soon.

(1994) 6 NLSJ 73

SOCIOLOGY OF LAW: MULTI-DISCIPLINARY APPROACH

*Prof. K.C. Gopalakrishnan**

> *"As a discipline, the Sociology of Law has for a long time been seen to be marginal to both Law and Sociology. Whilst this was not originally so in the case of Sociology, the Sociology of Law has for far too long been seen, to use Talcott Parson's phrase as 'an intellectual step-child".*

1. Introduction

Multi-disciplinary approach to law has become part of the curriculum in the study of law in many countries. It is realised that law in the text-books and its external operations in the society (law in the field) are different, and unless the influence and interaction of socio-economic forces in the society with law is understood, the knowledge of law will not be complete. It is aptly observed by Prof. Moore (of Harvard University), "Today social scientists approach law with a distilled and selective recombination of many of the classical ideas of 19th and early 20th century scholars."[2]

Because of this multi-disciplinary approach, two trends have emerged in legal studies. First, economic dimensions and consequences have loomed increasingly large in the study and evaluation of legal norms. The 'costs of justice and nature of access to justice' have become major issues. The high flown values that legal principles expressed are examined by legal economists in the light of their efficiency and their social effect and not just their self-defined moral content.[3] Secondly, the role of law in relation to discussions and conflict, cultural, pluralism and class stratification is an increasingly urgent question to be studied.

The interface of Sociology and Law was greatly advanced by Max Weber in his book on Sociology of Law. His was an universal approach linking law with social, economic and political factors on a scale not attempted before. Based upon a comparative survey of Roman, Islamic, English, German, Chinese, Buddhist, Jewish and numerous other legal systems, it broke through the traditional boundaries of legal studies and sought to analyse the transformation of law from its original mystical or given state to the stage of rationalisation.[4] Prof. Roscoe Pound,

---

* Professor of Legal Economics, NLSIU, Bangalore.

1 Weeramantry, An Invitation to Law 72 (1982).

2 Sally Falk Moore, The Sociological School: The Social Science Encyclopedia 448 (Adman Jessics Kuper et al. eds., 1985)

3 *Ibid. See also*, K.C. Gopalakrishnan, "The Interaction and Interface of Economics and Law," I *National Law School Journal* 55 (1989)

4 *Ibid.*

through his 'Sociological Jurisprudence', helped to link sociological and legal studies by insisting on the study of the actual effects of legal principles in society, by pointing the importance of sociological study as a prelude to legislation and by emphasising the importance of studying the operation of legal principles and institutions in the past.

As a result, the importance of socio-legal research to provide lawyers and legislators with means of factual material on matters previously left to imaginative surmise is felt in the academic circles and methods of socio-legal research form part of the regular course of instruction of some law schools and are indispensable for the researcher, especially in the area of law reform.[5] In this field of social-legal research, two approaches have been identified. One is *social problem-social engineering* approach that proceeds from the assumption that law is a consciously constructed instrument of control which has the capacity to shape society and to solve problems, an instrument which can itself be reformed and perfected towards the end. Research is oriented to serve these practical purposes. The other is *social context* approach which assumes that law is itself a manifestation of the existing structure (or past history) of the society in which it is found and tries to know, understand or explain its form, context, and institutions by showing contextual connections. Thus, instead of just one 'social science approach' to law, there are many.

The purpose of this article, however, is not to analyse, much less to discuss in detail the above research approaches, but to broadly review the importance of sociology and its discipline: sociology of law. Only one aspect of sociological problem, 'White Collar Crimes' will be discussed in detail.

2. Social Problem and Approaches

The basic problem in any society is to satisfy their desire for consumption with scarce resources. However, this process of allocation of scarce resources to competing claims depends on the society - structure, beliefs, mores, etc. Therefore, the society has to define the basic concepts like property rights, principles of production and distribution, use of means of production and regulation of the above process. In defining and interpreting the above, the social sciences differed because they looked at it from a different angle and in a different way. An economist looks from the point of view of individual, the sociologist from society's point of view, a lawyer from the point of view of how laws (legal rules) are applied in the society. For example, "The poor in India may be found dead of starvation besides perfectly healthy and edible cattle... A far eastern woman may have her head severed for going to bed with a man before marriage... Each of these instances involve norms - rules defining appropriate and inappropriate ways of behaviour."[6]

There are broadly three types of norms: folkways, mores and laws. These three types of norms vary in their importance within a society, and their violation

---

5 *Supra* n. 2

6 Ion M. Shephard, Sociology 63 (1981)

is tolerated to different degrees.[7] Folkways are informal and violations are not taken seriously because conformity to folkways is generally a matter of personal choice, but conformity to mores is required of all members of a society.[8]

As the society advances in economic prosperity, laws occupy a prominent place because laws are norms that are formally defined and enforced by certain designated persons. Laws, through sanctions, regulate the activities in the society. Sanctions are rewards and punishments used to encourage socially acceptable behaviour. Formal sanctions are normally given by officially designated persons (such as judges, quasi-judicial authorities, etc) and range widely in their forms and severity. For example, "A Saudi Arabian man convicted of rape may be buried upto his waist in sand and stoned to death with small rocks to prolong his torment. A college professor may give failing grades to some students... formal sanctions may be positive. A soldier may be awarded a State medal for heroism in a battle and a professor may reward some students with A s."[9]

However, to be effective, laws must be in conformity with the prevailing mores or else they are doomed to failure. An excellent example is the 18th amendment in the U.S. (popularly known as prohibition law) which failed. As observed by Prof. Samuel Koeing: "In a narrow minded or bigoted society, a similar fate would overtake an attempt to eradicate anti-negro bias or anti-semistism by merely passing a law. A lot of preparation of conditioning would have to be done prior to their being effectively outlawed."[10]

But if the mores are in the process of disintegration and a majority of the people no longer hold to these mores or are ambivalent about them, then laws against these mores will succeed since the governmental efforts will be mostly a matter of forcing the reluctant ones to accept the new legal way, which in time they do (e.g., U.S. Supreme Court outlawing racially segregated schools in the U.S.A.)[11].

In this context, seven conditions have been identified which are necessary to bring about social change through law:[12]

The first condition is that the rationale of the new law should be authoritative and prestigious. The second condition is that the rationale of the new law should clarify its continuity and compatibility with existing institutionalized values. The third necessary condition is the use of models or reference groups for compliance. The fourth condition is that the law should make a conscious use of the element of time in introducing a new pattern of behaviour. The fifth condition is that the enforcement agents must themselves be committed to the behaviour required by

---

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 Samuel Koeing, Sociology 47-48 (1968)

11 *Ibid.*

12 The Sociology of Law: A Social Structural Perspective 560 (W.M. Evan ed., 1980)

the law, even if not to the values implicit in it. The sixth condition is that as resistance to a new law increases positive sanctions are probably as important as negative ones. The seventh and final condition under which law performs an educational function is that effective protection be provided for the rights of those persons who would suffer if the laws were evaded or avoided.

3. Sociology of Law

In order to study the phenomena of how laws through sanctions work in a society, a new branch of sociology , Sociology of Law, has developed. Sociology of Law concerns itself with formalized social control or with the processes whereby members of a group achieve uniformity in their behaviour through the rules and regulations imposed upon them by the society. It enquires into the factors that bring about the formation of regulatory systems as well as into reasons for their adequacies and inadequacies as a means of control.[13] Sociology of law, therefore, examines the normal problems of society and how they are solved through law. The first step in understanding this is to identify the social problems. Broadly, they are:[14]

i) Scientific or societal - an analysis of the various phenomena of social life; and

ii) Ameliorative or social - a study of 'abnormal' or 'pathological' situations or mal-adjustments with the aim of ameliorating or of eliminating them(e.g., crime and delinquency, race conflict, poverty, divorce, etc.).

Prof. Harold Phelp classifies the social problems under four main categories corresponding to the major sources:[15]

i) Economic sources: poverty, unemployment, dependency, etc.

ii) Biological sources: physical diseases and defects.

iii) Psychological sources: neuroses, psychosis, feeble mindedness and suicide, maladjustments, etc.

iv) Cultural sources: problems of the aged, the homeless widowers, desertion, illegitimacy, racial and religious conflicts etc.

The above problems overlap and do not belong exclusively to any one category. However, Sociology of law is primarily concerned with deviance in the society. Deviance is a behaviour which contravenes social norms. Conforming behaviour is identifiable because it satisfies group expectations and does not violate norms; but identifying deviant behaviour is difficult because societal norms vary from group to group and with the passage of time. Deviance arises

---

13 *Supra* n. 10 at 4

14 *Ibid* at 302.

15 *Ibid* at 304.

when some people violate legal rules (robbing banks, committing murder, rape, etc), others violate informal rules (insulting others, not fulfilling promises, etc). Crime has become the most important type of deviance and a major problem in any society.

4. Crimes with reference to White-Collar Crimes and Approach of Law

Why should some people commit crimes knowing that it is a deviance from social norms? Most of the people desire to reap society's rewards, if possible through legal means, and if forced through illegal methods. Some criminals see their deviance as simply a way of making a living, one that is much more economically rewarding than other jobs they would get. Crime provides the money for living in the style they prefer. Dope dealers can get rich quickly and most prostitutes know that nobody in the straight world will pay them as much an hour as they make in their illegal trade. In other words, many criminals realise that criminal activity is the means of obtaining a greater share of a society's reward than they would otherwise earn. [16]

There are broadly three major types of explanations of deviance: biological, psychological and sociological factors. I will confine the discussion only to sociological factors. Sociologists have identified three broad theories of deviance: 'Anomic theory', 'Differentiated Association theory' and 'Labelling theory'. Each theory explains a particular aspect of deviance. According to Anomic theory, deviance is mostly likely to occur when there is a discrepancy between culturally prescribed goals and legitimate (socially approved) means of obtaining them.[17]

The "differentiated association theory" developed by the Chicago School, states that crime and delinquency are most likely to occur among individuals who have been exposed to more unfavourable attitudes towards the law than to favourable ones.[18]

The "labelling theory" elaborates the relativity of deviance. In the words of Howard Becker, who developed this theory, "Social groups create deviance by making the rules whose infraction constitutes deviance and by applying these rules to particular people and labelling them as outsiders. From this point, deviance is not a quality of the act the person commits but rather a consequence of the application by others of rules and sanctions to 'offenders'. The deviant is the one to whom the label has successfully been applied; deviant behaviour is behaviour that people so label."[19] This explains why unmarried pregnant girls are labelled as deviant and the men who are responsible for pregnancy are not labelled as deviant because our ideas about sexual behaviour and their responsibilities

---

16 *Supra* n. 6 at 174

17 *Ibid* at 159.

18 *Ibid* at 160.

19 Howard Becker, Outsides 9 (1963).

are different. This theory also explains why a rich class youth who steals a car may go unpunished on the plea that he borrowed the vehicle, whereas, a poor boy will be labelled as criminal and sentenced for stealing.

Therefore, the accepted view from the sociology of law perspective is that crime is an indicator that something is wrong with society. Its social function is to act as a notification of maladjustments, just as pain is a notification to an organism that something is wrong, so crime is a notification of a social organisation.[20]

The study of crime has attracted different intellectual and occupational enterprises and for different reasons. Broadly five types of contributions to criminology can be identified:

i) Those persons who are directly involved in daily programmes of crime control - Police Commissioner, Prison Administrator, etc.;

ii) Those who train persons for professional roles in crime processing or training or control faculty of schools of police, correctional administration, etc.;

iii) Those whose are involved in policy research with a correctional or crime control system - the research staff of a State or Federal agency, etc.;

iv) Those whose primary allegiance is to a particular academic discipline such as sociology but who typically apply the discipline to problems of crime and its control; and

v) Those whose, contribution to criminology comes essentially as side products of their primary pursuits within an academic discipline - psychologist who studies delinquents in order to learn about conscience developments or aggression.

I will restrict the discussion only to sociological criminology, crime as a social phenomenon, i.e., interrelationships between the three subject areas of criminal law, criminally defined behaviour and social and control reaction. In the modern world, there are broadly two types of white-collar crimes: Crime in Business (Occupational crime) and the Business of Crime (Organized crime). In both the cases, crimes include:[21]

i) Illegal activities in the course of legal activities i.e., embezzelement, fraudulent mis-appropriation of public funds, illegal tax evasion, patent infringements, fraudulent damage claims, misrepresentation in the labelling and packaging of foods and drugs, etc.

ii) Business activities and enterprises organised for the explicit purpose of making economic gain through criminal activity i.e., extortion of money and services from various businesses and organizations, gambling,

---

20 Edwin Sutherland and Donald R. Gresner, Principles of Criminology 24 (7th ed., 1966)

21 *Ibid* at 176-177

> prostitution, narcotics, illegal control of legitimate businesses, loan companies, real estates, labour unions, etc. However, in capitalist oriented societies like the USA (and for that matter, India also) these crimes are not treated in the same way as Blue Collar crimes (murder, dacoity, etc) in comparison to other crimes of businessmen, because these crimes are part of a competitive economic order and are so prevalent that there is practically no business or profession which does not have this racket and that frequently it is possible to obtain more crime news from the financial newspapers than from their front pages.[22]

Prof. Edwin Sutherland who studied systematically white collar crim,e defines it as "Crime committed by persons of respectability and high social status in the course of their occupations. Such crimes include bribery, corruption in business and politics, misconduct by professionals such as doctors, lawyers, the breaking of trade regulations, food and drug laws and safety regulations in factories, the misuse of patents and trademarks and misrepresentation in advertising".[23] White collar crimes are part of the economic system. Even the law enforcement agencies support this feature broadly in three ways:[23]

i) By selecting members of the subject class and punishing them as individuals, it protects the system which is primarily responsible for their criminal deviance;

ii) Imprisonment of selected members of the subject class legitimately neutralises opposition to the system; and

iii) Defining criminals as animals and misfits and enemies of the state providing a justification for incarcerating them in prisons.

Therefore, as observed by Prof. Sutherland, the sociological study of white collar crime provides support for the view that there is one law for the rich and another for the poor and that there is a consistent bias involved in the administration of criminal justice under laws which apply to business and the professions and which therefore involve only the upper socio-economic group.[24] This situation is summed up by Willey Gutton, a professional bank robber, who stated: "others accused of defrauding the government of hundreds of thousands of dollars merely get a letter from a committee in Washington asking them to come in and talk it over. May be it is justice but it is puzzling to a guy like me".[25]

The Law Commission of India, after noticing the soft justice syndrome for white collar crimes recommended: "Suggestions are often made that in order that the lower magistracy may realise the seriousness of some of the social and

---

23 M. Haralambos, Sociology, Themes and Perspectives 427 (1980). *See also*, The other side of Development 135-137 (K.S. Shukla ed., 1987) White-Collar crimes are also called 'privileged class deviance', 'crimes of the powerful', 'official deviance' and 'offences beyond reach of the law'. The sixth U.N Congress on Prevention of Crime mentions this brand of criminality.

24 Edwin Sutherland, White Collar Crimes (1960)

25 M.B. Grinard, Sociology of Deviance Behaviour 266 (4th ed., 1974)

economic offences, some method should be evolved of making the judiciary conscious of the grave damage caused to the country's economy and health by such anti-social crimes... It is of utmost importance that all the state instrumentalities involved in the investigation, prosecution and trial of these economic offences must be oriented to the philosophy which treates these economic offences as a source of grave challenge to the material wealth to the nation."[26]

The classic case decided by the Supreme Court regarding white collar crime is the case of *M.H. Hoskot v State of Maharastra*.[27] The petitioner, a reader in a University, was charged with the offence of attempting to concoct degree certificates of the University and was found guilty of the grave offences under Sections 417, 467, 468, 471 and 511 of the Indian Penal Code. However, the trial court sentenced him to simple imprisonment till the rising of the Court and a fine on the grounds that he belonged to a middle class family and the modern emphasis is on the corrective aspect of punishment which cannot be ignored and the public prosecution has no objection to the light sentence. On appeal, the High court enhanced the punishment and imposed imprisonment for three years.

On reference to Supreme Court, the Court inter-alia observed: "The appellant was beyond economic compulsion of making a living by criminal means. It is therefore surprising that the public prosecutor should have on behalf of the state considered that the administration should view sternly white collar offenders and should not abet them by agreeing to a token punishment. In the present case, the trial court has confused between correctional approach to prison treatment and nominal punishment in serious social offences. Soft sentencing justice is gross injustice where many innocents are the potential victims."[28] The Court further observed: "We are scandalised by the soft justice system vis-a-vis white collar offenders. It stultifies social justice and camouflages needed severity with naive leniency."

Empirical studies on white collar crimes reveals that in the fiscal field soft justice syndrome is widespread and has the blessings of the judiciary. Tax evasion and tax avoidance results in loss of revenue, and the defeat of other fiscal objectives. However, the judiciary, while condemning tax evasion has justified tax avoidance on the ground that it is equal in as much as a tax payer takes advantage of loopholes in the tax law. For example, Viscount Summor in the case of *Levene v CIR*,[29] has summed up the British view: "It is the trite law that His Majesty's subjects are free, if they can, to make their own arrangements so that their cases may fall outside the scope of the taxing acts. They incur no legal penalties, and strictly speaking, no moral censure in having considered the lines drawn by the Legislature for the imposition of taxes. They make it their business

---

26 47th Report of Law Commission of India.

27 *M.H. Hoskote v State Maharashtra* 1978 SCC (Cri) 469.

28 *Ibid.*

29 James Coppield, The Tax Gatherers 99 (1960).

to walk out of them. The courts in the U.S.A. have taken a similar approach. It has been categorically stated that "there is nothing sinister in so arranging one's affair as to keep taxes as low as possible.... for nobody owes any public duty to pay more than the law demands; taxes are enforced extractions not voluntary contributions."[30] Similar sentiments have been echoed in India also.

White collar crime continues unabated even though the socio-economic consequences of tax avoidance have been catalogued by the experts and committes. The Royal Commission on Taxation in Canada (Carter Commission) has given the following reasons in condemning tax avoidance:

i) Loss of revenue to the Government (the amount is difficult to estimate);

ii) The fruitless expenditure of intellectual effort by some of the best lawyers, accountants, and administrators in the economically unproductive tax avoidance battle;

iii) The sense of injustice and inequality which tax avoidance raises in the breasts of those unable or unwilling to profit by it;

iv) Deterioration of tax morality. If tax payers generally form the notion that tax avoidance is accepted practice the system of self-assessment may break down; and

v) Shifting of tax burden to honest tax payers.[31]

5. Conclusion

Inspite of the studies by various committees, social toleration of white collar crimes (especially in the fiscal field) continues in non-socialist countries including India. Therefore, it is not surprising that white collar crimes (or privileged class deviance) have not received an in-depth examination and analysis even in academic circles. However, in India, some studies on white collar crimes and other forms of privileged class deviance have been made with reference to actual crimes and their impact on socio-economic development in India. Prof. Pande, after a detailed analysis of this problem concluded that:[32]

1. In the post-independence era, there has been a marked increase on the incidence of privileged class deviance of diverse kinds;

2. This class of deviance differs from ordinary deviance in terms of motivation and social manifestations;

3. It is more harmful and socially more reprehensible;

4. Normally beyond the reach of law;

---

30 Jeff A. Schneffer, How to Pay Zero Taxes 405 (1985)

31 Government of Canada, Report of the Royal commission of Taxation (1966).

32 The Other Side of Development 157-158 (K.S. Shukla ed., 1987).

5. There is a need for proper identification of its multiple forms and their social ramifications;
6. Urgent need to explore the ways and means of effectively coping with, through law and other forms of control, the existing and the emerging patterns of privileged class deviance;
7. There is need for designing the enforcement process with a view of achieving fool-proof identification, apprehension, prosecution and trial of deviants;
8. Need to redefine the sentencing policy and refashion the sentencing techniques in relation to the privileged class deviants.

Each of the above observations can be the starting points of research at conceptual level and thorough empirical investigations for the students of Sociology of Law.

INDIAN LEGAL RESEARCH: AN AGENDA FOR REFORM

*Gurjeet Singh**

Research is the most pressing need of the day for India as it has been regarded as the basis for any developing country. It can make our society better and lead to an all round advancement. But despite the fact that research institutions have multiplied during a short span of time, the general standard of research, especially that of legal research has not shown much noticeable improvement. The requirement of a doctoral degree for recruitment or promotion to a teaching post without an adequate emphasis on the quality of research and its proper evaluation has led to large scale registrations for this degree. Most researchers have neither the necessary equipment and infrastructure nor the required aptitude and skill for research.[1] And many supervisors consider it a feather in their cap by simply having a large number of students registered under them even when some of them opt for registration just to stay on in the university for some more time.

In most cases, there is neither a fresh approach towards the subject nor originality of interpretation, nor evidence of critical and sound judgement, nor even a broad acquaintance with the field of research. Yet most of such dissertations and thesis somehow get approved for a post-graduate and doctoral degree, enabling the candidate to acquire the requisite qualifications and licence to teach even the senior most classes and to guide research themselves. Therefore, those who are genuinely interested and also do meaningful research are hardly given the due credit for their endeavours, thanks to the prevailing ethics in our universities and academic institutions. Thus the universities and law schools are presently facing a crisis of confidence and character.[2]

The present paper highlights the drawbacks and inadequacies of Indian legal research. An attempt has also been made to suggest remedial measures for improving the quality and enhancing the status of legal research in our law schools and university departments. The author got an opportunity to visit the United Kingdom recently in connection with the selection for the Nehru-Centenary British Commonwealth Fellowship in the field of law and is at present engaged in socio-legal research at the University of London. Thus the relevant comparisons between the state of legal research in India and the United Kingdom have also been incorporated at appropriate places in the body of the present paper.

Every branch of knowledge has got its own particular language and technical jargon. Law is no exception. As such, a scholar engaged in legal research is

---

* Lecturer in Law, Guru Nanak Dev University Regional Centre, Adarash Nagar, Jalandhar. Presently doing research at the Department of Law, School of Oriental and African Studies, University of London, London.

1 S.M. Shukla, Fundamentals of Research in Commerce Management And Economics 2(1989-90).

2 *Ibid* at 3.

expected to follow that particular style and language. In this way his writing can be followed by an average reader as well as the professionals in the field. However, most of the researchers at the doctoral level and post-graduate level simply ignore this fact. They resort to compilation in the name of research. Taking verbatim note of paragraphs and sometimes even number of pages from the books journals and articles and arranging them in accordance with their convenience, without acknowledging even the sources and also without expressing their own viewpoint, is, for these researchers, a research. And especially the so called research carried out by the researchers engaged in inter-disciplinary research who have citations from here and there without any uniformity in their writing, is nothing but plagiarism.

In the United Kingdom, the first thing that a post-graduate or a doctoral student may get is a list of useful reference works on guiding how to write good English[3] and also on effective writing.[4] This being the preliminary step, a research scholar may get confident of research writing once he goes through these references. This step is essential, not only for the overseas students from all over the world who join the British Universities every year, but is advisable for any research scholar. This step is immensely useful and enables the research scholars to write in a uniform, coherent and effective style.

In India, it is difficult to find this practice even in the most advanced law schools or the university law departments. Therefore, it is suggested that as and when a candidate starts working for his LL.M dissertation or gets registered for a Ph. D degree, he should be asked to follow this preliminary step. This will not only bring uniformity into the research writings, but will help producing original works in the field of legal research.

The type of methodology adopted for research work is not only important but is most essential. Without adopting a proper methodology, reliable research work is not possible. It is a matter of common observance that in our law schools, much emphasis is not laid on following an appropriate methodology by the students at least at the LL.M. level. Therefore a large number of LL.M. dissertations submitted for evaluation in our universities are written without having followed

---

3 *For example*, H. Fowler, Modern English Usage (1986); B.A. Phythian, A Concise Dictionary of Correct English (1979).

4 *For example*, Joseph Gibaldi, & Walter S. Achtert, MLA Handbook For Writers of Research Papers (1988); J. Bazun, & M. Graff, The Modern Researcher; P. Dunleavy, Studying for A Degree On The Humanities And Social Sciences ; D. Sternberg, How To Complete And Service A Doctoral Dissertation; G. Watson, Writing A Thesis: A Guide To Long Essays And Dissertations; J. Bazun, "A Writers Discipline," On Writing, Editing and Publishing; J.K. Galbraith, Writing for Social scientists: How To Start And Finish Your Thesis Book or Article, (1979) N. F. Ogburne "Writing & Typing" 52 *American Journal of Sociology* 383-388 (1947); H.C. Selvin, & E.K. Wilson. "On Sharpening Sociologists' Prose", *Sociological Quarterly* 205-222 (1984); M.A. Stoch, Practical Guide To Graduate Research; S.F. Trelease, How to Write Scientific Papers; K. Turabian, A Manual For Writers of Research Papers Theses And Dissertations (1982).

any uniform methodology. The term papers at M.Phil. and LL.M level are nothing but specimen of articles written in a journalistic style. This is true sometimes in the case of even Ph.D students. Even after having completed half of their research, not many of these students are aware of the basic "research tools". The fault lies not only with the students alone, but also with the supervisors, who do not care to put the researchers on the right track at the right time, either because of some vested interests or through lack of care. Thus a researcher is unable to do justice to his work in the absence of his knowledge about appropriate research methodology.

Unlike India, the second important step followed by research supervisors or post-graduate tutors in British Universities is to give the research scholar a list of references on research methodology.[5] In numerous sittings with the post-graduate tutor or supervisor, a research scholar is asked to express his view points and share his views with the supervisor on the question of methodology. And then the student is asked to follow a particular method or change the methodology in case he is unable to do justice to his project. There is a great need in India to accept even this step at the right time. The student working on LL.M dissertation as well as the Ph.D. scholar must be directed as regards methodology. An assignment prepared by a researcher by using appropriate methodology shall be definitely a better piece of research in comparison with the one without using any methodology.

Identification and formulation of a problem constitutes the starting phase of a research enterprise. Its importance cannot be over emphasised because the success of a research enterprise depends on their selection of an appropriate problem, and its proper formulation. While a faulty selection may fail to sustain the researchers interest in the study, a deficient formulation may land him/her in unanticipated difficulties at a later stage.[6] But it is a challenging and time consuming task. Before any research can be planned or data gathered, the investigator must have a clear idea about the problem he intends to investigate.[7] Our research scholars, in general, are willing to work on any topic given to them by their supervisor, since they do not have ideas of their own relating to research. In the absence of their not having read any of the books on research methodology, they are also unaware of the guidelines suggested by the leading authors on how

---

5 *For example,* C.A. Moser, Survey Methods in Social Investigation (1976); John T. Doby , An Introduction To Social Research (1967);H.W. Smith, Strategies of Social Research (1975) Gerald Hurnish, & Pradip Roy, Third World Survey: Survey Research In Developing Nations; William J. Goode and Paul K. Halt. Methods In Social Research (1952); James A.Black, Methods And Issues In Social Research (1976), John Galtung, Theory And Methods of Social Research. (1967).

6 S.L. Sharma, "Identification and Formulation of Research Problem ," *Journal of Indian Law Institute* 488 (1982).

7 Fred N. Kerlinger, "Formulation of Problem and Hypothesis Generation". The Concept of Political Enquiry (Louis D. Hayes and Roinald D. Hedlund ed., 1970).

to select a research problem.[8] Nor is there any constant pressure by the supervisor to the required extent. Even if they are able to formulate a research problem, they are not at all clear about the facets and dimensions of the problem thus formulated. Many a time they do not have true confidence to discuss the problem even with their supervisors.

In British Universities, and especially in certain leading institutions[9] there is a common practice that whenever a research scholar applies for registration, he/she is asked to annex a brief resume of the proposed study. This is also a condition precedent in almost all the universities in India. This resume necessarily includes a brief mention of the following: (a) Nature of study; (b) Basic research questions; (c) Objectives of the study; (d) Data base and methodology; (e) Sample design and sample universe; (f) Significance of the study; (g) Time frame, and (h) Likely contribution to the study to the existing knowledge. The major object of asking the researcher to submit such a plan is to know about the research potentials of the scholar and the scope for the intended project. Not only this, once he has started work on his thesis, a post-graduate as well as doctoral level student is asked to deliver a talk which in their terminology is called a "Seminar" on the topic of the research, before the fellow researchers, faculty members and guests. After about an hour's seminar, there is an interesting question answer session wherein the researcher is expected to defend or justify the research problem. By this interaction, a new researcher learns a lot. He receives many suggestions concerning his problem from the fellow scholars and faculty members. In substance this is really a sound academic exercise, and indeed purposeful for the researcher.

In Indian Universities, we do have almost similar formality, but at a different stage and in different manner. In certain universities, the proposed problem is

---

8 *For example*, according to Terrence Jones, the following factors should be taken into consideration while formulating a research problem:

(a) What is a general topic?

(b) What is already known about the topic?

(c) What kind of questions about the topic are to be answered

(d) What is the operational meaning of each term in the question?

(e) What is the best strategy for getting an answer to the question?

For details see Terrence E. Jones, Conducting Political Research 12 (1977). Similarly, Tyrass Hillway mentions five major questions which must be kept in mind by the researchers while selecting a problem for research:

(a) Is the problem interesting?

(b) Is it new?

(c) Will it add to the knowledge?

(d) Is it feasible?

(e) Has any one else a prior claim it?

See, Tyras Hillway, An Introduction To Research 28 (1970).

9 School of Oriental And African Studies (SOAS), University of London is one such prominent institution.

discussed among the faculty members only in meetings of Research Degree Boards or similar bodies just before finalisation of permission to be given to the candidate for working on that problem. The chief defect of this practice is that the researcher is not permitted to even associate with the meeting of the Research Degree Board. And he/she is thus unable to learn from the experience of the seniors in the field. In some other universities, this exercise is done at the time of viva voce examination of the candidate. That practice is called "Open viva system".[10] This is too late. Again, there is not much to reflect in the study what a researcher learns in the viva. Of course, the view points expressed and suggestions made at the time of viva voce can be incorporated, provided the thesis is sent for publication.

Thus the suggestions to be offered in this regard is that the practice of delivering a talk or seminar on the problem by the researcher before starting the actual field work should be made an obligatory step. This should be a public affair, that is even researchers from other social sciences should be informed of this event. This shall not only enable the researcher delivering the talk to learn from his listeners, but shall also infuse confidence in him/her. In addition, this will be purposeful for researchers engaged in socio-legal and other forms of inter-disciplinary research. Such a cross-interaction will be beneficial for all concerned and there is definite scope for improvement, however gradual, in the quality of legal research by such exposure to inter-disciplinary studies.

The level of research facilities available to a law teacher or any research scholar is often not conducive to sustained research. An average law teacher gets no typing, photocopying, or cyclostyling facilities at the institution. Often there is no photocopying machine in the institution. In certain universities, there is a single machine and that is over-worked, and often remains out of order. And if it is in order, then before the actual work can be done, an average scholar has to go through procedural and administrative difficulties including depositing money with the cash department of the university which may be at a distance of more than half a kilometer. And the researcher is also required to give each and every detail of the book/journal/periodical. And above all each form must be signed by the Head of the Department. In sum, too much time is wasted in useless and tiresome formalities. In the United Kingdom, there are at least five to six photocopy machines in each and every library besides one or two machines installed in each department for the teachers and administrative staff. There is no operator for these machines. Any person willing to use these machines has to operate it by himself inserting a computerised photocopy card in the machine which carries certain specific units and is renewable from another machine by putting the requisite amount of money therein. Detailed instructions are printed on all the machines. Once a person follows these instructions, these machines are quite simple to use. Their self-use not only saves manpower but also precious

10 Rajasthan University is one such university adhering to the practice of "Open Viva System".

time which a student or teacher has to simply waste in the process of getting things done in our country.

Most of the law teachers in India hardly know typing and those who know typing are unable to afford a type writer. Using the services of a professional typist remains for many of them a luxury.[11] This fact also inhibits the ongoing research in our law schools and university departments. The use of computers in legal research has become a need in the advanced countries where almost every faculty member is provided with a personal computer in the institution. So much so that in each department, there is computer room with a number of computers installed in it. All these computers are ultimately connected with a master computer installed in a computer terminal. There are two printers for each room. All the research students can use these computers and get the required material printed. The use of computers saves lot of stationary and also time. A full Ph.D. thesis of about one thousand pages can be stored on a small pocket size floppy disc. As and when the need arises any type of change can be made in the text without writing or re-writing everything. Later on, at the time of publication also, these are very useful because the whole substance is in the computer and any latest changes can be made very easily. There are lots of other advantages of using the computers, the most prominent being the saving of precious time of the researchers.

In India, most legal scholars, researchers and law teachers are simply unaware of the use of computers in legal research. This is one of the main reasons in the modern times for our lagging behind the advanced countries in the field of legal research. The constraint of resources to buy the computers cannot, however, be ignored. But an important point to be noted is that even when the resource allocation takes place, law departments in many Universities have often been given the step-motherly treatment.

These are just a few simple instances of the lack of necessary infrastructure and requisite facilities available to law teachers and other researchers. It is therefore suggested that for legal research to be effective, original, and meaningful, law teachers and researchers should be provided at least basic and minimum facilities. Even if a single computer or an electronic type writer is installed in a university law department or law school and free access is given to the teachers, doctoral and post-graduate students after basic training, a significant achievement in the field of legal research can be made in a short span of time.

Unlike other branches of social sciences, absence of collaborative research is one of the chief ailments of Indian legal research. We rarely find a piece of writing in any of the Indian legal journals contributed jointly by an Indian law teacher or jurist and a foreign counterpart. This is, however, a common feature in other social science and applied sciences journals. Collaborative research has its

---

11 Upendra Baxi, "Socio-Legal Research In India : A Program schrift," 24 *Journal of Indian Law Institute*, 416 at 419 (1982).

own advantages. Interaction between the researchers belonging to the same field and even related fields from different countries can be very useful for them as well as for others. This type of research can enrich the field and significantly add to the existing knowledge. Due to the simple fact that the environment and the research facilities as well as literature available vary between the countries, this presents ample scope for researchers at least in the third world countries to be acquainted with the latest trends in research and also with the latest publications in the field in advanced nations.

It is, therefore, suggested that to raise the level of legal research in India, joint ventures in the field should be undertaken. These joint research ventures will be useful not only for individual researchers but should also be beneficial for the overall development of the less developed countries of the third world.

In India we have University Grants Commission (UGC) and Indian Council of Social Science Research (ICSSR), New Delhi as the leading research funding agencies for social science research. However, a very small number of researchers including the legal researchers approach these agencies for financial support. There are two categories of grants, that is (a) Grants for Major Research Projects, and, (b) Grants for Minor Research Projects. For a Minor Research Project the amount can be sanctioned to the tune of Rs. 20,000 and for a Major Research Project the grant can be sanctioned for any amount more than Rs. 20,0000.00. Proposals for research projects may involve writing a book/monograph based on one's past research or principally analysis and interpretation of primary data/ material collected through survey research or based on secondary data. Grants under this category are made: (a) to an individual scholar, (b) to two or more scholars submitting a joint proposal or co-ordinated group of research studies, and (c) to an institution on specific request. There are also some awards for the teachers. These awards, with a maximum value of Rs. 7500 are intended to assist the social scientists: (1) to pursue their research interest on their own without any research assistance, (2) to provide marginal support to scholars in terms of secretarial assistance, research assistance, travel etc., (3) to write a book/ monograph based on their past research. Then there are research programmes which are studies on a theme or in an area extending ordinarily from 3 to 5 years and costing over Rs. 1 lakh. Besides these, the financial assistance is also available to an individual scholar or two or more scholars and to social scientists of eminence to enable them to pursue their study and research after retirement. The maximum assistance available to the eminent scholars is Rs. 10,000.000 only per annum and is given on year to year basis on receipt of the report of the work done during the preceding year. The assistance is available at the maximum for 3 years.

The chief drawback is that our law teachers and scholars are probably not aware of these funding facilities. And if some of them do know about these agencies and facilities, they do not possess the adequate skill and expertise to frame a suitable research proposal. For those who by their confidence and ability

are able to face the numerous administrative problems in managing to send these proposals in time to the funding agency, the sad story does not end here. The time involved in the whole process is more than usual and anticipated. Many a times, the projects are sanctioned formally only when the researcher has nearly completed his research work and thus the amount spent by him before the project gets formal approval is not reimbursable. This way sometimes three-fourths of the amount thus sanctioned remains unutilised. All these hindrances go a long way in discouraging a potential researcher from approaching the research funding agencies.

It is pointed out that there is no dearth of research grants for a dedicated researcher who knows how to formulate an adequate and proper research proposal. Even the booklets published by these agencies contain the required guidelines on how to formulate a proper research problem. Therefore, more and more law teachers and doctoral students should approach these agencies for getting funds for the completion of their respective projects. This shall enable the researchers to go in for meaningful field studies and empirical projects which are otherwise shelved because of the shortage of funds at the disposal of the research scholar. These agencies should also take minimum possible statutarily required time in formally sanctioning purposeful research projects so as to enable the interested law teachers and scholars to undertake some meaningful field studies and other good projects. Besides this, the research funding agencies should also adopt some suitable techniques by which more and more researchers should be in a position to approach them and get the required financial assistance. All this will pave a smooth way for some original, empirical, reliable, and publishable research work in the field of law. However, to ensure that there is no misuse of the funds, accountability on the part of the researcher should be fixed. It can be in the form of submission of the periodical reports before the release of the financial instalments. In the event of non-completion of the project within the specific time, the grant can be stopped and in case of abuse of money, the researcher must be made liable to reimburse the money thus obtained from the funding agency. This shall ensure discipline among the grant seekers and keep away the disinterested people.

Another important factor which needs immediate attention of the law teachers, practitioners, and other scholars engaged in legal research is to identify and chalk out a platform to meet and share their professional, academic, and research experiences. Almost all the social sciences people do have such common platforms. These are, for example, the Indian Commerce Association, the Indian Economic Association, the Indian Political Science Association, and the Indian Academy of Social Sciences etc. The scholars belonging to these professions do meet each other. Unfortunately, however, there is no such meeting place of the law teachers and jurists. The Indian Society of Criminology is one such association which does hold its annual conference or workshop. But that is normally a meeting ground only for the people belonging to the criminal law field. There was some time ago a Law Teachers Association, which, to the present author's best

knowledge and belief, has almost become defunct. Almost 80% of it members were part-time law teachers. The reason for its becoming defunct has been allegedly the inherent conflict among the members on the issue of implementation of the Five Years Integrated Course in Law (FYIC) on the lines suggested by the Bar Council of India.

The role of the Indian Law Institute, contrary to expectations, has not been absolutely satisfactory. More or less the law teachers in Delhi and its nearby places seem to have been really benefited from its functioning. Its library is perhaps one of Asia's best libraries from the literature point of view. However, the facilities available to any scholar at such a big library, unlike those in social sciences libraries are not available at the ILI library. Till recently, there have been grossly inadequate photocopying facilities. It has been observed that some really interesting seminars, talks by eminent jurists and Supreme Court judges and discussions do often take place at the ILI. However, the schedule is normally known only to the ILI staff, the participant speakers, some leading advocates of the Supreme Court and the passers by who happen to learn about the event from the placards hanging outside the gate of the main building. Nobody else knows about such events.[12]

Further, there is perhaps no mailing list of the ILI through which a law teacher or researcher could learn about the latest activities at the ILI including that of the recent research publications and also at least about the selective recent arrivals in the ILI library. There is no Newsletter of the ILI which could impart information to the members and to interested persons even from the related fields regarding the forthcoming and even past events like conferences, seminars, workshops, talks, discussions, symposia, and debates at the ILI. There are many national level events which take place in the law departments of various universities for which there is no information available to an average law teacher or post-graduate student. If by chance the host University sends any information or invitation for the papers from the neighbouring University, it gets locked up in the drawer of the Head of the Department, who may not even be interested in going there but makes it a point not to let it pass to any of his interested students much less of his colleagues. To begin with, it is suggested that at least one or two pages in the ILI journal (which is normally behind the publication schedule at least by a year or so) could be devoted to the various events taking place in the near future, their dates, addresses of the contact persons, themes, and other related details. First of all information could be given only regarding national level activities, and later it could be experimented with the regional level events. The Newsletter of the Indian Institute of Public Administration could be taken as a specimen. In order to speed up research activity in the field of law this is again a preliminary step.

---

12 One such debate was organised in the year 1989 under the title "Role of a Judge and Jurist in law making" between Professor Upendra Baxi, then Professor of Law Delhi University (later vice-chancellor Delhi University) and Mr. Soli J. Sorabji, Senior Advocate, Supreme Court of India (later Attorney General of India). In fact there were so many things which a researcher could learn from such debates.

Another major obstacle in the way of effective legal research is the lack of knowledge and absence of proper information regarding the possible avenues of publication. Sometimes an exceptionally good piece of research gathers dust in the libraries in the form of a term paper or dissertation or thesis simply because the author either does not know about publication avenues or he does not get proper encouragement to send it for publication. Even if he sends it, it simply gets rejected on the basis of the defective method used in citing foot notes and bibliography, or because it needs a little editing and slight updating in case the work involves an empirical study and collection of statistics. Many a times it has been noted that if a graduate or a post-graduate student wants to contribute to some journal, he is discouraged and laughed at. A related fact is that whereas a supervisor in the field of applied sciences feels it a pleasure to associate his researcher in the matter of publication of the research, in the social sciences nothing of this seems to happen. Either the supervisors do not associate the research scholars in the matter of publication on the pretence that the latter are still not mature to write and get the work published, or some opportunist supervisors get the student's work published in the form of a book or in a standard international journal by making slight changes in the language and substance without even acknowledging the name of the researcher, much less joining him as the co-author. This causes great discouragement to the candidate. These malpractices are apparent everywhere in our universities and Post-graduate Research Institutions, and need to be discouraged and condemned by one and all.

As regards the probable avenues of publication, there are some very good legal journals besides that of the Journal of the Indian Law Institute. These include: The Indian Bar Review (Delhi), The Indian Socio-Legal Journal (Jaipur), The Cochin University Law Review (Cochin), The Kurukshetra Law Journal (Kurukshetra), Punjab University Law Review (Chandigarh), Law Journal of Guru Nanak Dev University (Amristar), Kerala Law Times etc. The latest in the series is the National Law School of India University (NLSIU) Journal (Bangalore). It is suggested that Ph.D. scholars should be motivated and given encouragement by the supervisors to come forward and at least get their findings published once the thesis gets approved. And later the relevant portions of the thesis can also be sent for publication in the different journals. This should cultivate the habit of writing in the scholar and he will thus have to learn alternative methodologies and ways of citations as per the requirements of the particular journal, and shall ultimately learn the art of writing.

Some observations about the National Law School of India are also required in the present context. "If Dar-Es-Salam was the law school of the 60's, Warwick of the 70's and the early 80's, New South Wales of the 80's, then NLSIU is fair to be the Law School of the 90's," says Professor J.P.W.B. Mc Auslan of the London School of Economics.[13] The National Law School of India University (NLSIU) - a University for professional legal education, sponsored by the Bar

13 *1 Law News* 6 (1990).

Council of India and established in 1987 has been a "dream come true" for many people in the legal profession. Outside administration of justice, the NLSIU is perhaps the best example of Bar-Bench co-operation in the field of legal thinking in India today. The Chief Justice of India, as a visitor of the school and the Chairman of the Bar Council of India as Chairman of General Council of the School provide a stature and prestige to the Law School unparalleled in the history of legal education in India. A large number of retired judges of the Supreme Court of India and High Courts as well as the Senior Advocates have been assisting the school in its teaching and research programmes making education at NLSIU a rare and exciting experience to the teaching and student community alike.[14] The NLSIU is attaining heights day by day in the field of legal education and research. It is gradually becoming a "Common Platform" for meeting of law teachers and researchers. Academicians from all parts of the country as well as from abroad have been visiting the school very often. The Academic Staff College of the University Grants Commission (UGC) has also been established at the NLSIU. The said ASC has organised four refresher courses for law teachers. During these courses law teachers from all parts of the country have been coming together and sharing their research and teaching experiences with each other. Besides the refresher courses, the organisation of Memorial lectures, Afro-Asian International Moot Court Competition, Introductory Courses on Intellectual Property Law, Establishment of the Comparative Law Institute, Organisation of Alumni Association, Continuing Education Programmes, Exchange of the students with the leading law schools of the world, Practical Internship Programme for the students, Legal Aid Clinic, and Centre for Women's Studies[15] have been a few prominent events among the large number of academic and other achievements to the credit of this unique institution. However, there is still much to be done for the advancement of legal education and research. One of the suggestions is that the NLSIU should identify some priority virgin research areas in the legal field and circulate the same in the University law departments in India so that the interested scholars could concentrate on these. There has been so much duplicacy in the research endeavours that not many original and new research works have been coming forth. It is in this context that the NLSIU should do the needful. Another suggestion is that the school should organise an "Annual Event" to enable the members of the legal community to get together may be once in a year to share their research experiences. Offering "Visiting Fellowships" to law teachers of the various Indian Universities is another suggestion. Once it becomes equipped with computer facilities, it can and should provide documentation services like bibliographies for researchers engaged in inter-disciplinary research. In fact a lot can be legitimately expected from the NLSIU as it is spearheading the crusade for better legal education and research in India.

---

14 *NLSIU Bulletin* 5 (1990-91).

15 *Supra* n. 13 at 1.

In summing up, it may be pointed out that for every discipline to be developed, high quality of research is a paramount necessity. In the less developed countries, the quality and reliability of research has not been up to the mark. There have indeed been some good research endeavours in the law field in our country in the recent past, but this is just a tip of the iceberg. There is no dearth of intelligent, committed, hard working, and deep thinking researchers in India, but they lack all the necessary facilities and required environment for research. It is a matter of common observance that whenever our scientists, social scientists, technocrats, professionals, and other intellectuals go abroad to the advanced countries on research assignments, they outsmart their counterparts in their respective fields. And when they get so many facilities there, they prefer to settle down there only and the sender country is debarred from the possible contribution of these intellectuals even though it has spent millions on their education and training. This is the chief cause of the problem of "Brain Drain" that is, migration of the professionals and technocrats from the less developed countries to the advanced countries. Thus the major cause for our lagging behind those advanced nations is not the dearth of thinkers, academicians and researchers, but the lack of necessary infrastructure, inadequate facilities, absence of motivation, unfavourable academic environment in our universities, and lack of proper encouragement to the teachers and researchers. These are absolutely necessary for keeping the talented people at home and for the production of the high quality research in any discipline. In conclusion, therefore, it may be pointed out that if the suggestions offered in the present work are implemented in earnest, there lies every scope for the improvement of the situation and the possibility of coming across very high quality legal research in India in the decades to come.

(1994) 6 NLSJ 95

LAWYERING AND LITIGATING IN INDIAN COURTS:

SOME LITIGANT PERSPECTIVES

*Sasheej Hegde**

This paper is an extract from the author's doctoral dissertation in the Sociology of law. It describes and represents perceptions and experiences of litigants with our courts and with lawyers and judges. It focusses on issues devolving on questions of the law's legitimacy and the nature and effects of dispute processing. The data, drawn from interviews with only 65 litigants at various levels of the court system, even if not facilitative of generalizations, does throw light on aspects of what may be termed the phenomenology of lawyering and litigating in Indian courts or, more precisely, everyday legal practices. The data indexes, as it were, the context in which the everyday activities of such legal functionaries as lawyers and judges could be interpreted.[1]

Studying courts in context: Beyond the dispute-focused approach

The focus on the litigants vis-a-vis the legal system encounters a range of theoretical perspectives. Indeed some of the most significant developments in the contemporary Sociology of law have been facilitated by the 'dispute-focused' approach, which sees courts as but one of the large variety of methods of dealing with disputes in society.[2] One approach to disputes may be to avoid making legal claims at all. As Macaulay has shown, businessmen are often reluctant to litigate their grievances with each other, especially if they value the continuing relationship which they have.[3]

Of the various strategies open to disputants, apart from going to court, Hirschman has characterised three types of strategies in terms of 'exit', where the disputant simply decides to leave without making any claim; 'voice' which involves publicly expressing the nature of the dispute and can involve calling in a third party; and 'loyalty' which involves simply putting up with the dispute because the costs of doing otherwise may just be too high.[4] Likewise Felstiner, Abel and Sarat have focused on the process of the transformation of disputes, a

---

* Department of Sociology, Goa University.

1 The litigants interviewed comprised of "one-shotters" and "repeat players". The former refers to those who have infréquently used the legal system, and the latter includes those who have been its frequent users. *See,* M. Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change",9 *Law and Society Review* 95(1974).

2. *See generally*, R. Tomasic, The Sociology of Law 55-56 (1985).

3. S. Macaulay, "Non-Contractual Relations in Business", 28 *American Sociological Review*, 55-67 (1963).

4. *See* A . O. Hirschman, Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations and States (1970).

process which they refer to as 'naming, blaming and claiming', that is, the transformation of an unperceived injurious experience into a perceived injurious experience.[5] They point out that the Sociology of law should pay more attention to the early stages of disputes and to the factors that determine whether 'naming, blaming and claiming' will occur.

In keeping with the basic orientation of the dispute-focused approach, it has been recognized that there are a multitude of non-judicial dispute processing mechanisms within the community.[6] The presence of formal institutions like courts coexisting with larger informal mechanisms has led researchers to argue that formal justice exists in the shadow of informal justice.[7] Studies have also focused on the various types of third-party dispute processing forums, which range from being conciliatory to adjudicative.[8]

Nevertheless, it cannot be denied that courts emphasize greater procedural regularity than other types of forums and also base their decisions upon the marshalling of reasons by an impartial third party, namely, the judge. The limitations of court processing are that, unlike the legislature or administrative agency, it has to focus on the individual case at hand and tends to be reactive rather than proactive, in that it cannot seek out disputes. Also, courts are slow in responding to social and economic changes and are unable to account for the repercussions of their decisions since the affected parties cannot participate meaningfully in the court's decision making process.[9]

This study, although incorporating perspectives broadly congruent with the dispute-focused approach, does not flow from this approach. The focus is not disputes per se or the structure of a law suit, but, with a broader phenomenology which animates the context of our courts. Given the assumptions of individualism and rule-boundedness and the stress on the balance restoring features of disputing, the dispute focused approach ignores the key role of dispute-differentials and conflict strategies in the pursuit of dispute 'settlement' through courts and other mechanisms.[10] More importantly, this approach does not adequately address the

---

5 W. L. F. Felstiner, R. L. Abel and A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming and Claiming", 15 *Law and Society Review* 631-54 (1981).

6 *See,* D. M. Engel, "Legal Pluralism in an American Community: Perspectives in a Civil Trial Court", 3 *American Bar Foundation Research Journal* 425-54 (1980). *See also,* Caste in Modern India and Other Essays (1962); B.S. Cohn, "Anthropological Notes on Disputes and Law in India" 67 *American Anthropologist,* 82 (1965).

7. M. Galanter, "The Radiating Effects of Courts", Empirical Theories About Court 117-42 (K.D. Boyum & L. Mather eds., 1983); Fitzgerald and R. Dickins, "Disputing in Legal and Non-Legal Contexts: Some Questions for Sociologists of Law", 15 *Law and Society Review,* 681-706 (1981).

8. *See,* S. Roberts, Order and Dispute: An Introduction to Legal Anthropology (1979); P.H. Gulliver, Disputes and Negotiations: A Cross -Cultural Perspective (1979).

9 *See,* American Court Systems: Readings in Judicial Process and Behaviour (S. Goldman and A. Sarat eds., 1978).

10 *See* , R.L. Kidder, "The End of the Road? Problems in the Analysis of Disputes", 15 *Law and Society Review* 717 (1981).

varying definitions of lawyering and litigating that the court as an instrumentality is subjected to by human agents.

Nature of recourse to court

An analysis of the conditions in which disputants seek the assistance of courts would involve an inquiry into the early stages of the dispute, the strategies open to the disputants in dealing with their disputes, their decision to mobilize the legal system and the kind of demands they make on the courts. The information collected on the study focused on the nature of the issues on which the litigants in our sample went to court, the reasons adduced by them for going to court, their impressions about the uses to which courts are being put and, in the next section, their choice of lawyers and their expectations of them.

The nature of the issues on which the litigants interviewed went to court revealed that the court is mobilized to protect one's property or to secure an eviction, to recover money or to ensure the obligations of a contract, to wind up a partnership firm or to decide on the ownership of a factory, to restrain authority or to check arbitrariness, to secure an increment or to fight against a suspension, to obtain a divorce and so on.

For most of the litigants, the court is there to settle their disputes in an impartial manner and to protect and enforce their rights expeditiously. All of them said that they had been left with no alternative but to go to court, either as plaintiff, appellant or petitioner or as defendant or respondent.

Many of the litigants emphasised litigation as the most legitimate, though not necessarily the most effective, way of redressing their grievances and /or enforcing their rights guaranteed by law. "Justice", for them, corresponds to a social situation or condition where their disputes are settled (preferably in their favour) or where the rights between the disputing parties are established. Some held that they sought legitimacy through litigation, in the sense of vindicating their status as independent legal subjects or the legitimacy of official policy. The following statement of a retired University teacher who had fought a variety of litigations relating to service matters, eviction and property, is typical of many of the litigants:

> *Justice consists in the vindication of my legal right. Whenever my rights, that is my interests have been affected, I have gone to court - not merely to protect them but also to legitimise them through a court verdict. To have taken law into my own hands may have been an easier way out. But this is illegitimate.*

Narrating her experiences, a woman seeking a decree of divorce observed that she had taken recourse to the court chiefly in order to get a legal endorsement to her independent status. Likewise, a lawyer-litigant asserted that he had been forced to go to court since his property interests were threatened. The Law Officer of a leading nationalised Bank observed that, "In most of the disputes involving

the Bank, what seems to be primarily at stake is the official policy or decision of the Bank. This is sought to be defended at all cost".

Some of the litigants felt that they had been forced to defend themselves in court against the unlawful acts or claims of their adversaries, be it private individuals, groups, organisations or even the Government. The Legal Adviser of a state-owned public utility service maintained:

> *We have a lot of cases pending against us, not all of them legitimate. Mistakes have been committed by our staff, and the aggrieved go to court. But, what about the many instances where defaulters take advantage of the interim orders given by courts? This tendency has to be checked by the courts themselves.*

A business executive who had been drawn to court over a money dispute alleged that it was primarily meant to harass him. An industrialist expressed a similar sentiment:

> *Today, the bureaucracy which runs the Government has grown highly inefficient and corrupt, and often seeks to harass and cheat people of their rightful claims. The courts, as embodiments of the rule of law, seem to be the only check on bureaucratic arbitrariness and corruption.*

A few of the litigants maintained that their recourse to the court was to force the public authorities to a decision. They argued that it was primarily the attitude of avoiding obligations on the part of authority that was responsible for their going to court. Through the court, they hoped to force the authorities to assume responsibility.

Some of the litigants revealed that they instituted cases in court because it provided them a lever to bargain with others, be it individuals, groups, organisations or even the Government, or to delay the inevitable. The President of a nationalised Bank's Officer's Union disclosed that in those instances where the Union could not sit in judgement, such as, fraud by one of their colleagues, they would go to court for its decision. He also added that "stays" obtained from courts provide them an opportunity to bargain with the management or to gain time to mobilize the work-force. A private transport operator admitted that he had been able to secure relatively advantageous results from the concerned authorities merely by instituting cases in court.

Further, while attesting to the integrity and the legitimacy of their claims made in/through the court, most of the litigants criticized their opponents in the court for being dishonest in their claims or attempting to make an unlawful gain. As an elderly industrialist put it:

> *Litigation is a double-edged weapon. It can be preferred in order to assert and enforce rights or to set right a wrong. It can also be preferred as a means of harassing an adversary or to stall the*

> *inevitable. In most cases, while one party is justified in asserting the claims that are its legitimate due, the other party is unjustified in presenting its case. The latter, either as petitioner or as respondent, often seeks to deny the former its rightful due. The outcome of a case need not necessarily be the triumph of truth.*

This and such other assertions of the litigants bear ample testimony to the adversary spirit that underlies the conduct of the court's business.

It is therefore evident that the fulfillment of individual interests forms the basis for the litigants allegiance to the court system and a necessary condition for the mobilisation of law.

Lawyer choice and expectations about lawyers

Most of the litigants said that they had been primarily influenced by the professional standing of the lawyer. By this they meant not only the seniority and experience of a lawyer, but also his integrity, behavior in court and court performance. Since court proceedings are open to the public, many of the litigants were in a position to evaluate the relative performance of lawyers in court and thus gauge their professional standing. Closely associated with a lawyers's professional standing is his professional competency, chiefly defined in terms of his capacity to win cases. The litigants pointed out that the professional standing and the competency of a lawyer are often a matter of public opinion, both among professional colleagues and the public at large.

The choice of lawyers by many of the litigants was based on personal relation factors, such as being introduced to a lawyer by a friend or acquaintance, or approaching a lawyer who is part of their family or caste or religion.

Some litigants pointed out that the choice of a lawyer is often influenced by the lawyer representing the other side. For instance, a woman fighting a maintenance case affirmed that since the opposite side was represented by a woman advocate, she had also decided to take on a woman advocate to fight her case. Another litigant, a businessman involved in a money dispute, observed that since the other side had employed the services of a "senior" lawyer, he had to choose a "senior" lawyer.

Sometimes the choice of a lawyer, would also depend on the judge before whom the case would come up. If a judge was known to encourage junior lawyers, the litigants expressed the opinion that it would be better to seek the services of a "junior" lawyer, even though the opposite side may have a "senior" lawyer. It was reiterated that the choice of a lawyer could be quite critical to the outcome of a case.

A "negative criterion" is also alluded to by some of the litigants. According to them, the services of those lawyers who had either lost an earlier case of their's or had fought against them in a case were avoided. Some of the litigants reiterated that the qualifications possessed by a lawyer, as well as his specialization, also influenced their choice. In some cases, the litigants felt that the requirement of

specialized treatment, renders the services of some lawyers indispensable. As an industrialist pointed out, in matters pertaining to a highly specialized area of law, like taxation, a few law offices monopolised the work available.

The fees charged by the lawyer often affects the litigant's choice. The service orientation of a lawyer, that is, his earnestness to get justice to his client, was another criterion alluded to by few of the litigants.

The litigant perceptions further bear reference to the following criteria: complexity of the issue (for instance, partition suits were held to be fairly complicated and required the services of an experienced lawyer); confidence (for instance, the conviction of an aggrieved litigant in our sample that a woman's cause could only be sympathetically considered by women advocates); and ideological affinity (for instance, a litigant, involved in a labour dispute, maintained that his choice of a lawyer had been founded on the latter's commitment to the cause of labour).

These perceptions of the litigants interviewed seem to imply a certain pre-knowledge of the court's functioning which informs their choice of lawyers. Understandably, the "repeat players" have a wider knowledge of the system than the "one-shotters". This is also reflected in the criteria that they generally emphasise. While the "one-shotters" emphasise such criteria as personal relationship, public opinion, qualification, fees charged, complexity of the issue etc., the "repeat players" stress such criteria as professional competency, professional standing, lawyer representing the other side, negative criterion etc. It must also be pointed out that there were instances of some of the litigants interviewed employing different lawyers in different cases and of changing lawyers if they do not come up to their expectation.

Most of the litigants expected a high level of professional competency from their lawyer(s). This covers the quality of the representation made in the court and such other skills as capacity to anticipate developments during the conduct of a case, briefing witnesses and assisting in deposition, promptness in replying to all the queries made in the court, and not allowing the opponent to drag on the case. It also means that their lawyer must be able to counter the "machinations" of the other side. Closely aligned with the competency expected of a lawyer is the demand that is made of him to protect the client's interests. Most of the litigants expected their lawyers to "deliver the goods". The following response of a litigant, a hotelier, is fairly typical:

> *I want results from my lawyer. Why should I waste money on a lawyer who cannot ensure the results I want? It is not as though we engage in litigation for its own sake. Litigation is always directed towards specific ends and that it is the duty of the lawyer to secure these ends.*

Many of the litigants also insisted that a lawyer must tender correct and prompt advice, explain the legal position to them and appraise them on their

chances in court. Often qualities such as loyalty, punctuality, a sense of duty, discipline and sincerity are also expected of lawyers by some of the litigants. Lastly, some litigants held that a lawyer must be reasonable in respect of his fees, have a service orientation and an inclination to promote settlement.

The litigants in our sample on the whole expressed satisfaction with the performance of their lawyer(s). Many of them were categorical that performance of their lawyer(s) was better than that of their opponents' lawyer(s). However, a few of the litigants were dissatisfied, and felt otherwise. The rest were undecided, having been satisfied at certain stages of a case and disappointed at others or satisfied in some cases and dissatisfied in some others.

It must be emphasised that a positive assessment of a lawyer's performance need not necessarily follow from a verdict favourable to the client. A litigant who was successful in obtaining an order of eviction against his tenant from a court contended that it was not the performance of his lawyer that won him the case, rather it was the clear deposition of his daughter (who he had himself briefed) which "clinched the issue". Similarly, a negative assessment of a lawyer's performance need not necessarily follow from a verdict unfavourable to the client. A litigant, who unsuccessfully fought an eviction suit, maintained:

> *My lawyer argued well, and yet could not ensure the success of my case. The partiality of the judge and the influence wielded by the opposite side were chiefly responsible for my defeat.*

The foregoing information serves to amplify two broad points. First, an examination of these as "conceptive ideologists"[11] who translate client-problems and reconstitute them in terms of legal discourse, that is, rights' claims. It is the client (the litigant of our sample) who announces his need and sets the objective for the lawyer. The lawyer translates the objectives of the client, expressed in everyday discourse, into legal language and strives to achieve for the client the objective sought by him. For the lawyers and the litigants whom they represent, the legal system seems to be basically a system of rules and resources facilitating or obstructing the actions of individuals and groups in various situations. The mobilisation of law can thus be seen as the outcome of a coalition of interest between lawyers and litigants, an alliance which seeks to ensure the interests of both.

The litigants also implied that litigation is a form of social interaction involving the assertion of claims and counter-claims by parties represented by their lawyers, which is mediated by a judge.

---

11. M. Cain, " The General Practice Lawyer and the Client: Toward a Radical Conception" , The Sociology of the Professions: Lawyers, Doctors and Others 106 (R. Dingwall and P. Lewis eds., 1983).

Dispute processing vis-a-vis courts

It is important to ask what is the context in which these interests are and can be obtained. This leads us to look closely at the experiences that the litigants in our sample have with courts.

It may be argued that a concern with the nature and effects of dispute processing suggests a view of the court system as a mere dispute processing institution and disputes as the affirmation and focus of court work. Without sidetracking from the significance of these arguments, it must be pointed out that the court performs other tasks such as the affirmation and interpretation of legal doctrine, specification of the requirements of "collective" existence, courts as agencies of government and social control and associated ideological functions.[12]

Two main strands of opinion can be discerned in the response of our litigants to the questions that were put to them. These broadly reflect on (a) the condition within the courts, and (b) the effects of dispute processing.

(a) The conditions within the courts

As mentioned earlier, for most of the litigants, the court, at least in an ideal sense, is there to settle their disputes in an impartial manner and to protect and enforce their rights expeditiously. The qualifications, "at least in an ideal sense", has been necessitated by the fact that many of the litigants were aware of the situation prevailing in the courts even before they were directly exposed to it. Nevertheless, they were of the opinion that they had been forced to go to court as there was no other alternative and because the court was supposed to be an officially sanctioned system designed to settle disputes and uphold their legitimate claims.

However, in respect of those litigants who were unaware of the situation prevailing in the courts and who viewed the court as an impartial agency - (a "temple of justice", as a litigant expressed) - which settled the claims of people justly and expeditiously, the immediate consequence of an exposure to court was to shake the foundations of this confidence. Thus, in response to a question whether they saw the court as an impartial and principled decision-maker, many of the litigants replied "no" or "not sure". Some of them, who viewed the court as an impartial decision-maker were also quite dissatisfied with the delays and high costs associated with the legal process. As a litigant who had been successful in an eviction case after a protracted period of litigation, put it, "while there may be delays and high costs in court, justice is still done, as it was in my case. Only, the former may nullify the benefits conferred by the latter". Echoing the sentiments of many others, a litigant who had been involved in property dispute observed in exasperation, "I now understand the significance of the Kannada saying '*Geddavanu sota; Sotavanu satta'* (The winner has lost; the loser is dead)".

---

12. *See*, R. Cotterrell, The Sociology of Law: An Introduction 222 (1984).

The sources of dissatisfaction with the courts centre around what the litigants saw as the exorbitant costs, the excruciating delays and the risk of uncertain outcomes. As a woman engaged in a suit for maintenance observed:

> *I had come to court expecting quick disposal of my case. I now realize that justice is a never ending process. With each passing day, I am growing more sure of not getting justice. With the passage of time, costs mount, my witnesses are lost, there is greater scope for manipulation, and mental anxiety increases.*

The President of a nationalized Bank's Officers' Union mentioned:

> *As far as possible, we try to avoid courts. This is primarily due to the delay and uncertainty of outcome. Once we get stuck in court, we cannot proceed. Basically we have no faith in the court's ability to do justice. If we have resorted to court, it is chiefly as 'bargaining counter' with the management.*

The Legal Advisor of a state-owned public utility service observed, "there is no sense of urgency about issues. Every delay hampers our work. Public revenues are blocked and there is great loss to the exchequer".

Noting that the opportunities for delay were presented by the system itself, a litigant whose divorce application had been pending, observed:

> *When approaching the court, I did not expect this delay. Apart from the normal adjournments and the fact of the judge who had been hearing my case being transferred and having no replacement for some time, the opposite side also kept avoiding the receipt of the court notice and delayed filing its affidavit. Also, since the very nature of litigation is such that one side wins and the other loses there is bound to be a lot of delaying tactics by the side which is likely to lose.*

In many cases, the litigants in our sample also complained about what they termed as the "blatant injustice" of the judicial process. Thus, an industrialist who had just received an adverse High Court verdict in a dispute over ownership and possession of a factory, retorted:

> *Justice is not the aim of the courts. What is important is how the lawyer or the party concerned is to the judge. Take care of the judge and you will win.*

Narrating his experiences, a student, who had been co-accused in a criminal case of assault before the Magistrate observed:

> *Truth can never prevail in courts. A case cannot succeed if the truth is exposed. Both sides have to exaggerate. Apart from the unnecessary delay, lies are taken as valued statements. Even the judge seems to know that the arguments being presented by the lawyers are not factual, and yet he takes them as 'facts'. Criminal proceedings, indeed, are a big farce with each side lying about the other.*

Another litigant, a business executive, who had been successfully involved in a property litigation for over twenty years, observed:

> *Truth is the first casualty in court. Lawyers tutor their clients and witnesses to tell lies and 'facts' are twisted before the court. Justice is reduced to evidence 'prepared' by lawyers. In such a situation, can there be justice in courts or through courts?*

It must be pointed out that while most of the litigants were critical of the delays and "injustice" associated with the legal process, a few of the litigants noted the "beneficial" consequences of delay within the judicial process. As a litigant fighting an eviction case noted:

> *Uncertainties in the judicial process are so many. The outcome of a case is beyond me or my lawyer. Sometimes it becomes necessary to delay. For instance, if the judge is corrupt, rather than having no chance before him, it would be better to delay and wait for a more honest judge.*

Another litigant, engaged in a service case in the High Court observed:

> *Delay could facilitate a more detailed consideration of the law and facts of a case. Expedition in itself is no virtue, just as delay in itself is no vice. What is ideal is a balance between expedition and delay. Especially today, with the perceptible decline in the standards of the Bar and the Bench, the proverbial delays of the judicial process may turn out to be a boon.*

The consequences of increasing workload on the courts are also highlighted by a few litigants. As one of the litigants, a hotelier, succinctly put it, "administrative efficiency in terms of disposing off cases, rather than judicial rigour or justice of outcome, constitutes the dominant virtue in our courts today". The industrialist, referred to earlier, narrating his impressions about the Supreme Court where he had filed an appeal against an adverse High Court verdict, revealed that

> *Fifty-eight cases were disposed off in under two hours. The Supreme Court seems to be better than the High Court or the Trial Court in respect of this preoccupation with disposals. The judges of the Supreme Court do not want you there. They seem to be completely indifferent to the anxiety of parties. In my case, I had engaged the services of a top lawyer. The judge could not set him aside and therefore agreed to issue notice. If even the Supreme Court fails us, where can a law-abiding citizen go?*

Describing further the conditions of practice within the court, a litigant described a lawyer as "the fulcrum around whom the judicial process revolves". According to most litigants, lawyers were chiefly responsible for the outcome of cases within the judicial process. The judge is viewed as a "mere spectator", refraining from being strict with lawyers and often helpless with respect to the

way in which, as also the pace at which, the cases proceeded. A woman fighting a divorce case said:

> *My case has been taking a long time. The judge cannot be blamed for this. Frequent adjournments have been sought, even though the judge has been keen on taking up the issue. Even my lawyer does not object when the other party asks for adjournments.*

The President of a College Teachers' Association, recollecting his impressions, was categorical in stating that:

> *The court process is more conducive to lawyers than to judges. The latter cannot anticipate what the case is. He (judge) is dependent on the lawyer who only sells his case and does not present it. It would not be an exaggeration to assert that courts are often (mis)led by lawyers.*

A transport operator, claimed:

> *Justice depends on the capacity of a lawyer. The outcome of a case is often determined by the lawyer. If he is tactful, he can turn the mind of the judge, or can confuse the latter. Judges only go by the evidence before them, while the production and presentation of the evidence is the exclusive preserve of the lawyer and his client.*

These assertions amply testify to the primacy attributed to the lawyer in the judicial process. Dilating on the primacy of lawyers in the judicial process, some of the litigants were highly critical of lawyers as a professional community.

It is obvious that this criticism of lawyers by the litigants is a reaction having its roots in their exposure to the court, and more specifically, in their encounter with the lawyers engaged by the opposite side. On this basis, some may argue that these views of the litigants are tantamount to contradicting the point earlier made, namely, that the mobilisation of law can be seen as an outcome of a coalition of interest between lawyers and their client, an alliance which seeks to ensure the interest of both. The assertion that lawyers delay cases and exploit their clients may be taken to imply that the former have interests which run contrary to the interests of the latter. But such an argument would be a gross over-simplification. This study evidenced that many of the litigants interviewed were relatively satisfied with the performance of their lawyer(s). Even in those instances where the litigants expressed dissatisfaction with their lawyer(s), they asserted that, in the event of their approaching the court again, they would avoid these lawyers and engage others. More importantly, the litigants seemed to realize that lawyers, being the agents of their clients, would strive to achieve the objectives set by them. Considered in this perspective, the perceptions of the litigants, far from repudiating the view of lawyer-client relations as mutually reinforcing, reiterate it.

On the other hand, these litigants seemed to be quite caustic in their comments on, as also disapprobation of, the position and role of judges in the legal process.

While emphasising the primacy of lawyers in the judicial process, many of the litigants were quite critical of judges for choosing to remain passive. According to the litigants, even in those situations where they could intervene, judges refrained from doing so. They are of the view that, as expressed by a businessman "most judges are predisposed to give in to the demands of lawyers, such as, for adjournments, interim applications etc., mainly in order to keep the Bar in good humour". Another litigant, a retired chemist, who had been drawn to court mostly as a defendant in a property dispute and several money recovery suits, claimed, "things move fast only where senior lawyers are handling matters. Judges are afraid of senior lawyers, and the influence the latter may wield".

Many of the litigants expected the judges to take more active and firm management of cases, and thus markedly reduce the lawyer's ability to set the flow and timing of business. A few of the litigants wanted judges to use their authority to lead the evidence, limit the scope of questions put to witnesses, rather than leaving all this to the lawyers and also to make an effort to settle cases.

However, the suggestion that judges should make an effort to settle cases or conciliate between the parties is not acceptable to many of the litigants. Reacting to the efforts of the court to effect a compromise with the government, the President of a College Teachers' Association referred to earlier, maintained:

> *It is not the role of the High Court to bring about a compromise by requesting the Government to accommodate. Courts must take a stand. Judges sit to interpret the law, not to balance the two parties. They must give benefit to one party quickly. By and large, courts postpone decisions, especially in service matters, saying that it is an administrative matter.*

The industrialist referred to earlier observed:

> *The High Court judge tells me: "Why don't you settle the matter in the Sindhi Panchayat?" Is this what a judge has to tell? He is to do justice between the parties. If the matter could have been settled, we would not have come to the court.*

The litigants also alluded to what they described as the "declining standards" on the Bench. Instances of judges being influenced by the standing of the lawyers and the disputing parties were also provided by the litigants. A businessman, involved in a lot of money suits, argued that "judges being economically deprived, they were not above certain needs and influences."

The President of a nationalised Banks' Officers' Union referred to earlier, affirmed:

> *It is not so much the sanctity of law that decides an issue. Rather, it is the thinking of a judge that is crucial. How else do you explain two courts deciding on the same issue but contradictory verdicts?*

The experiences of the litigants are illustrative of certain aspects of the nature of dispute processing within the court system. Apart from asserting the primacy of lawyers in the judicial process, the views of the litigants elucidate certain other dimensions of the lawyer-client relationship. There is also a recognition of the limited role that judges play in the legal process.

b) The effects of dispute processing

The effects of dispute processing are revealed not only after the proceedings in court have been completed and the verdict pronounced, but also during the court proceedings, when the case is being decided. From the point of view of the litigants, the effects of dispute processing are many and include the various problems they had to face in court, the economic and psychological costs which they had to bear, and the inevitable distancing of the disputants, with the possible termination of any pre-existing relationship.

Some of the sources of the litigants' dissatisfaction with the courts are due to the following reasons: the scope that delays in court provide for the manipulation of a case; the humiliation in court, especially during cross-examination when irrelevant and embarrassing questions are put; the difficulty of getting and retaining witnesses and relevant documents; the dependence on the goodwill of witnesses; perjury in courts; the personal inconvenience of waiting in court; the threats from desperate defendants; corrupt and inefficient court staff; the overall mental tension and anxiety about the outcome of one's case; and the stigma attached to appearance in court, especially where women are concerned. Some of the litigants also referred to, as one of them put it, the "adversary culture" that pervades the court where everything is disputed and nothing conceded, the confrontationist styles and argumentative rhetoric of lawyers, and so on.

Some litigants referred to the distancing of the litigants from the legal process. That is, the realisation that once a dispute is handed over to be processed by the legal system, it is in effect taken away from (them) and is transformed into a case by lawyers and judges. In so doing, a translation of the terms of the dispute takes place as it is made to fit legal categories for easier processing through the courts.[13] This is not to imply that the litigants found this to be a major source of dissatisfaction. A college teacher expressed that there is , "a need to make legal rules simple and accessible to all, and to educate the people about their rights and duties, about how to approach courts, which court to go to and so on".

The litigants also alluded to the problems of implementing a court decree. As a litigant put it, "the fruits of a litigation lie in execution. However, an effective machinery to execute court orders is absent. The existing machinery is very corrupt and inadequate". Many of the litigants gave instances of the efforts made by the losers, in some cases even the government, to circumvent the court verdict. As a retired government official, who has fought successfully against his dismissal from service, maintained,

13. *Supra* n. 2 at 59.

> *Court verdicts are sought to be circumvented by the government. In my case, the court ordered reinstatement. To circumvent the order, the government ordered a gradation list to be prepared, which took time, and the benefit of the court order was deferred.*

Likewise, orders of eviction given by the court are held to be flouted by tenants. As a landlord who had obtained an order of eviction from a court observed, "the court may give a favourable verdict. But that does not end our problem. There is the problem of implementing the decree, which often forces us to go to court again".

In the light of these problems, many of the litigants claimed that the "court is a trap - it is easy to get in but difficult to come out". Understandably, some of the litigants disclosed that they were forced to negotiate and settle matters out of court or had taken recourse to more "drastic" courses of action, such as threats, intimidation through goondas, harassment, etc., to secure their legitimate due.

Many of the litigants also noted that litigation often leads to a distancing of the disputants and terminates existing relationships. Particularly, the businessmen among the litigants interviewed were categorical that they sought to avoid courts as far as possible and settle their disputes among themselves or through well-wishers.

They felt that the retention of business contacts and relationships is more important than a particular grievance that they may have, from the point of view of their long-term business success.

In essence, these problems alluded to by the litigants are suggestive of what individuals and organisations are exposed to or can expect when they come to court. Again, these problems are not something that the litigants were unaware of before going to court. The exposure to the court only bolstered their impressions. More importantly, however, a necessary consequence of these problems associated with the courts is, what some of the litigants identified as, an increasing tendency to show "disrespect" for the judiciary and an "I -couldn't-care-less" attitude to the courts. As an official of a nationalised Bank remarked, "the moment an issue goes to court, the defendant is in a better position. Many of our defaulting customers tell us: 'You can go to court'".

Indeed, some of the litigants in our sample maintained that they were no longer afraid of the courts nor respected it. The following response of a litigant, one who had been involved in a criminal case, is quite illustrative:

> *Before going to court, I was afraid of them. I thought that it was a holy place and that any wrong committed would be punished. Having been exposed to the court, however, I am no longer afraid of them. I now know that the court has no teeth-it is like any other place, corrupt and crowded. Get yourself a good lawyer and you can relax, rest assured that nothing untoward will happen.*

The more embittered among the litigants in our sample maintained that they would either seek "short-cuts", such as, influencing the judge, and even bribing him, or intimidating the other side, or avoiding courts altogether and settling matters outside, even though they may lose in the bargain. From the point of view of a litigant,

> *People are already seeking shortcuts to redress their grievances. Civil disputes are becoming criminal offences. The failure of the legal system to deliver justice can have dangerous consequences.*

These perspectives notwithstanding, the litigants in our sample, in response to a question whether they would go to court again, maintained that there is no other alternative but to mobilize the court in order to secure their private interest. Only a few of the litigants were categorical that they would not go to court again.

Conclusion

The point of this discussion has not been to mount a critique of the Indian courts from the point of view of litigants. Apart from highlighting aspects of the operative logic of courts, the responses of the litigants amply testify to the instrumentalism that underlies the practice of law and court recourse, the primacy of lawyers in the drama of courts, and the conception of lawyer-client relations as primarily collaborative rather than exploitative. The dimensions of lawyering and litigating outlined here seem to suggest that the court is often viewed as an "ineffective instrumentality".

The problem is how to conceptualize a condition, an institution, a practice which seems to have found itself on a denial of the very axes and premises on which it claims to have been based. Is it the "gap" we often speak about, between the promise of law on the one hand, and its performance on the other? Or, do we affirm, with Balbus that the legitimation of the legal order is not primarily a function of its ability to live up to its claims or 'redeem its pledges' but rather of the fact that its claims or pledges are valued in the first place.[14]

14. I. D. Balbus, "Commodity Form and the Legal Form: An Essay on the Relative Autonomy of the Law", 11 *Law and Society Review* 581 (1977).

WHAT AILS THE JUDICIARY?

*Dr. Justice David Annoussami**

1. Threat to independence from the Executive

(a) Disciplinary measures

Even though by and large the judiciary appears to behave independently from the other limbs of power, there are many cases in which that independence is fettered because the judiciary is in a position of dependence on many matters vital for it. It is true that regarding the tenure of the post, there is a constitutional guarantee that no disciplinary action except removal is possible in respect of judges of the Supreme Court and High Court. The removal from office cannot be effected except by an order of the President passed after an address, by each House of the Parliament supported by the majority of the total members and a majority of not less than two-thirds of the members present and voting, has been presented to the President, in the same session, for such removal on the ground of proved misbehaviour or incapacity. The process is so cumbersome that so far no removal has taken place even though there has been in the press serious allegations regarding the conduct of a few Judges and complaint about their practical impunity. This tarnishes the image of the judiciary and affects the confidence of the public. If there is a serious allegation, it should be cleared forthwith through a proper enquiry and consequential action.

On the other side the situation may undergo change and it may become possible for the Government to find the necessary majority for resorting to removal and such removal may perhaps take place in case when it is not warranted, in a vindictive manner jeopardizing thereby the independence of the judiciary. In fact the Government has got the Constitution amended 67 times with the same requirements regarding majority and it may find them for the removal of a Judge as well. So far the political will was missing, it may come into existence. Therefore, the power of punishment of judges should not be left to the pleasure of the Government and the decision of the Parliament. That may become a real danger for democracy. The power of removal should lie in the hands of a high level independent disciplinary body. That body should be able to act swiftly and efficiently in case of misbehaviour, maintaining intact the right of defence, so that the impression of impunity is totally removed. The same body or the same kind of body should also deal with other judicial officers for whom also there should be no punishment other than removal with or without pension. A judge on whom any other punishment is inflicted loses his prestige and cannot enjoy the confidence of the litigants which is so essential in the dispensation of justice. A

---

* Vice -Chairman, Central Administrative Tribunal, Madras.

confidential censure may be addressed by the Chief Justice of India in case of High Court Judges, by the Chief Justice of the State in case of District Judges, by the District Judge to those below him. No public stricture should be passed by any appellate court in the body of the judgement itself. But there should not be any hesitation in inflicting the punishment of removal whenever it is warranted. This will be part of the conditions of service which should otherwise be improved. Removed judges can always return to the profession of advocates and will not be in the street. Judges have proved too soft in dealing with their erring brothers. So the disciplinary body should not consist only of judges. It should also consist of responsible representatives of the society of high reputation.

A situation analogous to removal consists in the non-regularisation of additional Judges. Their status is most precarious. They can be made permanent only at the pleasure of the Government. How can they act independently during their tenure as additional Judges? Practically there is no need to have posts of additional Judges. If they exist, the incumbents should be made permanent as a matter of course, preferably to outsiders, unless there is a disciplinary action pending against them.

Another form of disguised punishment impairing the independence of Judges of the High Court is the possibility of their transfer. Transfer for a Judge who is in his fifties to another State where language, climatic conditions, food products may be extremely different, will put the transferred Judge to a considerable hardship and inconvenience. Therefore Judges are scared at the very idea of transfer. Some have even preferred to resign instead of joining their new posts in another State. It is true that except during the period of emergency not many transfers have been effected except in respect of Chief Justices. But the policy of having one-third of the Judges in each State from outside is brandished now and then. Who will be picked up under the guise of the implementation of the policy? This Damocles' Sword is a serious danger to independence of Judges. It is also to be noted that Judges transferred against their wish are likely to become aggressive, with all the evil consequences that such an attitude entails. Non-transferability is considered in France as an essential guarantee of independence. Such a guarantee should be given not only to High Court Judges but also to all judicial officers, transfer being made possible only upon the request of the Judges, or, upon the recommendation of the Disciplinary Body.

(b) Appointments

The ways open to the Government to influence Judges by way of threat are of course important. But the pernicious ways of earning them are much more dangerous. In the first place comes the appointment which rests ultimately in the hand of the Government. By a tacit convention, the seniormost Supreme Court Judge was made the Chief Justice, Chief Justices of the States were made Judges of the Supreme Court and the senior most Judges of each High Court were made the Chief Justices of the same High Court. But this convention has been given a

gobye when the confrontation between the Executive and the Judiciary reached its zenith. It has been even publicly stated several times that what the nation required were committed Judges; 'committed' meaning presumably, committed to the course of action pursued by the Government. The word now floated is 'common perception'. This situation creates for Judges a conflict between their conscience and their legitimate ambition for promotion. They have recourse to several methods, escapism by way of avoiding to decide a ticklish case having political repercussion, accepting the pressure without giving the game away by an exercise of trick-riding. But those courses are not always possible. A choice has to be made. Some remain jealously independent and impervious to pressures; others succumb to the temptation of promotion at the expense of independence. The aspirants to the posts may have to canvass the support of some political bosses or at least take care of not displeasing them. After promotion, some ungrateful Judges recover their independence, and assert clamourously their independence, some others nurture a feeling of gratitude for those who have favoured them in their getting promotion. Before and to some extent after promotion, the Judge mortgages in one way or another his independence.

Regarding the appointment of Judges from the Bar, let us first consider the appointment to the High Court. The bulk of the appointees to the High Court come from among Government Pleaders appointed by the party in power, from among advocates belonging to the party. There is in that way a pre-selection. Those who become Government pleaders and High Court Judges thereafter have well-anchored political convictions and they will have difficulty of getting rid of their allegiance to the chiefs of the party or at least to the ideology of the party. If the party remains in power for a sufficiently long period, the Court may very well reflect its political colouration. It is true that the Chief Justice of the Supreme Court and Chief Justices of High Courts have a role to play in the process of appointments. But the Government has the final word. Chief Justices may at best reach a compromise in the matter in order to avoid a deadlock. In fact here has been a considerable delay in making appointments. Further the process of selection appears to have deteriorated over the years. Now we witness the warrant of appointment by the President being successfully challenged. One wonders whether the Intelligence work is done properly or whether the report is called for or is ignored. At any rate the whole process of appointment is shrouded from the public eye, the appointing authority losing thereby the possibility of obtaining the fullest information regarding the person proposed to be elevated to a High office. If for being appointed as a Judge one has to secure the blessing of the Government, the litigant would be justified in entertaining a doubt about his independence vis-a-vis the Government.

The Government has got at its disposal another reward in favour of 'deserving' Judges. The remuneration of High Court Judges is more than half in kind or in the form of various allowances which will cease at the time of superannuation at the age of 62 whilst judges have still daughters to marry. The pension which cannot exceed 50% of the remuneration by way of salary alone will thus represent less

than 25% of their total remuneration while in service. This makes Judges highly vulnerable. The Government has got the power to offer Chairmanship of some Commission, or of a Tribunal to retired Judges. Therefore Judges on the eve of their retirement at least are tempted to look for appointment to such posts and will have much difficulty to keep intact their independence.

Appointment of District Munsifs or Junior Civil Judges go practically unnoticed, even though they are holder of posts with vast powers. They are ordinarily chosen by a Commission. There is no accurate job description and determination of qualities required and ways to assess their qualities. The usual way of selection is by way of interview aimed at ascertaining their knowledge of law and capacity of expression. In this system of selection by way of interview, there is possibility of candidates successfully bringing pressure on the members by all possible ways. So a Judge comes into existence with an original sin, which will necessarily perpetuate itself during his career. Law Ministers sincerely would like to have Judges enjoying a good reputation of integrity and impartiality, but they would like them to yield occasionally to their 'small' requests, forgetting that it is incompatible. One who is ready to accommodate the wish of the Minister would be prone to yield to other pressures as well.

(c) Other matters

The salary and other conditions of service of the Judges of the higher judiciary are to be determined by the Parliament and by rules framed by the Government. Those of the lower judiciary are completely governed by rules made by the Government. There can only be recommendations by the Chief Justice of India. The Government is free to accept them or not. So Judges as a corps should not displease the Government. In fact during a certain period of time the remuneration of Judges has been allowed to deteriorate by way of not raising it periodically so as to neutralize the rise of the cost of living.

Another trumpcard at the disposal of the Government, which is not apparent but very powerful, is the matter of finance. The judiciary depends on the Government for budget allocation and sanction for expenditure. It is bound to address the Government for creation of new courts, sanction of posts, construction and maintenance of Court buildings, purchase of equipments, etc. In all cases there is no direct act of hostility by way of action or omission by the Government, but officers in charge follow closely the opinion of their superiors on the judiciary. Judges, or at least Chief Justices and Principal District Judges cannot remain totally indifferent to the desiderate of the Government.

In our country the administration is tentacular; for getting anything done within normal time and according to law, one has to approach a number of offices. A judge for the maintenance of his official residence, or his own house and the exploitation of his properties or of those of his friends and relatives, cannot allow the application to the Government to take its own course through which it may not reach its end. He has necessarily to approach some highly placed officials or even

a Minister to get things done. This predicament places the Judge in a very uneasy position, because those things are not granted without a quid pro quo immediately or later. On account of the dependence of the judiciary on so many matters, there is a vicious circle of influences to escape from which one needs a lot of courage and spirit of sacrifice.

The attitude of the Government towards Judges and courts has been somewhat ambiguous. Sometimes one gets the impression that the Government wants to manifest its discontent in not yielding even to very modest and legitimate demands. Sometimes it appears that they want to win over the judiciary and are very generous. The attitude of the judiciary also discloses the same fluctuation at close scrutiny. The Government and the judiciary have to live side by side. The acts of the former are subject to the review of the latter. But the latter depends on the former in so many ways. Now their relations are subject to the whims of individuals and justice may become a casualty. A permanent arrangement has to be found allowing the Government to run smoothly and ensuring to judges dignity and independence.

II. Threats from other sources

a) Aggression by Advocates

The Government is not the only threat to the independence of judges, there are also influences from other quarters against which judges need to be shielded. Since Judges of all ranks have been in the Bar for more or less a long period; the Bench and the Bar always considered themselves as belonging to the same fraternity. There has been a great courtesy mutually. The Bar has always supported the Bench in times of confrontation with Parliament or the Executive. But, unfortunately, in the fine edifice, cracks have started appearing. This is due to the general deterioration of all institutions in the country and also to the large influx of young advocates without briefs. Manifestations are more and more numerous; gherao of judges and systematic boycott of courts of some judges are not rare. The Bar also succeeded in obtaining the transfer of judges from one place to another or they practically forced some Judges to resign. An incident which made sensation was the throwing of a chair by a lawyer on the Judge after he finished pronouncing a judgment. In another more recent incident a thousand of protesting advocates from Tis Hazari District Court led by their office bearers penetrated into the court rooms of the Delhi High Court, shouted slogans against the sitting judges and compelled them to leave for their chambers. The Full Bench of the Delhi High Court had to initiate contempt proceedings against seven lawyers of Tis Hazari including four office bearers of Tis Hazari Bar Association. At first they did not relent and were inclined to ignore the contempt notices and were heading for a show-down; the Delhi Bar Association resolved that more than 5000 lawyers will go to the High Court and ask the Judges to initiate contempt proceedings against them as well. Then ultimately reason prevailed and contemners

expressed their regret and tendered unconditional apology. This was not to the taste of the some of the lawyers who asked for a meeting of the General Body of the Bar Association and demanded the removal of the office bearers, who apologised. The seven lawyers were convicted and they would be called upon to appear in court and receive the sentence in case of repetition of the same kind of act. The new attitude of the Bar towards Judges is an unhealthy development undermining the independence of judiciary. Judges should enjoy the confidence and the esteem of the litigant public, otherwise the faith in justice will fade away and the whole system will crumble. Advocates are the main architects in building up the reputation of judges. If advocates sit in judgment over the conduct of judges and pass resolutions against them and also give publicity to it, judges are without any protection, and the prestige of judges so essential for the dispensation of justice is jeopardized. The proper course of action for the Bar would be to send a detailed complaint to the Higher Authority which should take prompt and efficient action. No publicity should be given by way of resolution or otherwise. If lawyers themselves take law in their hands, that is the death knell of the rule of law and those who will suffer ultimately are the lawyers themselves.

b) Non-co-operation by the Police

Police has been always faithfully subordinate to the judiciary. Stricture even by a Magistrate against a lapse in the investigation affected the career of the concerned police officer. With the new role the police has assumed in the evolving of democratic form of Government and the deprivation of Magistrates of their administrative powers on the process of separation of the judiciary from the executive, the situation has changed. Fear of the judiciary has given place to a mere formal respect. As a result they no longer take diligent action for the production of witnesses and execution of warrants, causing thus waste of time for criminal courts. The incident which occurred in Gujarat on 25th September 1989 reveals the depth of the evil. The Chief Judicial Magistrate, Nadiad, (Gujarat) was upset by the non co-operation of the police in the matter of trial. He complained against the local police to the higher police officials. The Police Inspector annoyed by the action taken by the Chief Judicial Magistrate withdrew constables posted in his court. The CJM filed two complaints against the Police Inspector and other police officials for their delaying the process of courts. The Police Inspector displeased by the actions taken by the CJM, made a complaint to the Registrar of the High Court through proper channel. While hostility between the two had reached that point, the Police Inspector met the CJM in his chamber, assuaged him and invited him to visit the police station to see registers by himself and further added that such a visit would have a mollifying effect on the sentiments of the police officials. The CJM accepted. What happened exactly in the chamber of the Police Inspector is not yet clear, but the CJM was arrested, handcuffed, tied with ropes. The photograph in such a state was given wide publicity. The CJM was sent for medical examination and at the hospital he was made to sit in the bench in the verandah exposing him to public gaze in the state

described above. Criminal action against the CJM was also started for offences of violation of the prohibition Act and acts of violence. This had created a great commotion in the Bench and the Bar. The Supreme Court was asked to step in. Six police officers, namely the District Superintendent of Police, the Inspector of Police, the Sub-Inspector of Police, one Head Constable, one Constable, one Mamlatdar were found guilty of contempt of Court, convicted thereunder and sentenced to imprisonment varying from one month to six months and fine varying from Rs.500/- to Rs. 2,000/- . The Supreme Court in this case has given some guidelines to be followed for preserving the independence of judiciary and ensuring that offences are properly investigated. But the police officials in Gujarat have taken a serious exception to the Supreme Court decision and submitted to the Governor a two page memorandum in which they asked the Government to move an application for the revision of the Supreme Court order by a Constitution Bench. This incident should be an eye opener and lead to redefining clearly the relationship between the judiciary and the police and to restoring the authority of the former enabling it to act in full independence, and authority unhampered by the police.

c) Intervention of Superiors

In India unlike in European countries, the judiciary is divided into two separate corps: the "higher judiciary" and the "subordinate judiciary". Judges belonging to the first category do not consider those of the second category as belonging to the same species. Even in the manner of addressing judges those of the higher judiciary are addressed as 'Your Lordship' whereas those of the lower judiciary are addressed as 'Your Honour'. But in countries like France for instance all judges from top to bottom are addressed as 'Mr. President'. One can also wonder why in a Republic like ours the word 'Lordship' is still used. If there was only a difference of vocabulary the evil will not be so grave, but the career of the Members of the 'subordinate judiciary' depends entirely on the pleasure of the 'higher judiciary'. Promotion, disciplinary action and transfer are in the hand of the higher judiciary. What is worse is that there are no established norms for transfer in all States. So the members of the 'subordinate judiciary' are prone to always earn the blessings of the members of the 'higher judiciary' and in that process when a member of the 'higher judiciary' wants a favour for himself or his friends, he can easily influence the judges of the 'subordinate judiciary'. The very word of 'subordinate judiciary' seems to suggest the possibility of the fact.

d) Solicitation of the Proximate Circle

It is easy to imagine that a judge will be subject to the influence of his relatives, of members of his caste, religion and of the circle of friends. As far as the 'subordinate judiciary' is concerned, in order to keep judicial officers away from such an influence they are posted outside their district. This solution is not a very happy one. First, it smacks of colonial administration. In a democracy any group should be able to govern itself and also justice should be rendered by its

own members. Secondly, this practice is not conducive to the dispensation of good justice. In order to deal with cases, one should have not only the knowledge of law, but also the knowledge of the environment in which problems arise. He should have some insight of the local mentality. In big States there are vast differences in behaviour between urban and rural areas, hills and plains, fertile and densely populated areas, and arid and scarcely populated areas. Sometimes even the colloquial language used in the locality is different and when one does not know it, he may be led to misunderstand the evidence tendered before him. Of course everyone is influenced by the image of justice found in the Old Bailey, the Central Criminal Court in London, where justice is represented blindfolded with a sword in one hand and a pair of scales in another. The blind foldedness means only that no consideration should be given to the persons before the judge. One thing is to take into account the persons appearing before the judge; another thing is to know the real situation in which the parties are placed. To the latter, judges should not be blind, they should rather have their eyes wide open. They should be familiar with the social realities of the locality.

On the other side, the practice adopted is not also very efficient, because very often the family circle follows the judge. Members of the caste and religion will also be in the new place and a new circle of friends and touts will get soon formed in the new post. Transfer of a judge is not a solution for the problem, it is only transferring the problem from one place to another. The fact that judges of the subordinate judiciary are never appointed in their own district compels them to frequent visits to their home town entailing unnecessary additional expenditure for them and less days of work for the State. They are also automatically transferred from one post to another every three years without any possibility for their wives to devise ways of earning honestly additional income by their activities. On the contrary, if a judge is given an opportunity to serve in his own town he will enjoy more prestige and public recognition than in another place. He will attempt to preserve that prestige and consideration and in order to avoid transfer, he will try to behave as best as possible. He will give the best of himself to the task. Working in his own place requires more restraint than working in an unknown place where one can afford to go out of the way without losing much. At any rate, impartiality cannot be achieved by this artificial mean of posting outside the district. Only semblance of impartiality will be there. So a judge should be allowed to work in a place of his choice, if vacancies are available and conditions favourable to reduce the influence of the proximate circle should be created.

III. Factors Aggravating Judicial Maladies

i) Insufficient Income

Remuneration of judicial officers is quite inadequate especially for those in the lower ranks. The salary did not follow the variation of cost of living index. For instance, the average salary of the District Judge was Rs. 1500/-p.m. at the time

of independence. The present day Rupee is equivalent to 6.57 paise of that time. Therefore to maintain the salary the same level in terms of real value, his average salary should be in terms of present day rupees, Rs. 22830/-, but it is only Rs. 5400/-. In other words, the real salary is only approximately 1/4 of the previous salary. Officers of the corresponding rank in the administration and the police have suffered the same fate in matter of salary, but they have been successful to tide over the difficulty to some extent in creating for themselves several benefits in kind which are not official but which are quite sizable like vehicles, telephone charges, etc. which the officers of the judiciary do not enjoy. Some Magistrates find it convenient to get from the police the procurement of some advantages in kind which they cannot get by themselves. In the process, they close their eyes on the irregularities committed by the police in the investigation work which the Magistrate is expected to supervise. So the police is no longer scared by the magistracy. The advocates have been able to attune their fees to the rise of cost of living, so much so the income of a judicial officer in a month may be inferior to the fee of an advocate arguing before him in a day. Further his pension will not be more than 50% of his last pay and he will retire at the age of 58 with a meagre pension, when he has got still many family responsibilities, having sons and daughters pursuing higher studies at a high cost. If he is provident enough, he thinks of accumulating wealth during his tenure for the expenditure for the rest of his life.

Formerly judges used to come from affluent families and salary constituted a supplement of income. Now people from various strata of the society without personal property are able to accede to the post of Judges and they have no other income than their salary. On the other side occasions of expenditure are becoming more and more important like Telephone, T.V., Photo, Video and all sorts of machines and gadgets. Those in the business have a sizable income which they can also protect to some extent from the Income tax net. This class of people nurture in the country the cult of wealth and of a high level of ostentatory expenditure, making Government servants to envy them and if possible to imitate them. In this predicament, judges are driven to find a supplement of income in one way or the other and thus the gate way is open for corruption. There are frequent and persistent rumours of corruption by judges. Quite recently the Bar Association of Tirunelveli has constituted a special five member committee to inquire into the corrupt practicies of judges in some civil courts in the district and to report to the High Court. Giving judges enormous powers and not providing with an income which is in consonance with that power, would irresistibly lead to malpractices. It is also true that corruption of judges is magnified in the imagination of the public. The judiciary on the whole resists the temptations but in some cases here and there they yield to them. This leads people to generalize and to proclaim that all judges are corrupt. Any society has the judiciary it deserves. The values prevailing in the society will necessarily percolate in the judiciary. However, corruption of judges is not tolerated by the people who have reconciled themselves with corruption in other quarters. It is so because judiciary is the last recourse

against attacks of different kinds by individuals or public bodies and also on account of the tradition handed over by centuries of literary works placing judges on high pedastal; they are considered almost as God. It is significant to note that even in the preamble of the Constitution, 'justice' appears in the first place. In the reaction of the society against corruption of judges, lies a ray of hope, if the society is up in arms against corruption of judges and is able to put an end to it, not by resorting to punitive measures which will not work, but by removing the causes of corruption, that may trigger corrective steps in the whole administration and also the society as well.

ii) Institutional Factors

What facilitates judges succumbing to influences is the uncertainty of law and the vast power enjoyed by judges in the application of law. Even though the doctrine of *stare decisis* is applicable in India and Judges are bound by precedents, the existence at present of a vast number of lengthy judgments of higher courts sometime contradicting each other, gives the liberty to the judge to take his own course. Further, one of the characteristics of the common law itself is that when the set of facts is different, the previous decision would not apply and can be modified to suit the new set of facts. So by way of distinction the judge can easily apply the law as he thinks fit. Thus we have reached a point which is quite similar to the pre-Macaulay period when judges were asked to deliver judgements according to "Justice, equity and good conscience".

The exercise of influence is made easier also by the facility with which the interested party can get his case brought before the judge of his choice, by way of creation of special courts, of withdrawal of cases, and of transfer of cases. Withdrawal of cases from a judge is common feature. The distribution of cases is not made systematically and is modified quite often. Parties get the case adjourned till a favourable Bench is seized of the matter. So it is enough that in each court there are a few judges amenable to influence, and the whole system gets vitiated and the independence of judiciary as a whole is affected. The transfer of cases has become a matter of routine. In a country like France it is not so. Separate Benches for the year are constituted for each kind of cases. Withdrawal of cases should be justified. The Press and the Association of Judges react sharply when it is done for an oblique motive. For having a case transferred, one has to take exception to the judge concerned. That is possible only in circumstances prescribed by law. The procedure is rather complex. The Bench which decides on transfer sits in a solemn manner, the judges wearing red robes as in a Sessions case. When the prayer for transfer is rejected, the party who prayed for transfer is sentenced to fine and in addition to pay compensation for damages for the judge, if he applies for it.

Thirdly, most of the cases are decided in India by a Single Judge or Two Judges. In some circumstances, in a Bench of judges there is only one deciding judge. It is so for instance when a new judge happens to have been a junior under the other judge or when a District Judge promoted as a High Court Judge has been living for years

under the fear of the other judge. The senior judge by mere rapidity in conducting the business may render a newly appointed junior judge ineffective. In order to reduce the effect of outside influences, one should have always a collegium of three judges, at least at the level of judgement, the trial being left to be conducted by a single judge. Thus influence to which a judge is subjected will get neutralized to a large extent and also the judge could more easily ignore external influences and say that the decision was taken by the other two judges. This would mean that the expenditure on judiciary will increase, but a society which wants impartiality in judgements has the obligation to create conditions congenial for it. Justice is like any other commodity, if one wants quality he should pay the price.

Lastly, judgements of lower courts are not at all taken for hearing on appeal or revision in time on account of huge arrears in higher courts, so that judges are less and less apprehensive of the opinion of the higher courts. They are in this way tempted to act as they wish and they can easily yield to several influences.

CRIMINAL JUSTICE AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

*Martin L. Friedland, Q.C.**

In 1982, Canada enacted the Canadian Charter of Rights and Freedoms.[1] Its interpretation should be of interest to jurists in India, just as the interpretation of the Indian Constitution, adopted in 1949, should be of interest to Canadian lawyers and judges. Unfortunately, however, neither country makes very much use of the legal judgments and scholarship of the other.[2]

One of the main reasons for this is the inaccessibility of the law reports of the other country. The only Canadian law reports available to the Supreme Court of India in New Delhi are the Canadian *Supreme Court Reports*, which only contain judgments of the Supreme Court of Canada. There are no Canadian provincial reports in either the Supreme Court Library or the impressive library of the Indian Law Institute. The Indian Law Institute does not have the Canada-wide series, the *Dominion Law Reports*, and the library of the Supreme Court of India stopped subscribing to that series of reports in 1967. Neither the Canada-wide Canadian *Criminal Cases* or *Criminal Reports* are available in New Delhi.

The position in Canada is even worse. The Supreme Court of Canada stopped subscribing to the *All India Reporter* in 1984. The reports are still available at Osgoode Hall Law School in Toronto, but this is obviously not convenient for somebody wishing to use the reports in Ottawa. It appears to me to be very odd that the highest court in Canada does not have easy access to the reports of the highest court of an important sister member of the Commonwealth.

The Canadian Charter of Rights and Freedoms has now been in operation for 10 years. It had a major impact on many areas of the law. In this paper I will concentrate on the criminal law. First let me provide some background into the criminal law in Canada.

---

* Professor of Law, University of Toronto, Canada. This paper is based on a lecture given in April, 1991 at the National Law School of India University. The author is grateful to Professor N.R. Madhava Menon and his colleagues for their hospitality and stimulating discussions.

1 Set out in Part I of the Constitution Act, 1982, as enacted by the Canada Act 1982 (U.K), c. 11.

2 *But see*, H.M. Seervai, Constitutional Law of India, (3rd ed., 1984), Appendix 1, "Canadian Charter of Rights and Freedom". *See also, for example*, the work of the Canadian scholar, Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" 37 *American J. of Comp. Law* 495,(1989) and "Bitter Knowledge, Vibrant Action: Reflections on Law and Society in Modern India" *Wisconsin L. Rev.* 109,[1991] reviewing Marc Galanter's, Law and Society in Modern India (1989). For another excellent review of Galanter's book, *see* Cunningham, "Why American Lawyers Should Go to India: Retracing Galanter's Intellectual Odyssey" 16 *Law and Social Inquiry* 777 (1991). Cassell, The Uncertain Promise of Law: Lessons from Bhopal. Other Canadian legal scholars interested in India are Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Judicial Guaranties?" 141 *University of Pennsylvania Law Review*, (1992) forthcoming, and Brenda Cossmam and Ratna Kapur, "Trespass, Impasse, Collaboration: Doing Research on Women's Rights in India" 2 *Journal of Human Justice* 99 (1991).

Unlike the Indian Constitution, which places Criminal Law and Procedure on the concurrent list of powers,[3] the British North America Act of 1867, now called the Constitution Act, 1867, placed Criminal Law and Procedure on the list of exclusive federal legislative authority.[4] The Colonial Secretary, Lord Carnarvon, expressly gave his approval of the arrangement in his speech on the British North America Act in the House of Lords:[5]

> To the Central Parliament will also be assigned the enactment of criminal law. The administration of it, indeed, is vested in the local authorities; but the power of general legislation is very properly reserved for the Central Parliament. And in this I cannot but note a wise departure from the system pursued in the United States, where each State is competent to deal as it may please with its criminal code, and where an offence may be visited with one penalty in the State of New York, and with another in the State of Virginia. The system here proposed is, I believe, a better and safer one.

The administration of the Criminal Law is, however, given to the provinces. Section 92 (14) of the B.N.A. Act gives the provinces authority over "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction". Moreover, the provinces were given the legislative power under section 92 (15) of the Act to impose "punishment by fine, penalty, or imprisonment for enforcing any law of the province..." There have been many instances where provincial legislation has been struck down by the courts because it was essentially criminal law. For example, in one case a city by-law dealing with prostitution was declared void by the Supreme Court of Canada as " a colourable attempt to deal, not with a public nuisance but with the evil of prostitution".[6] Nevertheless, the Supreme Court of Canada has shown some reluctance to strike down provincial laws on the ground that there is existing federal legislation unless there is a real conflict between the two laws "in the sense that compliance with one law involves breach of the other".[7] The end result, therefore, is perhaps not dissimilar to the Indian Constitution which provides in Article 254 that "If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provisions of an existing law with respect to one of the matters enumerated in the Concurrent List, then, ... the law made by Parliament, ... shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void". In both countries, therefore, federal law prevails in the case of a conflict.

---

3 Seventh Schedule, List III.

4 S. 91 (27), 30 and 31 Vict., c. 3 (U.K.); R.S.C. 1970, App. II, No. 5.

5 Quoted in M. Friedland, "Criminal Justice and the Constitutional Division of Power in Canada" A Century of Criminal Justice 48 (1984).

6 *Westondorp v The Queen* (1983) 2 C.C.C. (3rd) 330 at 338 (S.C.C.)

7 Per Martland J. in *Smith v The Queen* (1960) 128 C.C.C. 145 at 168 (S.C.C.).

Both countries also have a federal Criminal Code. Canada's Code was enacted about .100 years ago —in 1892. It was based on the English Royal Commissioners' Draft Code of 1879, which in turn was based on James Fitzjames Stephen's Draft Code of 1878.[8] Stephen is, of course, well known to an Indian audience as the drafter of the Indian Evidence Act. The Canadian Code has been subject to numerous revisions, including a major revision in the 1950s, but it is still basically Stephen's Criminal Code, just as yours is basically still Thomas Babington Macaulay's Indian Penal Code, produced in 1837, but not adopted until 1860.[9]

In 1971 the Federal Government in Canada established the Law Reform Commission of Canada.[10] The Minister of Justice stated in the House at the time that "the Commission should have a complete rewriting of the criminal law as one of its' first projects".[11] For the next twenty years the Law Reform Commission worked on this task. It produced over 30 highly regarded Reports to Parliament and over 60 widely cited Working Papers. It was hoped that Canada would have a new Criminal Code in 1992 or possibly in 1993, the centenary of the implementation of the 1892 Code. A major report entitled "Recodifying Criminal Law" was issued in 1988[12] and an initial report on criminal procedure, "Recodifying Criminal Procedure", was released in 1991.[13]

Unfortunately, in late February, 1992 the federal Minister of Finance announced in his budget speech that the Law Reform Commission of Canada, along with a number of other federal agencies, would be eliminated. The reason given was the high federal deficit and the state of the economy. They must be serious because several weeks ago I received a parcel in the mail from the Law Reform Commission in Ottawa which contained my picture — I was a former Commissioner - - that had been hanging on the wall of the Commission's office.

Nobody is sure what will happen to the criminal law reform efforts. A Parliamentary Subcommittee had started hearings on the General Part of the Code several months before the axe fell on the Commission and it is said that they will be continuing the hearings. But whether the present Government is still committed to a new Criminal Code is uncertain.

The pattern in Canada is typical of other efforts to bring in new Codes. England, for example, started producing a new Criminal Code in 1968; it has not yet been enacted.[14] The United States Government appointed a National Commission

---

8 *See generally,* Friedland, "Codification in the Commonwealth: Earlier Efforts" 2 *Criminal Law Forum* 145 (1990).

9 *See,* S. Kadish, "Codifiers of the Criminal Law" 78 *Columbia L. Rev.* 1098 (1978).

10 R.S.C. 1970, c. 23, 1st Supp.

11 Hansard, February 23, 1970, at 3963.

12 Report 31 (a revised and enlarged edition of Report 30 (1986)).

13 Report 33, volume 1, Police Powers.

14 Law Commission Report No. 177, *A Criminal Code for England and Wales* (1989).

on Reform of Federal Criminal Laws in 1966, and the Commissions's 1971 report still has not been implemented.[15] Criminal Codes inevitably touch on many controversial issues: abortion, capital punishment, gun control, euthanasia, drugs, wiretapping, and minimum sentences, to name just a few. Pressure groups, dissatisfied with particular provisions, often let their views be known. As a result, the package as a whole usually lacks the enthusiastic endorsement that would push a Government to find the will and the legislative time for its enactment.

Perhaps, in part, because of this lack of movement on the legislative front, the courts in Canada have taken on a major role in reforming the criminal law — both the substantive law and the procedural law. They have done this through the vehicle of the Canadian Charter of Rights and Freedoms.

The Charter was enacted as part of the move to repatriate the Canadian Constitution from England. One reason for its adoption was to fulfill Canada's international obligations under the United Nations International Covenant on Civil and Political Rights, which had come into force in 1966 and to which Canada became a signatory in 1976.[16] Article 2.2 of the Covenant obligates each signatory state "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

The Charter has played a very important role in the development of the criminal law — much greater than most observers would have thought when the Charter was enacted. In the first few years after its enactment, over 25% of the reported criminal cases in one series of reports, the *Canadian Criminal Cases*, discussed the Charter.[17] More recently, the number of reported criminal cases discussing the Charter has risen to about 50%.[18] Amongst the reported Supreme Court of Canada criminal cases, the percentage is even higher.

Moreover, the Charter has brought us closer to American law — and further removed from English law. One can see this in the increasing frequency in which U.S. cases are cited in reported judgments. About 30% of the Supreme Court of Canada criminal cases now cite U.S. cases, and in both civil and criminal cases in all courts the percentage is increasing. Before the introduction of the Charter, less than 3% of all the cases in the *Dominion Law Reports* cited U.S. cases;[19] now over 10% do so.[20]

---

15 *See generally*, Gainer, "Report to the Attorney General on Federal Criminal Law Reform", 1 *Criminal L. Forum* 99 (1989).

16 *See* Fisher, "The Human Rights Covenants and Canadian Law", *Can. Yearbook of International Law* 42 (1977).

17 Friedland, "Criminal Justice and the Charter", A Century of Criminal Justice 205 (1984).

18 *E.g.*, 280 out of 535 reported cases in volumes 51-62 of the *Canadian Criminal Cases*. I am indebted to Alan Baldachin, a second year student in the Faculty of Law, University of Toronto, for compiling this figure.

19 *Supra* n.17 at 206.

20 *E.g.*, 45 out of 379 cases in volumes 72-79 of the *Dominion Law Reports*.

In 1960, Canada had enacted the Canadian Bill of Rights,[21] but it did not have a major impact on the legal system. It was simply a Federal statute, not a constitutional document, and it applied only to the Federal government. Moreover, it was not clear whether the Bill of Rights was merely a guide to interpretation or whether it could be used to strike down legislation.

Until the enactment of the Charter, only one piece of legislation was ever struck down under the Bill of Rights by the Supreme Court of Canada. That was in the *Drybones* case[22] in 1970, in which the Court struck down under an equality section a provision of the Act making it an offence for a native person to be drunk off a reserve. The Bill of Rights was not repealed when the Charter was introduced; it is still operative. "Equality Rights" under the Charter did not come into force for three years after the Charter came into effect and so the Bill of Rights was still needed with respect to Federal laws on equality issues during this period. Moreover, the Charter does not specifically protect "property" in its "fundamental justice" clause, whereas, the Canadian Bill of Rights includes "the right of the individual to life, liberty, security of the person and enjoyment of property".[23]

Like the Indian Constitution,[24] the Charter now makes it clear that legislation that violates the Charter can be struck down. Section 52 (1) of the Constitution Act states that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". Under that provision, the Supreme Court of Canada has struck down a number of important criminal laws, such as the Criminal Code sections dealing with constructive murder[25] and abortion.[26]

One perhaps unique feature of the Canadian Charter is the ability of the Federal Parliament or the legislature of a province under section 33 of the Charter to "expressly declare in an Act of Parliament or the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding" a violation of certain sections of the Charter. This declaration lasts up to five years and must be subsequently reenacted every five years. Although it has been used by the provinces on a few occasions, it has not yet been employed by the Federal government.

Unlike the earlier Canadian Bill of Rights, the Charter applies to the "Parliament and government of Canada" as well as to the "legislature and government of each

---

21 R.S.C. 1970, Appendix III.

22 *Regina v Drybones* [1970] 3 C.C.C. 335 (S.C.C.).

23 S. 1 (a).

24 Article 13(2).

25 *Vaillancourt v The Queen* (1987) 39 C.C.C. (3d) 118 (S.C.C.). *Regina v Martineau* (1990) 58 C.C.C (3d) 353 (S.C.C.); *Sit v The Queen* (1991) 66 C.C.C. (3d) 449 (S.C.C.).

26 *Morgentaler et. al. v The Queen* (1988) 37 C.C.C (3d) 449 (S.C.C.).

province".[27] An interesting comparison can be made between the interpretation of our section and Article 12 of the Constitution of India which provides that "the State includes the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities". In one case dealing with mandatory retirement in Universities, the Supreme Court of Canada held that state funded Universities do not come within the provisions of the Charter.[28] My impression is that the Indian Constitution would in such cases encompass more than ours.

One very important provision in our Charter is section 1, which provides that the "Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The section has been utilized in a great many cases. The Courts have tended to give specific rights a very expansive meaning and then have turned to section 1 to see if the impugned legislation is such a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society". The Supreme Court has held that the onus of proof is upon the party seeking to uphold the limitation and the standard is proof by a preponderance of probability. Not only must the legislative object be a matter that is of substantial and pressing concern, but the means chosen have to pass a proportionality test.[29] An interesting comparison could be made between section 1 of the Charter and Article 19 of the Indian Constitution, which allows "reasonable restrictions" on the exercise of certain rights. My own view is that the courts in Canada have relied too heavily on section 1. It would have been better if more of the balancing of interests had been done under the specific provisions of the Charter.

The Charter also contains a provision providing a remedy for the infringement of a Charter right. Section 24 (1) provides that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".[30] Then in subsection (2) there is a specific provision with respect to the exclusion of illegally obtained evidence. The common law in Canada is that evidence is admissible even if it is illegally obtained.[31] The American rule excludes illegally obtained evidence. The Charter takes a position midway between the two and provides in section 24 (2) that if evidence was obtained in a manner that infringed or denied rights guaranteed by the Charter, "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". The test adopted by the Supreme Court

---

27 S. 32 (1).

28 *McKinney v University of Guelph* (1990) 76 D.L.R. (4th) 545 (S.C.C.).

29 See *Regina v Oakes* (1986) 24 C.C.C. (3d) 321 (S.C.C.)

30 Compare Article 32 of the Indian Constitution, which only applies to the Supreme Court.

31 *See, The Queen v Wray* [1970] 4 C.C.C. 1 (S.C.C.)

of Canada in the *Collins* case in 1987 was: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable [person], dispassionate and fully apprised of the circumstances of the case?"[32] Again, a comparison with the law in India would be interesting.

No doubt the most fascinating comparison that could be made between the Canadian Charter and the Indian Constitution is in comparing the Canadian section 7 and the Indian Article 21. (And a comparison with the American "due process" provisions would make the study even more interesting). Each has turned out to be a very expansive, important provision. Section 7 of the Charter provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Article 21 of the Indian Constitution provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law". "Article 21, if read literally", states one Indian Commentator,[33] is a colourless article and would be satisfied, the moment it is established by the State that there is a law which provides a procedure which has been followed by the impugned action". But, as the cases decided under Article 21 show, the Indian courts have used the article to require reasonable, fair and just procedures. The article has been important in such areas as bail, delay, legal aid and speedy trial.

The Canadian "fundamental justice" provision has also been given a surprisingly - - surprising to me- - wide interpretation. In particular, the Supreme Court of Canada has interpreted "fundamental justice" as including substantive, not just procedural justice. In the *B.C. Motor Vehicle Act* case,[34] decided in 1985, the Supreme Court dealt with the question whether it was a denial of fundamental justice for the province of British Columbia to make it an absolute liability offence punishable by a minimum seven days in jail to drive when one's license is suspended. The Court said that it was, holding that fundamental justice is not limited to procedure. "Whether any given principle may be said to be a principle of fundamental justice within the meaning of section 7", the Court stated, "will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves". Mr. Justice Lamer, now the Chief Justice, also stated in that case that "the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system". The result of the case was that it was held to be a denial of fundamental justice for an absolute liability offence to provide for even the possibility of a person going to jail. So, the section was

---

32 *Collins v The Queen* (1987) 33 C.C.C (3d) 1 (S.C.C.), adopting the test suggested by Professor Yves-Marie Morissette in "The Exclusion of Evidence Under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do" (1984) 29 *McGill L.J.* 521 at 533.

33 P.M. Bakshi, The Constitution of India 26-27 (1991).

34 *Reference Re Section 94 (2) of the Motor Vehicle Act* (1985) 23 C.C.C. (3d) 289 (S.C.C.)

struck down. In my opinion, the *B.C. Motor Vehicle Act* case will turn out to be perhaps the most important case decided under the Charter in this century.[35]

The section was later used to strike down the Canadian constructive murder sections.[36] The Supreme Court held that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight. "To label and punish a person as a murderer who did not intend or foresee death", Chief Justice Lamer stated in *Regina v Martineau* in 1990, "unnecessarily stigmatizes and punishes those whose moral blameworthiness is not that of a murderer".

In the *Morgentaler* case,[37] decided in 1988, the Supreme Court of Canada held that the Canadian abortion provisions in the Criminal Code requiring approval of a "therapeutic abortion committee" on a finding that the mother's "life or health" would be endangered violated section 7 of the Charter in that the woman was deprived of "security of the person" without being in accordance with the "principles of fundamental justice". The Court held that the delay resulting from the intervention of the therapeutic abortion committee brought about unnecessary hardship and danger to the pregnant woman. The provision, the Court said, could not be upheld under section 1 of the Charter.

Let us look at some of the other provisions of the Charter. Section 2 specifies a number of fundamental freedoms:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

This section is very similar to Article 19 of the Indian Constitution and comes up in cases involving such issues as hate literature.[38] I should also mention our section 15, dealing with equality. Again, I will not say much about section 15 because it has not arisen in many criminal cases.

Section 15 provides as follows:

> 15. (1) Every individual is equal before and under the law and has

---

35 Note that the Supreme Court has held that section 7 does not apply to corporations: *Irwin Toy Ltd. v Quebec (Attorney-General)* (1989) 58 D.L.R. (4th) 577 (S.C.C.); other sections, such as the right to a speedy trial under s. 11(b) do apply to corporations.*See CIP Inc. v The Queen*, April, 1992 (S.C.C.) *36See cases cited supra* n. 25.

37 *Regina v Morgentaler et al* (1988) 37 C.C.C. (3d) 449 (S.C.C.)

38 In *Regina v Keegstra* (1990) 61 C.C.C. (3d) 1 the Supreme Court of Canada upheld the Criminal Code hate literature section (section 319(2) and 3(a)) under section 1 of the Charter.

> the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Note the similarity between this section and Articles 14-17 of the Indian Constitution. I know from the discussion following my lecture at the National Law School of India University that the equality provisions and particularly the affirmative action provisions of the Indian Constitution are very controversial. Once again, a fascinating comparison could be made between these aspects of the Canadian and Indian Constitutions.

Let us now turn to the specific criminal law provisions in the Charter. Needless to say, I will only touch on some of the highlights of the court decisions under sections 8 to 14, the sections that relate specifically to the criminal law.

Section 8 provides that "Everyone has the right to be secure against unreasonable search or seizure". In *Hunter v Southam*, [39] decided in 1984, the Court adopted the U.S. technique of requiring prior judicial authorization of searches. As Chief Justice Dickson stated: "Where it is feasible to obtain prior authorization, I would hold that such authorization is a pre-condition for a valid search and seizure". Later cases have carved exceptions from the general rule. For example, frisk searches can be conducted as an incident to a lawful arrest. [40] I would have made another exception when an electronically recorded conversation had the prior consent of one of the participants, but the Supreme Court of Canada has held that prior judicial authorization is required in such a case,[41] and struck down legislation exempting such conduct from the wiretapping requirements.

Section 10 of the Charter contains a provision which expands the former law. It provides that "Everyone has the right on arrest or detention.... to retain and instruct counsel without delay and to be informed of that right". This means that upon detention the police have to specifically tell the accused that they are entitled to counsel, and a recent case[42] has held that the police must go further and tell the accused about the legal aid system. Article 22 of the Indian Constitution also gives a right to counsel, but does not require that the accused be informed of the right. If the accused is not told about the right to counsel, then any statement

---

39 (1984) 14 C.C.C. (3d) 97 (S.C.C.).

40 *Cloutier v Langlois* (1990) 53 C.C.C. (3d) 257 (S..C.C.)

41 *Duarte v The Queen* (1990) 53 C.C.C., (3d) 1 (S.C.C.)

42 *Regina v Brydges* (1990) 53 C.C.C. (3d) 330 (S.C.C.)

made or evidence taken is likely to be excluded under section 24(2) of the Charter. So, for example, a driver cannot be taken to police station for a breathalyser test without being told about the right to counsel. Roadside screening tests for impaired driving can be obtained, however, without referring to the right to counsel. The Supreme Court upheld the latter practice under section 1 of the Charter.[43]

In the recent case relating to legal aid that I just mentioned the Supreme Court of Canada gave the police 30 days to conform with the ruling. This is a form of prospective lawmaking, often engaged in by American courts, but very rarely by English or Canadian courts.[44] The Supreme Court also adopted the technique in a case where they struck down as a violation of fundamental justice under section 8 and an arbitrary detention under section 9 the Canadian practice of holding in custody for indefinite periods persons found not guilty by reason of insanity. The court gave the Federal Government six months to introduce a new scheme.[45] In the meantime, the existing legislation would be deemed to be valid.

Section 11 provides nine clauses relating to the criminal law. The section is introduced with the words "Any person charged with an offence has the right...." The meaning of these words comes up in the double jeopardy cases in which a person is charged with a criminal offence after having been convicted of a disciplinary offence, such as an internal police disciplinary charge[46] or a prison disciplinary offence.[47] The Supreme Court of Canada has permitted the later criminal charge on the ground that the earlier charge did not come within the meaning of the phrase "any person charged with an offence".

Subsection (b) of section 11 provides that a person has the right "to be tried within a reasonable time". Following the American jurisprudence, the Supreme Court has held that the only remedy for unreasonable delay is to stay the charge.[48] One would have thought, however, that other remedies should also be possible.[49] Then in a much-criticized decision in 1990, *Regina v Askov*,[50] the Supreme Court appeared to many to say that a delay of 6 to 8 months after a committal for trial was *per se* unreasonable. The Courts stated that "a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable". As a result, perhaps 50,000 charges were

---

43 *Thomsen v The Queen* (1988) 40 C.C.C. (3d) 411 (S.C.C.)

44 *See*, Friedland, "Prospective and Retrospective Judicial Lawmaking" 24 *U. of Toronto L.J.* 170 (1974).

45 *Regina v Swain* (1991) 63 C.C.C. (3d) 481 (S.C.C.)

46 *Wigglesworth v The Queen* (1987) 37 C.C.C. (3d) 385 (S.C.C.).

47 *Shubley v The Queen* (1990) 52 C.C.C. (3d) 481 (S.C.C.).

48 *Rahey v The Queen* (1987) 33 C.C.C. (3d) 289 (S.C.C.).

49 *See generally*, Friedland, "Controlling the Administrators of Criminal Justice" 31 *Criminal Law. Q.* 280 (1988-90).

50 *Regina v Askov* (1990) 59 C.C.C. (3d) 449 (S.C.C.).

dismissed or withdrawn in the province of Ontario alone. In the latest Supreme Court of Canada judgment, however, the Supreme Court permitted a $14^1/_2$ month delay between an accused's arrest and trial on an impaired driving charge and held that the period of time mentioned in *Askov* was a guideline only and not a fixed limitation period.[51] I note that the Indian courts have brought in speedy trial concepts under Article 21 of the Constitution. An interesting comparison could be made between the Indian and Canadian law on speedy trial, both as to the law and the practice.

Section 11(c) of the Charter provides that a person charged with an offence has the right "not to be compelled to be a witness in proceedings against that person in respect of the offence". There is no surprise in this subsection. Article 20(3) of the Indian Constitution provides a similar safeguard. The Supreme Court of Canada has gone further, however, and held that the right to remain silent at any stage is a basic tenet of the law and thus comes within the concept of fundamental justice in section 7 of the Charter.[52]

Perhaps the subsection that has resulted in the greatest number of sections of statutes being struck down is section 11(d) which gives an accused person the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". The concept of "fair hearing" gives great scope for the development of the law. In a recent decision, for example, the Supreme Court of Canada held that the right of the Crown to have an unlimited number of jurors stand aside was a violation of the "fair hearing" provision of the Charter. Again, the Court gave Parliament 6 months to correct the process by new legislation.[53] There are also numerous cases dealing with the meaning of a "public hearing" and whether the hearing is "by an independent and impartial tribunal".

It is the first part of the section "to be presumed innocent", that has been the most fertile, however. The courts have generally held that any shifting of the burden of proof onto the accused will be a violation of the Charter.[54] The real issue is whether the reverse onus can be upheld under section 1 of the Charter. In two recent cases - - one dealing with the traditional reverse onus when an accused uses the defence of insanity[55] and another dealing with shifting the onus for regulatory offences [56] - - the Supreme Court upheld the reverse onus provisions under section 1.

Other subsections deal with the right "not to be denied reasonable bail without just cause" (s.11(e)), the right to "trial by jury" where the offence has a potential punishment of imprisonment for five years or more (s.11 (f)), and the right not to be convicted under a retroactive law (s.11 (g)).[57] The latter contains an exception which permits retroactive legislation for offences that are "criminal

51 *Morin v The Queen* , March, 1992 (S.C.C.).

52 *Regina v Herbert* (1990) 57 C.C.C. (3d) 1 (S.C.C.).

53 *Bain v The Queen*, January, 1992 (S.C.C.).

54 *See e.g., Regina* v. *Oakes* (1986) 24 C.C.C. (3d) 321.

55 *Chaulk v The Queen* (1990) 62 C.C.C. (3d) 193 (S.C.C.).

56 *Wholesale Travel Group Inc. v The Queen* (1991) 67 C.C.C. (3d) 193 (S.C.C.)

57 Compare Article 20(1).

according to the general principles of law recognized by the community of nations". This allowed retroactive legislation relating to war criminals to be introduced in Canada.

A further subsection deals with double jeopardy. Section 11(h) [58] provides that a person has the right "if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again". The word "finally" in the subsection has meant that Crown appeals from acquittals continue to be legal in Canada.[59] The Supreme Court has decided many double jeopardy cases in the past ten years, but it has decided them under common law principles and has, for the most part, not resorted to the Charter. In my view, cases should, if possible, be decided under ordinary criminal law principles and not the Charter. The danger in constitutionalizing the criminal law is that Parliament's ability to change the law and experiment with new ideas becomes limited.

A further potentially important section is section 12 dealing with "cruel and unusual treatment or punishment". The section has been used by the Supreme Court of Canada to strike down a provision in the Narcotics Control Act mandating a minimum sentence of seven years imprisonment for importing narcotics.[60] Canada eliminated capital punishment for Criminal Code offences before the enactment of the Charter and so there have not been cases directly dealing with the issue. The question did come up, however, when a fugitive facing the death penalty in the United States tried to block his extradition from Canada. By a 4 - 3 majority he was ordered extradited without requiring the Canadian Government to seek an assurance from the U.S. that the death penalty would not be imposed.[61]

This review of the Canadian Charter shows that the Charter has had a profound and for the most part a beneficial effect on criminal law and procedure in Canada. It has taken some of the harshness out of the criminal law and introduced a number of new procedural rules. One drawback in so much activism by the courts is that Parliament has taken a back-seat in the development of the criminal law. The recent demise of the Law Reform Commission of Canada attests to this shift in focus. Let us hope, however, that it does not signal the abandonment of the pursuit of a new Criminal Code. Parliament is the body that should have the primary role in the development of the criminal law. The recent decisions by the Supreme Court in which they shift the ball back to Parliament to come up in six months time with a solution to particular area of law is an interesting sharing of responsibility between the two bodies.

I believe that the Canadian experience over the last 10 years under the Charter should be of interest to Indian lawyers and jurists, just as the interpretation of the Constitution of India should be of interest in Canada.

---

58 Compare Article 20(2).

59 *See, Morgentaler v The Queen* (1988) 37 C.C.C. (3d) 449 (S.C.C.).

60 *Smith v The Queen* (1987) 34 C.C.C. (3d) 97 (S.C.C.).

61 *Re Kindler and Minister of Justice* (1991) 67 C.C.C. (3d) 1 (S.C.C.).

HUMAN RIGHTS MOVEMENT IN COLONIAL INDIA

An Historical Perspective

*Sitharamam Kakarala**

Introduction

The term 'human rights' is of recent origin. A small committee appointed by the United Nations to discuss and draft a Bill of Rights for the people of all nations coined the term in 1947 after deliberations of more than two years.[1] However, as a concept human rights has more deeper historical roots. It is basically a Western concept and traversed through a variety of trajectories in the last millennium or so. The dynamics of the concept could be discerned from different theories of 'Natural Rights' of medieval and modern times, declarations of various revolutions and mass upheavals and in the contemporary socio-political discourse.[2]

The struggle or movement for human rights, as a conscious political activity, has nearly a century of pedigree.[3] The movement was born in France at the end of nineteenth century with the formation of the French League of Rights of Man and Citizens and spread to the other parts of Europe and America during the early

---

* Research Associate, National Law School of India, Bangalore.

1 Eleanor Roosevelt, who was member of the drafting committee, is credited for coining the term 'human rights' as alternative expression to a more gender biased 'rights of man'. *See*, Maurice Cranston, "Are There Any Human Rights?" 1 *Daedalus*, 112 (No. 4, 1983). For an historical outline of the concept *see*, David Weissbratt, "Human Rights: An Historical Perspective", Human Rights,(Peter Davis ed., 1988).

2 *See*, Richard Tuck, Theories of Natural Rights: Their Origin and Development(1979). Jack Donnely, The Concept of Human Rights (1985); Maurice Cranston, What are Human Rights (1973); Antonio Cassese, Human Rights in a Changing World (1990); Human Rights (Eugene Kamenka and Alice Eorthsoon Tay eds., 1978) ; Neil Mitchel *et al*, "Liberalism, Human Rights and Human dignity", *American Political Science Review* 921-28 (1987). For Marxian critique and perspective *see*, Colin Summer, "The Rule of Law and Civil Rights in Contemporary Marxist Theory", *9 Kapitalistate*, 63-92 (1981); Florence E. McCarthy and Feldman Shelly, "Human Rights as Class Conflict: A Reconceptualisation of the Issue", *7 South Asia Bulletin* 64-67 (1987); L. Kolakwski, "Marxism and Human Rights",112 *Daedalus*, 81-92, (No. 4,1983); T.C. Campbell, The Left and the Rights: A Conceptual Analysis of the idea of Socialist Rights (1983); Paul Hirst, "Law, Socialism and Rights", Radical Issues in Criminology, 58-104 (Pat Carlen and Mike Collison eds., 1980). A precise definition of the term however remained an elusive task. The contemporary concept of human rights can no longer be equated with 'civil liberties' or something that emanated from the bourgeois revolutions. The present concept of human rights owes to a variety of ideological movements, particularly to liberalism, marxism, feminism. Any attempt to reduce human rights to one or another strand of thought is simplistic and leads to reductionist interpretation.

3 It was originally a movement for civil liberties, i.e., the values associated with the philosophy of liberalism and the European democratic movements, but gradually became a much wider movement in the course of time, accommodating different strands of rights consciousness and struggles.

decades of twentieth century.[4] These movements emerged in the background of an uneasy quiver of the credentials of the liberal democratic State in honouring the democratic norms and process. For the State's violation of constitutional norms was flagrant and a proper constitutional check to which the State could be accountable was absent.[5] The basic thrust of this movement was to monitor the functioning of the State, or playing, in other words, a watch-dog role, with a view to protect the democratic norms which the State promised to honour.

These Western organizations provided the necessary impetus for the birth of similar organizations elsewhere. The Indian experience is no exception.[6] The present paper seeks to provide a broad historical outline of the emergence and growth of human rights consciousness and movement in colonial India.

The Early Middle Class Organizations

Rights consciousness in India was a corollary to the development of colonialism. On the one hand, colonialism pauperized Indian people and plundered ruthlessly the natural and human resources. Its policies helped sharpening the social stratification. A middle class had emerged.[7] On the other hand, the 'Indian mind' was introduced to the vibrant movements and discourses of the West. The liberal discourse, American and French revolutions and other democratic movements inspired a whole new generation of Indian intelligentsia.[8]

Both the entrenched aristocracy and the emerging middle class saw the idea of rights more or less as a means to their own amelioration than fundamental democratic values. Few individual reformers like Raja Rammohan Roy perceived civil liberties as a democratic value, but could not overcome the limitations imposed by colonialism. Thus his struggle was primarily against the 'undemocratic' Hindu (upper caste) society. He felt colonialism was a *fait accompli* and sought to perfect its rule in India.[9] It was not *liberty* from the colonial state intervention but *equality* with the colonial masters. It was not *resistance* to colonial plunder but an appeal to *absorb* them into the process.

---

4 American Civil Liberties Union (ACLU) of USA was born in 1920 and the National Council for Civil Liberties (NCCL) of UK born in 1934.

5 For instance, NCCL was born when the British state adopted undemocratic measures to suppress the 'hunger marches' by deliberatively infiltrating police as *agents-provocateurs*, into the procession in order to disrupt them. *See*, Mark Lilly, National Council for Civil Liberties: The First Fifty Years, 1-10 (1984). Similar reasons generated impetus for formation of the French League and the ACLU. The details could be found in Rammanohar Lohia, The Struggle for Civill Liberties (1936).

6 *See*, Lohia, The Struggle for Civil Liberties (1936).

7 *See*, Bipin Chandra, Nationalism and Colonialism in Modern India (1987); Sumit Sarkar, Modern India (1987); A.R. Desai, The Social Background of Indian Nationalism, (1989); Anil Seal, The Emergence of Indian Nationalism: Competition and Collaboration in the late Nineteenth Century (1968).

8 *See*, Political Thought in Modern India, (T. M. Pantham ed., 1986).

9 *Ibid*, for an elaborate discussion on the struggle of Raja Rammohan Roy.

The ambiguous legacy of Rammohan Roy subsequently acquired a striking class character in the articulations of organized aristocracy and middle class. The landed organizations raised the issues of civil rights but their emphasis was more towards their interest. The Zamindars Association (1837), for instance, intended to claim for the Indian people the same rights that Englishmen enjoy in England. However its primary motive was to "agitate against the resumption of rent-free lands".[10] The Bengal British India Society, established in 1843, also had a similar objective. Its aim was to collect information about the true conditions of the people of India and strive in a constitutional and peaceful manner for the improvement of different classes and sections. The central thrust of the organization, however, was "securing favourable land legislation."[11]

The British Indian Association (1851) which proclaimed its aim as advancing the common interests of Great Britain and India, and ameliorating the condition of the natives, opposed the extension of tenancy rights which the Government sought to provide under the Bengal Tenancy Bill of 1882.[12]

The Indian Association articulated the demands of the advanced sections. For instance, one of its major agitations was against the age limit reduction for Civil Service by the British. It opposed in 1878, the Arms Act and the Vernacular Press Act - the former proscribed possession of arms by Indians, while the latter imposed various restrictions including censorship on the native newspapers.[13]

The Poona Saravajanik Sabha also agitated against the Vernacular Press Act, and the Bombay Forest Regulations. It had set up arbitration courts to settle agrarian disputes. However, the Sabha's special interest in the agrarian problem of the Deccan appears to be aimed at winning a 'permanent settlement' of the land revenue which would give Bombay "a version of the great European advantage of forward looking and prosperous landlords, recruited from the professional classes and higher castes."[14]

The rights consciousness was thus concomitant to the emergence of organized landed gentry and middle class. They tended to perceive 'civil liberties' as something that only advanced sections of the natives can enjoy and appreciate. In other words, 'rights' became 'advantages' conferred by the colonial rule on the advanced sections of India. This attitude was further consolidated by the leaders of the Indian National Congress (INC) during the first three decades of its practice.

---

10 Anil Seal, The Emergence of Indian Nationalism: Competion and Collaboration in the late Nineteenth Century 198-9 (1968).

11 Bhabani Bhattacharaya, Socio-Political Currents in Bengal: A Nineteenth Century Perspective, 27-8 (1980).

12 *Ibid* at 35.

13 The Vernacular Press Act, owing to intensive native protest, was repealed in 1881.

14 *Supra* n.10, 240.

The Congress and Human Rights

The Indian National Congress (INC) had continued the ambiguous legacy of rights consciousness. For the convenience of argument we analyze its approach under two sub-headings: civil liberties and democratic rights. Civil liberties are those issues which liberalism recognized as essential for any democratic order and democratic rights are those issues related to human dignity, survival and exploitation etc.

Civil Liberties

In the realm of civil liberties, the INC had by and large unambiguous approach. The INC demanded, for instance, introduction of representative institutions, trial by jury, separation of powers of the executive and the judiciary, and amending Criminal Procedure Code to separate the criminal judicial powers from the district magistrate etc. It had also raised the issue of repressive laws. It opposed the Arms Act of 1878, which proscribed bearing of arms by any Indian the Censorship Bill against the Press the Sedition Act of 1897 and the Indian Penal Code Amendment Act IV of 1898 - a replica of the Vernacular Act of 1878. It had also opposed the Regulation of Meetings Ordinance of 1907.[15] However, in certain issues moderates in INC adopted ambivalent strategy. They always had a dilemma between civil liberties and the problem of 'law and order', and at times did not hesitate to choose the latter. The striking examples are an Act passed in 1908[16] and the Indian Press Act 1910.[17]

Democratic Rights

Unlike in the case of civil liberties, the INC had a relatively more ambiguous approach with regard to the issues of democratic rights, often leaving room for conflicting interpretations. Here we focus on two types of issues: agrarian and industrial legislations.

The INC had shown concern in the problems of the agrarian poor from the beginning.[18] It had opposed a legislation in Bengal which sought to empower the

---

15 This ordinance subsequently became the Prevention of Seditious Meetings Act in 1911.

16 This Act was enacted to proscribe seditious writings in newspapers, pamphlets and books, and 'incitement' against the British rule. It empowered the authority to take judicial action against the editor of any paper that published material which, in their view, was an incitement to rebellion. A district magistrate was empowered as the ultimate authority. The moderates hoping that the Act was a 'temporary measure' to ensure 'law and order' had lent their support to it.

17 The Indian Press Act of 1910 empowered the government to instruct its solicitor to go before the presidency magistrate to demand security from any newspaper publishing matter considered offensive. the burden of proof of innocence was left on the shoulders of the accused. Although there was provision of appeal, even the High Court had no power to question the discretion of the executive authority. The moderates, troubled with the dilemma of growing revolutionary terrorism and 'law and order' yielded to the Act. Before the Act was repealed in 1922, 350 printing presses and 300 newspapers had paid penalties while as many as 500 publication were proscribed.

18 For instance, in the very second year of its formation Congress kept its concern regarding poverty in India on record. It resolved, "that this Congress regards with the deepest sympathy the view with grave apprehensions, the increasing poverty of the vast numbers of the population of India".

Zamindars to collect and enhance rents. It was also critical of forest laws of the British. The root cause, of backward agriculture and the destitution of the agrarian poor according to INC, was the land revenue policy of the British.[19]

But the INC also unequivocally opposed certain legislations that sought to ameliorate the conditions of the marginal and middle peasantry. An interesting case was the Punjab Alienation of Land Bill of 1899. Its aim was to close to urban classes their opportunity and freedom to acquire rural estates in satisfaction of their mortgage decrees. In a strict sense the Bill was intended to hit the 'interests of both money lenders and their lawyer-supporters'.[20] The Congress vehemently opposed the Bill and held that any restriction on the freedom of sale or mortgage of land is a reactionary step, although such freedom in past caused absentee landlordism and indebtedness which ruined tenants.[21]

The INC's approach to the rights of the workers was equally ambiguous. In 1901, for instance, it passed a resolution expressing serious concern about the conditions and wages of Assam tea plantation 'coolies'.[22] On the other hand, it also opposed, despite the miserable state of the working class, certain pro-labour legislations enacted by the colonial government. Leading members of INC vehemently opposed the Factory Act of 1891, which sought to proscribe the employment of children below 7 years and restrict the working hours of children of 7-12 years to 9 hours a day, as an unnecessary interference in the industrial affairs and harmful to the production.[23] It also opposed the Indian Mines Bill in 1900 which sought to restrict the employment of children and women in coal mines.[24]

These contradicting views are explained in terms of competing interests in the INC. That is, while the Factories Act and the Mines Bill adversely affected the Indian industrialists, who were also members of INC, the owners of Assam tea plantations were Europeans and it had no hesitation to express concern over coolies' conditions. The following citation from a Presidential speech of Badruddin Tayabji is a succinct illustration of how deeply the interest of 'wealth and education' perceived civil liberties and democratic rights as an effective means to their self amelioration.

> "Gentlemen, to be a true and sincere friend of the British Government, it is necessary that one should be in a position to appreciate the great blessings which that Government has *conferred* upon us, and I should like to know who is in a better position to appreciate these

---

19 1 Encyclopedia of the Indian National Congress 139 (A.M. Zaidi & S.G. Zaidi, eds..).

20 B.B. Mishra, The Indian Political Parties, 76 (1976).

21 *Ibid* at 75.

22 4 Encyclopedia of the Indian National Congress 261 (A.M. Zaidi & S.G. Zaidi, eds..).

23 Sumantha Banerjee, "Hundred Years of Congress and Democratic Rights", (in Telugu), *Swechcha*, (March and April 1985).

24 3 Encyclopedia of the Indian National Congress, 700 (A.M. Zaidi & S.G. Zaidi, eds..).

> blessings - the ignorant peasants or the educated natives? Who, for instance, will better appreciate the advantage of good roads, railways, telegraphs, good laws and impartial courts of justice? - The educated natives or the ignorant peasants of this country? .... it is the educated natives that are best qualified to judge, because it is we, who know and are best able to appreciate, for instance, the *blessings* of the right of public meeting, the liberty of action and of speech, and high education which we enjoy under Great Briton..."[25]

Rowlatt Satyagraha

Rowlatt Satyagraha, the struggle against the Rowlatt Act,[26] was a watershed development in the history of human rights movement in India. It was significant owing to the following reasons. First, it was the first mass campaign against the colonial state on the issues of rights. The earlier approach of the INC was primarily passing resolutions and writing petitions. Secondly, the masses who, with few exceptions, were not mobilized in the national movement, took part in big numbers. Thirdly, the focus of the civil liberties changed from 'equality' with the British to opposition to the colonial state. And, finally, the *Satyagraha* and its coercive suppression by the government ushered a new era of civil liberty consciousness.

The INC not only had expressed its apprehension on the Rowlatt Act, but also adopted the Declaration of Indian Rights in its Bombay special session in 1818. S. Satyamurthy, a Congress leader from Madras, wrote a treatise, *Rights of Citizens*, in 1919. Ever since the INC appointed a sub-committee to inquire into the 'Amritsar Massacre'[27] and repression in Punjab, voluntary initiative in understanding truth regarding civil liberties violations acquired greater legitimacy.

Nevertheless the ambiguous legacy by and large continued. Satyamurthy's *Rights of Citizens* sought to provide an elaborate discussion and theoretical justification to the demands originally articulated in the Declaration of Rights adopted by the INC. But his definition of 'repressive' laws was rather absurd. He, for instance, opposed the Sarada Act, which sought to proscribe the child marriages, as it was an 'infringement' on the liberties of Indians. He went further

---

25 *Supra* n. 19, at. 219. This however, is not an isolated example. Gokale, for instance, after a decade and half, held quite similar views. *See*,4 Encyclopedia of the India National Congress, 701-5 (A.M. Zaidi & S.G. Zaidi, eds..).

26 The popular name for the Anarchichal and Revolutionary Crimes Act of 1918. It was the first comprehensive legislation to control the 'terrorist activities'. Its objective was to dispense with the ordinary procedure to the extent possible for a 'speedy conviction' of the accused. There were provisions for special courts, whose judgement had no appeal, trial in camera and consideration of unusual evidence.

27 Popularly known as the Jalianwala Bag massacre, wherein hundreds of unarmed people gathered for a meeting against the Rowlatt Act were killed. The INC appointed a sub-committee, under the chairpersonship of Mahatma Gandhi, to find the details.

and arranged marriage for his four year old daughter in order to defy the law.[28] He was also an ardent supporter of untouchability.

Similarly, Gandhi's response to the Rowlatt Act was firm opposition. He declared in unequivocal terms that "I consider the Bill to be the unmistakable symptom of the deep-seated disease in the governing body. It needs, therefore, to be drastically treated." He further said that "arming the Government with power out of all proportion to the situation sought to be dealt with, is a greater danger" than the 'subterranean violence', which is confined to "isolated and very small parts of India and to a microscopic body of the people."[29] Gandhi , however, had a predominantly moralistic viewpoint and did not hesitate to take a stand that could go against the spirit of rights on the issues which he felt were amoral or not in accordance with the principles of non-violence. For instance, during the Rowlatt Satyagraha he preferred to be silent on the army atrocities in Gujarat and tended to blame the people responsible for the incidents. He said that, "[I] placed myself unreservedly at the service of the authorities... I deliberately refrained from narrating the acts done by the military under martial law."[30] After a few days he reiterated that, "about 250 persons were wounded and more than 50 people killed. For this, I do not blame the Government. We ourselves are to blame. I want you all to learn this lesson."[31]

At a philosophical level, Gandhi was against the notion of 'rights' and emphasized on 'duties', a concept closely related to the ancient and medieval Hindu notion of *Dharma*. In his cable to H.G. Wells, who sought Gandhi's opinion on the charter of '*Rights of Man*' prepared by him, Gandhi unequivocally held that,

> "Have carefully read your five articles, you will permit me to say you are on the wrong track. I feel sure that I can draw up a better charter of rights than you have drawn up. But of what good will it be? Who will become its guardian? If you mean propaganda or popular education you have begun at the wrong end. I suggest the right way. Begin with a charter of Duties of Man (both D and M capitals) and I promise the rights will follow as spring follows winter. I write from experience. As a young man I began life by seeking to assert my rights and I soon discovered I had none, not even over my wife, my children, friends, companions and society and I find today that I have greater rights, perhaps than any living man I know. If this is too tall a claim then I say I do not know anyone who possesses greater rights than I."[32]

---

28 M.S.S. Pandian, "Denationalisation of Past: The Concept of 'Nation and Nationalism' in the Political Thought of E.V.R.", Economic and Political Weekly (No. 40, 1993).

29 15 Collected Works of Gandhi, at 120.

30 *Id.*

31 *Ibid* at 250.

32 The Essential Writings of Mahatma Gandhi, 388 (Raghavan Iyer ed., 1991).

Gandhi's ambivalent attitude towards untouchability perhaps could be understood better in this background. He held that treating the untouchables as a "separate class is a blot on India's forehead". He condemned it in an emotionally appealing tone as "a sin, a great crime, and if Hinduism does not destroy this serpent when there is yet time, it will be devoured by it". He however argued that the root of this 'serpent' was not the caste system as it is only 'a hindrance, not a sin'.[33] He could not firmly hold even his limited appeal for a long time. For instance, when the oppression against the untouchables continued, even in Gujarat, the stronghold of the Mahatma, he could do little. In fact he toned down his appeal to the caste Hindus as the fund flow from them had shrunk.[34] Gandhi perceived untouchability as a problem that needs 'service', but not as a problem of social justice or civil rights.[35]

The increasing mass orientation of the National Movement, significant growth in the militant activities, and the emergence of new broadly left oriented leadership in the INC brought a new focus on the issues of rights. Increasing suppression of peaceful movements of INC, particularly the ruthless suppression of the Civil Disobedience Movement, provided the necessary impetus for a fresh look at the concept of civil liberties.[36] Jayaprakash Narayan succinctly articulated this spirit.

> "The whole country is in a manner subject to it [arbitrary rule]; and acts of high-handedness and unlawful victimization are not uncommon elsewhere even in normal times. Most of these acts would not be committed if the public were a little vigilant and if there were some organization, the task of which was to bring such acts to light and put up a fight against them, through the law-courts, the legislature, the press and the platform".[37]

Indian Civil Liberties Union

The idea of an organized public opinion against civil liberties violations was mooted somewhere in 1935. The left-wing of the INC led by Jawaharlal Nehru, Jayaprakash Narayan and Rammanohar Lohia vigorously propagated for such an

---

33 14 Collected Works of Gandhi at 73.

34 Ghanshyam Shah, "Congress and Deprived Communities", Congress in Indian Politics: A Centenary Perspective 128 (Ram Joshi and R.K. Hebsur eds., 1987).

35 Elenor M. Zelliot, "Gandhi and Ambedkar - A Study in Leading", The Untouchables in Contemporary India (Micheal J. Mahar ed., 1987), cited in *Ibid.*

36 10 Encyclopedia of the Indian National Congress, 275 & 530. (A.M. Zaidi & S.G. Zaidi, eds..)The Congress Party was banned. Press censorship was imposed. As per a modest official estimate, about 50,000 *satyagrihis* were imprisoned and 110 people died in police firings and many more wounded. Pt. Madan Mohan Malaviya in his Presidential address in 1931 had put the figure of the arrested at 1,20,000, while the General Secretary Report of the same year held it to be 54,480.

37 Towards Struggle: Selected Manifestos, Speeches and Writings of Jayaprakash Narayan 108-9 (Yusuf Meherally ed., 1946)

organized civil liberties movement. Soon after his journey to Europe in 1936, Nehru prepared a circular proposing the formation of Indian Civil Liberties Union and addressed it to about 150 'prominent individuals' of all political parties and leading professionals. He proposed a non-party and non-sectarian union which would be open to all individuals who believe in the value of civil liberty. The foremost objective of the Union would be 'to collect data and give publicity to it'.[38]

While the overall response to the circular was encouraging, vehement criticism came up from the Liberals. They opposed Nehru's proposition on two important grounds. First, the methods of the Congress were responsible, according to the Liberals, for the worsening scene of civil liberties and with a change in its methods, the restrictions on civil liberties were likely to be easily removed.[39] Secondly, the Liberals were skeptical about the realization of a non-party, non-partisan civil liberties union, for they felt that it might function as a 'second string to the Congress bow' [40]

The Indian Civil Liberties Union (ICLU) was formally inaugurated by Nehru in Bombay on 24 August 1936. It was also the inaugural meeting of the Bombay Civil Liberties Union (BCLU). A National Council was appointed but all the office bearers were not elected. Rabindranath Tagore and Sarojini Naidu agreed to be the Honorary President and President respectively on the request of Nehru. Nehru tried for a suitable person for the General Secretary post. After some trials, he appointed K.B. Menon, a Congress Socialist from Madras Presidency (part belonging to the present-day Kerala). Subsequently branches were inaugurated in Madras (MCLU), Calcutta (CCLU) and in Punjab.

Organization

There were two levels of organizational structures. At one level, there was a national body, viz. ICLU, and at the other level, there were regional bodies broadly representing the then Presidencies, viz., Bombay, Madras and Bengal. The ICLU had a 'National Council', consisting of 'prominent men', from all corners of India representing various shades of political opinion. The National Council was the supreme body of the organization and was virtually created by Jawaharlal Nehru, for it was he who invited these 'prominent men' to come and join the National Council.[41] The immediate purposes of the National Council were two. First, it was a body vested with the authority to elect an Executive Committee and the office bearers for the day-to-day functioning of the organization. Secondly, to bring more legitimacy to the idea and activity of civil liberties, to strengthen the authenticity of its inquiries and data, and to effectively raise the national and international public opinion.

---

38 7 Selected Works of Jawaharlal Nehru (SWJN) at 411.

39 *Ibid* at 412.

40 *Ibid* at 427.

41 1 Indian Annual Registrar 259 (N.N. Mitra ed., 1936).

There was a 21 member Executive Committee, which included Jawaharlal Nehru, Abdul Kalam Azad, Sharat Bose, Ramananda Chattopadhyay, Bhulabhai Desai, Zakir Hussain, Amrit Kaur, Jayaprakash Narayan, Sardar Patel and Rajendra Prasad.[42] The Executive Committee was headed by an Honourable President, a Chairperson and a General Secretary.

The regional organizations also had Executive Committees, largely comprised of individuals voluntarily joined. But we do not know much about the relations between the regional and the national organizations, and the National Council and the Executive of the ICLU. It is not clear as to whether the regional organizations functioned under the umbrella of the ICLU or independently. But what seems to be certain is that there was some communications between the regional organizations and the national body about their activities.

Ideology

As such there are no 'documents' that can authentically support the perspective of the ICLU or the regional organizations. There is no data about the constitution or declaration of objectives or a manifesto of ICLU. Nevertheless it could be discerned from the available data that it was a non-party organization, sought to monitor civil liberties violations and mobilize the enlightened public opinion through the Press, public meetings etc. The following citation from Nehru may suggest the broad conceptual understandings of the ICLU.

> "Every government tends to resent forcible criticism and opposition, and a democracy can only function properly if public opinion constantly checks government and prevents it from becoming too autocratic. In India where there is no democracy, the government is essentially autocratic and the need for preventing it from indulging in the worst excesses is thus all the greater. Obviously this does not and must not mean approval of the methods of any political party. Nor does it mean that the Congress or any group should be allowed by government to carry on revolutionary activities by civil disobedience without check or hindrance. But there are certain fundamental principles governing civil liberties which apply whatever the activities of political parties might be...."[43]

Leadership

In a formal sense, the ICLU had many senior national leaders, prominent individuals as its activists. Rabindranath Tagore was its Honorary President. Sarojini Naidu was the Chairperson. The Executive Committee had such prominent individuals as Moulana Azad, Sardar Patel, Jayaprakash Narayan and Rajendra

---

42 *Supra* n.38 at 435.

43 *Ibid* at 412-13.

Prasad. K.B. Menon, a Congress member and associated with the All India States' Peoples Movement, was the General Secretary. But little is known about their efforts in building the ICLU or the civil liberties movement.

Rabindranath Tagore, at the dusk of his life, fought for the causes of civil liberties in his own style. He was one of the first persons to respond to the suicides of Bengal Detenus[44]. He wrote poetry on civil liberties.[45] Going much ahead of many of his contemporaries, he actively supported the rights of the working class.[46]

Writing about the role of ICLU and his association with it, Tagore observed that,

> "by accepting Presidentship of the Indian Council of Civil Liberties, I have publicly associated myself with organized effort to further democratic ideals for our people. The European and the Far Eastern Wars, as well as the complications in the Indian situation, have made our task more imperative."[47]

However, Jawaharlal Nehru was the true creator of the organizational structures and perspective of the ICLU. Nehru was a charismatic leader. Both his charisma and conviction in the value of civil liberties were responsible for the emergence of the ICLU. From mooting the idea to the creation of organizational structures, he played a significant role.[48] He was instrumental in convincing Rabindranath Tagore and Sarojini Naidu to join the ICLU. He tried to find a 'suitable' General Secretary, tried to convince Krishna Menon, but eventually appointed K.B. Menon. He repeatedly struggled to raise funds to save ICLU from the 'closure'.[49]

In addition to this organizational work, he has fine articulation of the concept of civil liberties.

> "The existence of civil liberties is generally considered to be essential for the development of every kind of national activity - political, cultural, social and economic. With their suppression all these activities suffer. In countries with a democratic background the greatest value is therefore attached to civil liberty and people of the most diverse and mutually hostile opinions join together in a common attempt to protect this foundation of all liberty and activity".[50]

Nehru, however, retained the characteristic ambivalence of his times on the

---

44 Towards Freedom, 919-21(P.N. Chopra, ed.,1987).

45 *See, for e.g.*, Gandhi's editorial to *Harijan*, 23 October 1937 cited in *Ibid.*

46 *Supra* n.44 at 446-47.

47 Nilanjan Dutta,"With Little Victories and Big Defeats", Civil Rights Movement: First Fifty Years 44 (1986)

48 2 Indian Annual Register 7 (N.N. Mitra ed., 1937).

49 10 SWJN at 460.

50 *Supra* n.38 at 410.

issues of civil liberties. In the times of conflicting situations between the interests of INC and civil liberties, he was often overwhelmed by the 'needs' of the former. The weak organizational structures of the ICLU, and its virtual dependence upon him and his popularity for 'survival', brought certain deeper implications, for whose details we shall return to shortly. He thus became a principal reason for both the emergence and decline of the ICLU.

Mobilization

Despite its formal inauguration in August 1936, the ICLU had begun its true functioning in the early 1937, i.e. more or less simultaneously with the new Provincial Governments.[51] This in a way imposed certain limitations in the functioning of the organization. For it had to focus, on the one hand, on the violations of civil liberties under the colonial state in general, and, on the other hand, to be equally vigilant in the provinces, including the ones ruled by the Congress.

The primary activity of ICLU was gathering of information about violations of civil liberties particularly regarding the condition of prisoners and detenus, proscriptions of literature, police brutalities and restrictions on the Press. It is not very clear as to whether it was done through investigations, although some scholars claimed.[52] But it seems to have depended to a great extent on the reports of the vernacular press and the support of local party network. Based on such 'compiled facts', it prepared appeals and sent them to prominent people and the national and international Press in order to mobilize favourable opinion. It is difficult, and probably wrong, to assume that the ICLU had done anything significant other than this. It had organized, in the later days, certain public meetings and processions.[53] This was one reason probably that certain contemporary activists were not enthusiastic in their assessment of its activities.[54]

The poor mobilization programmes however should not relegate the historical significance of the ICLU, i.e., the larger consciousness it created. The formation of ICLU provided the necessary impetus for a discourse on the concept and inspired many intellectuals to take up the issue. The following are certain examples. Rammanohar Lohia wrote *Struggle for Civil Liberties*, the most popular hand-book on the topic during the late thirties. The popularity of the book

---

51 *Supra* n.44 at 202-4. The 'Manifesto on Civil Liberty in India', released in April 1937 was perhaps the first detailed appeal of the Union.

52 *Supra* n.47 at 43

53 *Supra* n.49 at 455.

54 *Supra* n. 49 at 460. Nehru, in his letter to Bhulabhai Desai, an Executive Committee Member of ICLU, commented, on its performance in the first three years that "(it) has not done any remarkable piece of work". V.M. Tarkunde held a similar opinion when he said, The CLU did not really become a force in the country at any stage. It has historical importance in that it was thought of at that time ... a separate presence of the CLU was not felt as it took up the same issues as the National Movement", *Lokyan Bulletin*, 5/4-5, 112-13 (1987).

could be gauged from the intention of the British Government to proscribe it.[55] Setalvad, a prominent activist of the Bombay Civil Liberties Union, wrote *War and Civil Liberties*. The impact was, however, not confined to the individuals associated with the organization alone. The treatise of M. Venkatarangaiah, a professor of political science in Andhra University, *The Fundamental Rights of Man and Citizens*, is the case in point. Suravaram Pratapa Reddy, the editor of Golkonda, a Telugu fortnightly from Hyderabad, enthusiastically responded to the issue of civil liberties in his paper.[56] He also wrote a small booklet, *The Rights of Citizens*, in Telugu.

Decline of the ICLU

The INC participated in the elections to the Provincial governments in 1937. It emphatically promised protection of civil liberties in the election manifesto. Despite high claims of its leaders, the situation remained grim in the early period of the Provincial Governments. The 'High Command', therefore, passed resolutions throughout the year asking the Congress Governments to implement the election manifesto.[57] The Congress Ministries subsequently released many of the political prisoners, relaxed ban orders on books, press securities were returned and certain repressive laws were repealed.[58]

These changes however did not account to the extent of Nehru's tall claims, when he observed that, "A fundamental change has been that now the poorest peasant feels great burden removed, and knows that the police cannot harass him, and, generally, he can say and do what he likes."[59] Although the Congress Governments had shown relatively better respect for civil liberties, it did not fundamentally change the situation. The Civil and democratic rights of the working masses, for instance, remained a far cry. The Congress Socialist Party warned against the persecution of workers and the Trade Union Movement by the Congress Ministries which, it exhorted, was a "sure method of inviting disaster".[60] Mr. Annapurnaiah, himself a Congress member, and an MLA in Madras province, severely criticized Rajagopalachari's Government, for it treated the election manifesto as a 'scrap of paper'.[61]

---

55 H.S. Stephenson's letter to Gwynni, *Supra* n.44 at 173-4.

56 Suravaram Pratapa Reddy, Golkonda Sampadakeeyalu 14-16 (1989).

57 The Working Committee resolution in Calcutta in November 1937 clearly suggested that the "Congress Ministries must guide themselves by the principle of civil liberty and the democratic approach by means of persuasion rather than by coercive action". *See, Supra* n.19 (Vol. 11), p. 307.

58 11 Enclopedia of the Indian National Congress at 519-20.

59 8 SWJN at 56.

60 *Supra* n.44 at 1159.

61 *See, supra n.* 48 at 356-59. In Madras Presidency Rajagopalachari encouraged CID activities, which the Congress assiduously resented earlier. In some cases, the released prisoners, who had connections with working class politics, were implicated in new cases and arrested immediately.

The practical problems of state management, particularly under the supervision of a colonial state, forced the INC to make many compromises. As the popular protest increased, the attitude of the Congress leaders towards civil liberties had also undergone conspicuous change.

For instance Nehru himself was deeply unhappy with the approach of ICLU towards Bombay Government, where Congress was in power. When the ICLU passed a resolution against the arrest of some labour leaders, Sarojini Naidu resigned from the Chairpersonship of the union. Responding to this Nehru, in a private letter to K.B. Menon, exhorted him not to be 'anti-Congress'.

> "It seems to me that certain individuals and groups who are notoriously anti-Congress are trying to exploit the situation to their own advantage. Under these circumstances it is not desirable for you to associate yourself with these elements in public demonstrations. This would have been so at any time but, in view of the crisis that has developed, this is peculiarly necessary".[62]

Similarly, K.M. Munshi, the then Home Minister of Bombay clearly stated that, "You cannot have civil liberty in an atmosphere surcharged with violence and excitement such as a breach of the peace."[63] The changing tone and emphasis of Congress on civil liberties is evident. Before the election, the tone and concept were 'radical'. With the formation of ministries its approach had become rather willy nilly. It had taken up certain important measures to restore civil liberties but implemented them half-heartedly.

This transformation in the attitude of the INC leaders threatened the very survival of the ICLU. Most of the INC leaders, on whose help the ICLU was deeply dependent, either gradually withdrew, as in the case of Sarojini Naidu, or became uninterested like Nehru. Some of the Congress Socialists and Liberals said to have functioned with ICLU. We however know very little about their efforts. By the time of Quit India Movement in 1942, the Human Rights Movement in Colonial India reached its moribund state. It was only after the independence, when the Indian government had shown a coercive approach to social turbulence[64] that there were efforts of revival of the movement.

---

62 10 SWJN at 445.

63 *Supra* n.48 at 292.

64 In the wake of widespread communal tensions and riots, the Government banned both the rightist and leftist organizations including the CPI and RSS and arrested hundreds of activists and sympathizers. A number of concerned individuals tried to revive the Human Rights Movement. An All-India convention was held in Bombay in 1948 and all the three metropolitan civil liberties committees in Bombay, Calcutta and Madras were revived. They too however could function for only a few years.

CRISIS IN THE ADJUDICATION OF TERMINATION DISPUTES: A STUDY OF THE PROCEDURES AND WORKING OF LABOUR COURTS AT BANGALORE

*V. Nagaraj**

In a *laissez-faire* State, where freedom of contract prevailed in the area of employment relations, employers could employ workmen according to their terms and conditions, and dispense with their services arbitrarily. Workmen had no rights beyond the terms of contract. The change in the philosophy of the State and the development of Labour Jurisprudence have eroded most of the prerogatives of the employer in hiring and firing workmen. The terminated workmen now have the right to challenge the termination. The Labour Courts established under the Industrial Disputes Act 1947 as specialised bodies are conferred with wide powers unknown to the common law system. They have the duty to see whether the principles of Natural Justice are followed while taking disciplinary action and whether the punishment inflicted is in proportion to the misconduct. They can also look into the bonafides of the employer's action in inflicting the punishment. The Labour Courts have powers to reinstate the terminated workman, if necessary with back wages and other consequential benefits.

The Labour Courts and Industrial Tribunals are kept out of the rigid procedural laws like Civil Procedure Code and Evidence Act, except for the purpose of conferring some powers of Civil Court under the Civil Procedure Code.[1] Further the Labour Court and Industrial Tribunal are required to evolve their own procedures for deciding an Industrial dispute. The purpose is to mitigate the rigour and technicalities of procedural law for achieving expeditious settlement of disputes.

But the substantive safeguards evolved over a period of time to protect the workmen from arbitrary acts of the employer are being eroded because of inordinate delay and crisis in the working of Labour Courts. Even a patently illegal order of termination could be litigated upon for a decade before it is set aside.

Among the disputes over which labour court has jurisdiction, termination dispute is an important one.[2] Majority of the disputes registered before the Labour Court are termination disputes. The Industrial Disputes Act, expects that these disputes should be disposed off within a maximum period of three months.[3] The

---

* Assistant Professor, NLSIU. This paper forms part of the M.Phil Thesis submitted to the NLSIU, Bangalore

1 Sec. 11(1) of the Industrial Disputes Act, 1947.

2 The other disputes over which labour court has jurisdiction are contained in the Second Schedule to the Industrial Disputes Act, 1947.

3 Proviso to Sec. 10 (2-A) of the Industrial Disputes Act, 1947.

rules made under the Act also supplement this expectation. But, in reality, termination disputes have been pending for periods exceeding eight years. Only very marginal number of cases are disposed off within the stipulated period of three months and such disposals are either out of court settlements or ex-parte decisions.

The charts 1, 1A, 1B indicate the type of cases registered before the three Labour Courts at Bangalore and also the percentage of termination disputes to the total disputes.

The charts 2, 2A, 2B reflect the time taken for disposal of 'Termination Disputes' in the selected three labour courts. More than 80% of the cases have taken beyond one year and often extend upto a decade or more. The writ petitions filed before the High Courts against the awards of the Labour Courts take another of about 8-10 years for disposal.[4] If a special leave petition is admitted by the Supreme Court there is further delay.

Delay is a common feature of our judicial system. Pendency of labour disputes in general and termination disputes in particular for long period of time leads to frustration among workers and indiscipline in Industry. While a termination dispute is pending before labour court for 8-10 years a number of disturbing questions arise: How will such a workman and his family survive in the present day of large scale unemployment? Will it not lead to social deviance of that workman and his family? If a Labour Court orders re-instatement after about eight years, which happens in a good number of cases, how should the employer accomodate him? Will it not lead to multiplicity of Industrial disputes? When a workman is re-instated generally back wages from the date of illegal termination are awarded. This is wages for no work, which adds to the cost of production and inflation.

The above may be the reasons as to why the legislators in their wisdom intended that termination disputes should be disposed off within a maximum period of three months. The expectations of the law must be wholly fulfilled otherwise, law itself becomes an instrument of further exploitation. Keeping these in mind, this study is intended to find out the reasons for delay and suggest the necessary reforms for efficient disposal of termination disputes. The involuntary determination of the workman's contract of employment is called 'termination dispute' for the purpose of this article.

The Termination dispute

Prior to 1965 a termination dispute in order to be an Industrial Dispute was to be espoused by a Trade union or a substantial number of workmen of the industrial establishment. In 1965 the Central amendment to the Industrial Disputes Act made a termination dispute as deemed Industrial dispute. Like any industrial dispute it has to go through conciliation. On failure of conciliation the appropriate government may refer the dispute for adjudication.[5]

---

4 122 *Law Commission Report.*

5 Sec. 10 (1) of the Industrial Disputes Act, 1947.

The Government of Karnataka having taken note of the futile exercise of conciliation process in termination disputes has amended the Industrial Disputes Act and made provision for workman to approach the Labour Court directly in case of termination dispute.[6] The Central Government has not made any such amendment.

In the study out of the 2008 termination disputes disposed during the period 1981-90 in the three Labour Courts of Bangalore, 10% of the cases were selected through stratified random sampling. Out of these 200 cases only 142 case files could be retrieved. From these files the following aspects were studied - stages where delay has been occurring, the procedure followed, adjournments, time taken at different stages of the case, etc.

In the study sample of 142 disposed cases, 36 were compromise settlements, 32 were decided ex-parte (15 workmen and 17 Management), and 74 cases were actually contested. In the 74 contested cases oral evidence was led in 39 cases, others were decided based on the documents available and arguments.

The stages where delay has been occurring are classified as follows:

1. Filing of Pleadings: The rules under Industrial Disputes Act expect that the filing of pleadings must be completed within one month from the date of reference of the termination dispute. After the Karnataka State amendment, the time must be even less in Karnataka. The rule is observed more in breach than in practice. The table provided speaks of the time taken for filing pleadings:

Time taken for filing pleadings - categorisation:

1	Upto one month	2 cases	1-4%
2	Between 1-2 months	8 cases	5.6%
3	Between 2-4 months	22 cases	15.5%
4	Between 4-6 months	32 cases	22.5%
5	Between 6-8 months	20 cases	14.1%
6	Between 8-10 months	16 cases	11.3%
7	Between 10-12 months	13 cases	9.2%
8	More than one year	29 cases	20.4%
		142 cases	

2. Filing documents: The parties are expected to file relevant documents along with their pleadings.[8] Unfortunately in termination disputes, this has become a confused process.

6 Sec. 10 (40-A) of the Industrial Disputes Act, 1947, Karnataka Act No.5 of 1988, the I.D. (Karnataka Amendment) Act 1987, notified in the Karnataka Gazette on 7.4.1988.

7 Rule 10-B (1) and (2) of the Mysore rules and Rule 10-B 1-5 of the Central rules.

8 Rule 10-B 1-5 of the Central Rules, Order 7 rule 4 and Order 8 rule 1 of the Civil Procedure Code.

In the study sample, in 40 cases documents were filed along with pleadings, in 35 cases time was sought for production of documents, in 29 cases there were no documents and in 38 cases there were no pleadings of one or the other party. In the cases where time was sought for production of documents, time taken is as follows:

1	Upto one month	1 case
2	1-2 months	10 cases
3	2-4 months	12 cases
4	4-6 months	6 cases
5	6-8 months	2 cases
6	8-10 months	1 case
7	10-12 months	Nil
8	Beyond one year	3 cases

In a particular case the time taken was 2 years 4 months and 7 days. During this period there were 44 adjournments.

3. Validity of Domestic Enquiry: When a workman challenges the termination he invariably challenges the fairness of domestic enquiry conducted. The Labour Court tries this question as a preliminary issue. If the domestic enquiry is held to be bad, it is as if the employer has not conducted any domestic enquiry.

In the study sample of 142 cases, domestic enquiry was conducted in 56 cases. In all these, the validity of domestic enquiry was questioned. In 24 cases the domestic enquiry was conceded as fair. This was done at different stages in different cases. In some cases it was at the stage of arguments on the fairness of domestic enquiry. In 25 cases the domestic enquiry was set aside. Only in five cases domestic enquiry was held to be fair.

Average time spent at the stage of adjudicating the validity of domestic enquiry:

1	No. of cases where domestic enquiry conducted and challenged.	56
2	Average total time for disposal	1213 days (438-2926 days)
3	Average total time for adjudicating the validity of domestic enquiry	481 days (0-1535 days)
4	Average time for evidence on domestic enquiry	215 days (0-1218 days)
5	Average time for arguments on domestic enquiry	266 days (0-702 days)
6	Average total adjournments for disposal	41.3 (0-187)

7	Average adjournments on adjudicating validity of domestic enquiry	14.1

8 Distribution of adjournments on adjudicating the validity of domestic enquiry

Evidence		7.6	Arguments	6.4	
W	M	P.O.	W	M	P.O.
1.6	5.11	0.98	1.57	3.86	0.98

4. Adjudication on Merits: This stage could be called as the final stage of a termination dispute before Labour Court. The question of victimization is adjudicated at this stage. In the study sample, five cases were disposed off within 90 days and none of them were adjudicated, they were compromised even before evidence was recorded.11 cases were disposed between 91-180 days, out of which evidence was led only in one case, another eleven cases were disposed between 181-365 days. The remaining 115 cases have taken more than one year.

Average time at the stage of Adjudication on Merits:

1.	Total time for disposal	1183.7 days (0-3385 days)
2.	Total time for adjudication	492.7 days (0-2579 days)
3.	Time for evidence	386.8 days (0-2316 days)
4	Time for arguments	105.9 days (0-1336 days)
5	Average total adjournments for disposal	41.21 days (0-187 days)
6.	Average adjournments for adjudication on merits	21.24 days (0-163 days)

7. Distribution of adjournments on merits

Evidence	15.7		Arguments	5.47	
W	M	P.O	W	M	P.O.
3.17	10.91	1.70	1.57	3.19	0.70

5. Miscellaneous Applications for recalling the Awards and Rehearing the Case:

This is yet another stage not contemplated in the Statute but evolved in the process of adjudication. This is indiscriminately applied to perpetuate delay and duplication of work in the Labour Courts. When a Labour Court decides an Industrial dispute ex-parte, the party absent earlier now files miscellaneous application for recalling the award and re-hearing the dispute. Such applications are generally allowed. In the study sample there were six such instances. The awards are re-called even after sending them to the appropriate government.

Miscellaneous applications for re-opening industrial disputes:

Sl. No.	Year	PLC	ALC	2nd ALC
1.	1981	N.A.	6	N.A.
2.	1982	NA.	6	14
3.	1983	N.A.	8	N.A.
4	1984	5	6	09
5	1985	12	23	11
6.	1986	13	19	25
7.	1987	11	15	15
8.	1988	14	26	14
9.	1989	17	29	22
10	1990	19	24	30

Source: Registers of the Labour Courts concerned at Bangalore.
N.A. Not Available.

Publication of awards

The next stage where delay occurs in disposal of termination disputes is the stage of publication of awards by the appropriate government. The Industrial Disputes Act, 1947 casts a duty on the appropriate government to publish the awards within a period of 30 days from the date of its receipt by the appropriate government.[9] Though this stage of delay is not directly connected with the Labour Court procedures, it is nevertheless very much related to the overall delay in the disposal of a termination dispute. The proceedings before a Labour Court are deemed to be concluded on the date on which the award becomes enforceable.[10] An award becomes enforceable on the expiry of thirty days from the date of its publication.[11]

The awards are normally published in the Official Gazette of the government concerned. In Karnataka till the year 1986 awards were published in the Official Gazette. This was causing inordinate delay, ranging upto few years. In order to expedite the publication of awards, in the year 1986, the government of Karnataka through a notification has changed the mode of publication of awards.[12] After this the awards are published on the notice board of the Labour Commissioner's office at Bangalore. It may be noted that the Labour Commissioner's office publishes only the reference number of the award and names of parties to the award. The

9 Sec. 17 (1) of the Industrial Disputes Act, 1947.
10 Sec. 20 (3) of the Industrial Disputes Act, 1947.
11 Sec. 17-A of the Industrial Disputes Act, 1947.
12 No. SWL 205 LLA 84, dt. 2.1.1986.

parties to the dispute will have to approach the concerned Labour Court for obtaining copies of the award. Inspite of amending the mode of publication in Karnataka, the study reveals that it takes on an average about three months for an award to be published.

Causes for delay in the adjudication of Termination Disputes

The industrial adjudication bodies are conceived as specialised bodies for efficient disposal of Industrial disputes. But in reality it has not been so. Persons without any knowledge or experience in Labour laws are being appointed as Presiding officers of Labour Courts and Industrial Tribunals. The 122nd Law Commission Report has observed that the qualifications prescribed for the Presiding officer of a labour court are such as would almost make it an impelling necessity to select persons from civil judiciary, and therein lies the potentiality for spill over of all the technicalities, dilatoriness and formal approach quite evident in administration of Civil Justice.[13] Obviously results are different from what is expected and the consequences are disastrous.

In the State of Karnataka the senior District and Sessions Judges are appointed as Presiding Officers of Labour Courts. There are no training facilities for them. It is only after taking charge as Presiding Officer, that they start learning Labour legislations. There are hardly any incentives for this. They become Presiding officers of labour adjudication bodies not out of their interest but by compulsion of circumstances. Some are appointed just before their retirement.

They are not equipped to regulate the proceedings properly. Frequent transfers add to this malady. Further there will be considerable time lapse between the transfer of a Presiding officer and appointing a successor to that post.

Regarding the contribution of advocates and parties to the delay, both parties to the dispute seem to be contributing to the delay, though it may not be correct to generalise. The incentive for the Management is to keep the probable troublesome workers away and to harass them. The incentive for workmen is the back wages.

Very frequently the excuse given for the delay is that there are too many cases before the labour courts and with so much of a backlog it is very difficult to dispose the cases in time. This seems to be a lame excuse if one looks at the work culture of Labour Courts. To know the work culture, the working of Labour Courts was observed for a period of 15 days continuously and the data tabulated as follows:

---

13 122, Law Commission Report p.2.

Court Hall	Average Workingtime minutes	Average cases posted	Average cases heard	Average cases adjourned on request	Average cases adjourned for lack of time
PLC	83.75	64.67	0.33	64.34	nil
2ALC	161.1	68.67	1.57	67.1	nil

Additional Labour Court Presiding Officer - vacant during the period of observation.

Court sitting hours 11 A.M. to 2 P.M.
3 P.M. to 5 P.M.

i.e. it is supposed to work for 300 minutes per day.

Rate of filing and disposal for the period July 91 to December 91:

Court	As on 1st July opening Balance		Months						Balance as on 31st December 91	Difference in six months	Average Cases/ Months
			July	August	September	October	November	December			
PLC	2285	Filing	53	25	21	26	31	13		+25	28.2
		Disposal	12	18	10	23	10	31	2310		17.3
ALC	1009	Filing	14	17	8	7	18	4			11.3
		Disposal	18	23	21	25	26	18	950	-59	21.8
2ALC	1769	Filing	19	8	12	30	26	27	1847	+78	20.3
		Disposal	22	15	4*	3*	-*	3*			7.8

*No Presiding Officer and the indicated disposal is Compromise Settlements.

The data reveals that the average rate of filing of cases is less than 30 per month. The sample of disposed cases selected for study revealed that 25.4% of cases were compromise settlements; 22.54% of the cases were decided ex-parte and the contested cases were only 52%. The Labour Court procedures are supposed to be summary procedures. The reason for the delay could be the work culture and the non-regulation of the Labour Court procedures by the Presiding officers.

In the hands of the ill equipped Presiding Officers, Section 11 (1) of the Industrial Disputes Act, 1947 vests vast discretionary powers with regard to the procedures to be followed. This serves no purpose.

The interpretation given to section 11-A of the Industrial Disputes Act in *Workmen of Fire Stone Tyre and Rubber Co. of India Ltd. v The Management*,[14]

14 (1973) 1 LLJ 278 (SC).

has made the conducting of domestic enquiry before dismissal redundant. The decisions of the Supreme Court in *Maheswari v Delhi Administration* and *Verma v Mahesh Chandra*[15] further reiterate the redundancy of the domestic enquiry. As a result, the disputes where domestic enquiry is conducted take more time for disposal than the cases where no domestic enquiry has been conducted. This is because invariably domestic enquiry will be challenged as a preliminary issue and labour court will have to give findings on it.

Section 36 (4) of the Industrial Disputes Act has not been effectively used. Advocates have been appearing before Labour Courts in almost all cases. Another factor which has been contributing to the delay is the restoration of proceedings by setting aside ex-parte awards. This not only causes delay but duplication of work. The Supreme Court in *Grindlays Bank Ltd. v The Central Government Industrial Tribunal*,[16] has held that where a party is prevented from appearing at the hearing due to 'sufficient cause' and is faced with an ex-parte award, such an award is nothing but a nullity. In such circumstances the Tribunal has not only the power but also the duty to set aside the ex-parte award and direct the matter to be heard afresh.

What is this sufficient cause ? The study reveals that series of adjournments are sought by the parties and while granting adjournments no reasons are recorded. The Presiding officers are reluctant to proceed ex-parte.

Publication of awards by the appropriate government has been contributing to the delay. There appears to be no logic behind publication of awards in termination disputes, especially when a termination dispute can go before the Labour Court directly.

Suggestions for overcoming the problem of delay

The suggestions are two-fold. Suggestions which do not require any amendments to the Industrial Disputes Act, 1947 and suggestions which require amendments.

Suggestions which do not require any amendments are-

1. The Presiding Officer is the pivot around which the efficiency of Labour Courts and Industrial Tribunals revolve. It is suggested that the presiding officers of these bodies are selected from among the judicial officers who are around the age group of 40 years and who have put in about seven years of service as judicial officers. The presiding officers so appointed must be given compulsory training for a period of six months before they work as presiding officers. While framing the curriculum for training the recommendations of the 122nd Law Commission report, the constitutional goals and the new economic policy must be kept in mind.

---

15 (1983) Lab. I.C. 1629 SC and 1483 SC

16 (1981) Lab. I.C. 155 SC.

2. The presiding officers so appointed and trained must continue in the Labour Judiciary for the rest of their service. There must be good promotional avenues and other attractive facilities created in the Labour Judicial Service.

3. To keep these presiding officers well informed about the developments taking place, there must be refresher courses arranged periodically. Streamlining the appointment and training of judicial officers goes a long way in solving the problem of delay and improving efficiency.

4. The validity of the domestic enquiry will have to be decided based on the records made available and arguments only. The procedure of recording oral evidence must end.

5. In cases where domestic enquiry is set aside or where no domestic enquiry is held interim relief must be awarded. This is subject to the condition that parties will not delay the proceedings. If the workman is causing delay, the interim relief awarded may be withdrawn and if management is causing delay the quantum of interim relief may be increased. In doing so the Labour Court will be acting within the powers it has under the Industrial Disputes Act.[17]

6. The presiding officers should properly regulate the proceedings and adjournments should not be granted indiscriminately. They can follow the minimum principles of Natural Justice.

7. The termination disputes should ordinarily be decided based on the pleadings, documents and oral arguments. Only in complicated cases oral evidence may be allowed. At present recording of oral evidence is done mechanically.

8. In order to clear the backlog of cases Lok Adalats will have to be arranged at frequent intervals. Once the backlog is cleared, if each presiding officer can dispose off around 30 cases per month, then there will not be any delay or piling up of cases.

9. The Presiding officers should exercise the power under Section 36 (4) of the I.D. Act. While permitting advocates to represent parties, conditions will have to be imposed to the effect that they will conduct the cases without delay.

Suggestions requiring Amendments: Few amendments to the Industrial Disputes Act, 1947 are required to bring about uniformity and improve the efficiency.

1. The law requiring publication of awards must be taken out of the Industrial Disputes Act 1947. The State of West Bengal has already brought about such an amendment.

---

17 Sec. 19 (4) and 11(1). The power to order interim relief has been recognised by the Supreme Court in *Hotel Imperial v Hotel Workers Union.* AIR 1959 SC 1342.

2. The proviso to Sec. 11-A of the Industrial Disputes Act should be clarified in the light of the Supreme Court decisions. The decision in *Workmen of Fire Stone case*,[18] has negatived the effect of the proviso and has made the conducting of domestic enquiry redundant.

3. An Industrial Relations Commission must be set up at the State level at least.[19] The IRC at the state level must have appellate jurisdiction over the awards of Labour Court and Industrial Tribunal. The existing writ jurisdiction under Articles 226 and 227 should be taken out. The IRC in its supervisory capacity must have power to review certain percentage of decisions given by Labour Courts and Industrial Tribunals. This is very important in the light of wide discretionary powers they have under the Industrial Disputes Act.

---

18 *Supra*, n. 14.

19 The National Commission on Labour 1969, 'the Sanet Mehta Committee Report 1982', the 122nd Law Commission Report have voiced their views in favour of an Industrial Relations Commission at the State level as well as at the centre. The Trade Unions and Industrial Disputes (Amendment) Bill, 1988 contemplated creating an Industrial Relations Commission at the State as well as Centre.

Chart 1

Cases Registered under different heads before the Principal Labour Court, Bangalore for the years 1981-90 and the % of Termination disputes to the Total Disputes

Sl.No	Year	Termination Disputes	Collective Disputes	App. u/s. 33 C (2)	App. u/s 33-2 (b)	App. u/s 33A	C.G..A.	E.S.I. M.A.	S.O.	Total	% of Termination Disputes to the total disputes.
1	1981	59	10	149	65	1	-	-	-	284	20.77
2	1982	71	11	38	8	-	-	-	-	128	55.45
3	1983	67	8	34	5	27	22	1	-	164	40.86
4	1984	112	28	80	11	1	10	2	-	244	45.90
5	1985	133	21	63	8	1	20	4	-	250	53.20
6	1986	224	8	54	5	-	17	2	1	311	72.03
7	1987	325	20	67	13	-	17	54	4	500	65.00
8	1988	548	35	209	15	1	7	55	3	873	62.77
9	1989	274	21	63	13	1	4	36	3	415	66.02
10	1990	400	58	98	25	-	1	26	4	612	65.36

Source: Registers of the Principal Labour Court, Bangalore.

Chart - 1-A

Cases Registered under different heads before the Additional Labour Court, Bangalore for the year 1981-90 and the % of Termination disputes to the Total disputes

Sl.No	Year	Termination Disputes	Collective Disputes	App. u/s. 33 C (2)	App. u/s 33-2 (b)	App. u/s 33A	Total	% of Termination disputes to the total disputes.
1	1981	53	17	16	6	3	95	55.78
2	1982	99	15	7	12	-	113	74.43
3	1983	101	22	13	9	5	150	67.33
4	1984	116	23	10	6	2	157	73.88
5	1985	228	48	10	23	1	310	73.54
6	1986	76	56	53	19	1	205	37.07
7	1987	57	25	63	17	-	162	35.18
8	1988	215	35	42	26	1	319	67.39
9	1989	164	44	29	29	3	269	60.96
10	1990	176	19	41	31	-	267	65.91

Source: Registers of the Additional Labour Court, Bangalore.

Chart 1-B

Cases Registered under different heads before the 2nd Additional Labour Court, Bangalore for the year 1981-90 and the % of Termination disputes to the Total disputes

Sl.No	Year	Termination Disputes	Collective Disputes	App. u/s. 33 C (2)	App. u/s 33-2 (b)	App. u/s 33A	Total	% of Termination disputes to the total disputes.
1	1981	86	31	116	8	-	241	36.38
2	1982	47	4	71	3	-	125	37.60
3	1983	72	20	90	4	1	187	38.50
4	1984	109	22	68	34	1	234	46.58
5	1985	115	12	152	8	3	290	39.66
6	1986	140	23	86	-	2	251	55.78
7	1987	56	59	93	6	1	215	26.05
8	1988	622	26	177	-	1	826	75.30
9	1989	358	N.A.	100	1	1	460	77.83
10	1990	227	N.A.	37	-	1	265	85.67

*N.A. Not Applicable.

Source: Registers of the 2nd Additional Labour Court, Bangalore.

Chart -2

Disposal and Pendency of Termination disputes in the Principal Labour Court, Bangalore.

Sl. No.	Year	Total Termn. Disputes Regd.	Disposal within 90 days	Disposal between 91-180 days	Disposal Between 181-365 days	Disputes Beyond 365 days	Disposal Pending as on 31-12-91	Disposal Beyond one year including pending ones	% of disputes taking more than one year time
1	1981	59	2	4	6	35	12	47	79.66
2	1982	71	nil	3	4	38	26	64	90.14
3	1983	67	nil	2	3	41	21	62	92.56
4	1984	112	1	2	7	61	41	102	91.67
5	1985	133	7	7	7	62	50	112	84.21
6	1986	224	7	9	20	69	119	276	83.93
7	1987	325	2	17	20	90	186	276	84.92
8	1988	548	2	13	23	105	405	510	93.07
9	1989	274	4	4	12	12	242	254	92.70
10	1990	400	nil	8	6	nil	386	386	96.50

Source: Registers of the Principal Labour Court, Bangalore.

Chart - 2A

Disposal and Pendency of Termination disputes in the Additional Labour Court, Bangalore.

Sl. No.	Year	Disposal Termn. Disputes Regd.	Disposal within 90 days	Disposal between 91-180 days	Disposal Between 181-365 days	Disputes Beyond 365 days	Disposal Pending as on 31-12-91	Disposal Beyond one year including pending ones	% of Disputes taking more than one year time
1	1981	53	4	2	6	34	7	41	77.36
2	1982	99	2	7	5	65	20	85	85.86
3	1983	101	2	3	7	58	31	89	88.11
4	1984	116	nil	3	2	83	28	111	95.69
5	1985	228	7	5	15	121	80	201	88.16
6	1986	76	2	5	1	38	30	68	89.48
7	1987	57	2	nil	3	17	35	52	91.22
8	1988	215	14	11	19	21	150	171	79.53
9	1989	164	2	21	18	11	112	123	75.00
10	1990	176	14	6	3	1	152	153	86.93

Source: Registers of the Additional Labour Court, Bangalore.

Chart - 2B

Disposal and Pendency of Termination disputes in the 2nd Additional Labour Court, Bangalore.

Sl. No.	Year	Total Termn. Disputes Regd.	Disposal within 90 days	Disposal between 91-180 days	Disposal Between 181-365 days	Disputes Beyond 365 days	Disposal Pending as on 31-12-91	Disposal Beyond one year including pending ones	% of disputes taking more than one year time
1	1981	86	3	10	4	59	8	67	77.91
2	1982	47	1	2	6	21	3	24	51.10
3	1983	72	2	1	5	43	21	64	88.89
4	1984	109	nil	5	14	54	36	90	82.57
5	1985	115	2	4	6	57	46	103	89.57
6	1986	140	2	7	11	53	67	120	85.71
7	1987	156	nil	1	3	17	94	111	71.15
8	1988	622	3	9	24	160	426	586	94.21
9	1989	358	nil	5	9	21	323	344	96.08
10	1990	227	22	3	14	nil	188	188	82.81

Source: Registers of the 2nd Additional Labour Court, Bangalore.

(1994) 6 NLSJ 164

FEDERALISM AND ALL-INDIA SERVICES - AN EVALUATION

*Narayana**

Provision for the All-India Services as an integral part of the Indian federal system, has prompted many critics, commentators and publicists to assail the scope and character of the Indian federal system,. They have looked at the All-India Services from a very narrow constitutional and political angle. Besides, they have not given due consideration to the pertinent factors and forces that necessitated the creation of the All-India Services, notwithstanding the establishment of a federal set up.[1] Considerations of administrative unity and national integration weighed very much with the founding fathers. Consequently they were disinclined to attach undue importance to the constitutional niceties of federalism while creating the All-India Services with the object of sustaining and promoting administrative unity and national integration.

Federalism, unlike the unitarianism, necessitates the mechanism of dual Government: federal and State without which the existence of federalism, let alone its functioning, is inconceivable. The existence of dual Government in a federal set up is in consonance with the political theory underlying federal polity. Both these governments are created by the Constitution. The degree of independence enjoyed by these two Governmental systems and the degree of co-ordination that exists between these differs widely from federation to federation. Since both the authorities are the creatures of the Constitution neither the Centre can attempt unconstitutionally to liquidate the State authorities nor can the States combine and operate in an undesirable manner to endanger the Centre. This is for the simple reason that the respective areas in which both the authorities can operate as distinct entities and legislative and administrative subjects in respect of which they can exercise their respective power and authority are defined and demarcated.

Keeping in line with this fundamental political and constitutional requirement of federalism, there exist two different systems of public services one coming under the authority of, and functioning within the sphere of federal government and the other functioning under the State authority. In fact, the existence of two different systems of public services, functioning separately under federal and State authorities, is a logical corollary of the mechanism of dual government which constitutes the heart and soul of federalism.

However, in India there exist three different types of public services: Central Services, State Services and All-India Services. The existence of this triarchy in the

---

* UGC Research Project Investigator, NLSIU

1 Shattered by the devastating consequences of partition and its aftermath the constitution makers realised the vital necessity of India's administrative unity. In accomplishing this they found an excellent mechanism in the contrivance of the All-India Services.

realm of public services places the Indian federal system in a special category. It is a direct consequence of the pre-independence constitutional and administrative evolution and practices and administrative frame work through the instrumentality of the erstwhile Indian Civil Services (I.C.S.) and Indian Police Services (I.P.S.) which maintained the administrative unity of the country. [2] The existence of triarchy in the realm of public services speaks eloquently of the tremendous impact of constitutional evolution and administrative legacy on the constitution-makers.[3]

An analysis of the functional utility and importance and personnel aspect of the central services shows that the members of these services are responsible for manning the numerous Ministries and Departments of the Union Government in which constitutional authority and responsibility are vested for the administration and legislation of subjects coming within its purview.[4] Likewise, the members of the various state public services are responsible for managing the various departments and agencies of State Government which is constitutionally empowered to legislate and administer subjects constitutionally earmarked for the state.[5]

Unlike the Central and State Public Services, the All-India Services do not belong exclusively either to the Centre or to the States. The members of these services have planted firmly one foot at the Centre and another in the States.[6] In view of this it would be a grave error to infer or to say that their loyalty is confined exclusively to the Centre or States. Their loyalty is, and should be, strictly speaking to the Constitution as they are created by it. This point deserves special emphasis in view of the attacks of the critics who have disputed the *raison d'etre,* utility and relevance of these services in the Indian federal context.

---

2 *See*, Ashok Chanda, Indian Administration (1958) *See also, Reports of the Union Constitution Committee, Union Powers Committee, Advisory Committee on Minorities, Sub-Committee on Fundamental Rights.*

3 *Ibid.*

4 Apart from the members of the All-India Services who occupy the most important and strategic positions, members of the Central Services are responsible for manning the various agencies of the Union Government. An appraisal of the variety of central services and their role in manning the numerous ministries/departments and agencies of the Union Government highlight the utility, value and role of the personnel of the central services in the conduct of union administration. This also emphasises the point that in the conduct of administration at the union level, apart from the part played by the personnel of the All-India Services, the members of the central services embracing such ministries as defence, finance, posts and telegraphs, transport survey etc. play a very significant role.

5 In the conduct of state administration too the personnel of the All-India Services occupy the important positions. But their presence alone won't be able to ensure the smooth conduct of state administration play a still more important part in the conduct of administration. There is hardly a department or branch or agency of state administration which is not serviced by the personnel of the state administrative services.

6 All -India Services constitute one of the eye-sores of the critics of Indian federal system. Going by the tenor and language of the critics of the All-India Services and Indian federal system, many of these critics have laboured hard to show that the All-India Services belong exclusively to the Union Government. This is a travesty of truth. They are constitutionally created. Though in terms of legal provisions, rules and regulations the Union Government exercises a great deal of control, regulation,direction and supervision, they do not belong exclusively to the Union Government.

The Indian Constitution, in deference to the administrative continuity and imperative needs and considerations of administration, has empowered the Union Parliament to create by law, one or more All-India Services common to the Union and States.[7] The service conditions of the members of the All-India Services, subject to other provisions of the Constitution, are regulated by law made by Parliament, and rules and regulations made by the Union Government thereunder.

To judge the constitutional propriety and administrative implications of the All-India Services, what is most important to consider is not the norms and requisites of federalism, as expounded and emphasised by the respectable and competent authorities in the field of federalism but the acute felt needs and requirements of Indian administration and the specific purposes or goals for which the Constitution has created and further empowered Parliament to create the All-India Services.

At the dawn of independence, barring the British Indian provinces and few states in princely India, there was no tradition of sound and efficient administration in the rest of India.[8] Apart from this stark administrative reality, India, unlike several other federations that preceded, has had to address herself to the task of framing her Constitution in an age marked by the demise of the philosophy of individualism, and the growing momentum of the concept of social welfare state.[9] The cracks and interstices noticed in the theory of federalism as developed and expanded ever since 1787, the need for creating and restructuring federal polity on a more pragmatic basis in the wake of the calamitous changes wrought by the world wide economic depression of 1929-30 and world war II, and the supreme need for framing in the middle of the twentieth century a constitution to meet the needs of not merely a law-and-order oriented administration, but more importantly, to effectualise the goals of the concept of welfare state - were factors which profoundly influenced the framing of India's Constitution. The cumulative effects of these formidable forces could be seen in the All-India Services as these services have sought to promote national integration, administrative unity and become positive and vital instruments for implementing effectively and promptly the various socio-economic plans, policies and programmes of Central and State governments to establish a new social order based on justice and accomplish the goals of welfare state.[10]

In view of the creation of a federal polity under the Constitution, the Constitution-makers realised the need for dualism in public services, ie. separate public services at the central and state levels respectively. This resulted in incorporating Article 309 and Article 315 in Part XIV dealing with public services[11] and Union and State

7 Article 249.

8 V.P. Menon, The story of Integration of Indian States (1956)

9 The profound impact of this concept of the Indian Constitution could be seen in Part IV concerning the directive principles of state policy.

10 *See*, S.P. Iyer, "Federalism and All - India Services", Centre-State Relations in the Seventies (B.L. Maheswaran ed., 1974)

11 Articles 308-313 deal with such important aspects of public services as the recruitment and conditions of service of persons serving under the Union and States, tenure of office of persons serving under the union and states, dismissal, removal and reduction in rank of persons serving under the union and states, All-India Services, Parliament's power to vary or revoke conditions of service of certain persons (serving under the Union or State governments) and transitional provisions.

Public Service Commissions[12] By providing for recruitment and conditions of service of persons serving under the Union and States, Article 309 recognised the paramount importance of administrative autonomy at the state level, a core principle of federalism.

But the importance and implications of Article 309 seem to be partially eclipsed or paralysed by the provisions of Article 312 which deal with All-India Services. To know the extent to which Article 312 has been able to jeopardise the administrative autonomy of the States by creating the institution of the All-India services it is very important to recognise two pertinent factors:

1) the provision for All-India Services is created by the single comprehensive constitutional framework consisting of the governmental systems of both the centre and states, and,

2) the two important All-India Services, viz. Indian Administrative Services (I.A.S.) and I.P.S. preceded the framing and inauguration of the new Constitution.

The decision to create these new All-India Services, I.A.S. and I.P.S. to replace the old I.C.S. and I.P. led to emergency recruitment to the I.A.S. and I.P.S. Thus these two All-India Services were created before the new Constitution took its birth. The decision to create these two All-India Services was influenced more by the supreme desire to promote and preserve the administrative unity which was rudely shaken by the partition of the country and many complex and complicated problems of administration cropped up in its wake.

For the survival of India as a single political entity, not only her newly won political independence but also her administrative unity were absolutely essential. It was with this supreme object in view the constitution makers realised the importance of providing for these All-India Services. Thus the provision for these services was not motivated or influenced by any intention or desire to deviate from the accepted norms and requisites of federalism.

The questions arising are - these All-India Services consistent with the political and constitutional theory of federalism? Cannot the Centre make use of these services, over which it has supreme authority, to strangulate or cripple the administrative autonomy of the States? Would they be able to affect the balance one way of or the other?

The members of the All-India Services occupy the strategic posts and vital points in administration in the States and at the Centre. But the states have no say in the matter of their recruitment, training and allocation. Nor would the centre inform the stares about the allocation of personnel to the states. Except for the

12 Articles 315 - 323 cover such aspects as the Union and State Public Service commissions, appointment and term of office of members, removal and suspension of members of public service commission, power to make regulations as to the conditions of service of members and staff of the commission, prohibition as to the holding of office by members after ceasing to be such members, functions of commission and power to enlarge the same.

posting and transfer of the members of these services allocated to the States, the States do not have any disciplinary authority over them. As the relevant constitutional provisions show, the Union Public Service Commission is responsible under Article 320 for recruiting by means of open competitive examinations, the members of these services. The Government of India through the Home Ministry is responsible for the training of the candidates recruited to these services, and after ascertaining the wishes of the candidates, on their successful training, allocate them to the Centre and States. So, in none of these important matters-recruitment, training, allocation and disciplinary control, the States have any effective voice. The Union Public Service Commission and Union Government dominate in these matters. Their promotions are determined by rules and regulations concerning service conditions laid down by the Union Government. If any disciplinary action became necessary against any members of these services, the State concerned initiates, on its own, action, as in this matter too, supreme authority lies with the centre. Thus it can be seen that in the case of these All-India Services, the Centre has both power and responsibility whereas the States are only saddled with responsibility. In States the members of the All-India Services occupy the most important places in the administration of departments, barring departments like Public Health, Medical Services, Education, Public Works, Agricultural and a few others. Even in these departments, the top policy making positions are occupied by the All-India Services officials.

But considering the kind of circumstances and forces that influenced the framing of India's Constitution, and the type of problems and challenges India had to face, it may be said, without being unfair to the cause of federalism, from India's point of view that the provision for All-India Service is not inconsistent with her brand of federalism. Pure theorists and champions of the Indian federal system view it as a constitutionally crippled and politically hybrid federal system in the comity of federations. Nevertheless, given the character of political culture and administrative genius, the provision for All-India Services cannot be denounced as anti-thetical to her federal system. The institution of All-India Services is not designed to cripple the States' administrative autonomy or deliberately upset the federal balance, as it has been endeavoured to be made out by certain critics.[13] But the avowed constitutional purpose sought to be emphasised and served is the promotion of administrative interdependence between the Centre and States. The need for administrative interdependence between the Centre and States constitutes one of the distinctive features of the Indian federalism.[14] The administrative interdependence between the Centre and States will not fail to act as an antidote to relieve the dangers and evils inherent in India's highly centralised federal system.

A study of the manner in which the members of the All-India Services work, whether at the Centre or in States is indispensable for proper understanding of the

---

13 *See*, Government of Madras, Rajamannar Committee Report on Centre-State Relations (1971).

14 *See*, M. Venkataranjayya, Competitive and Co-operative Federalism, (1951).

appropriateness and validity of the All-India Services in the federal context of India.

On successful completion of their training, the members of the All-India Services according to their option, are allocated to work at the Centre or in the States. The members of these services borne on any particular State cadre will have to work under the direction, supervision and control of the concerned State except in disciplinary matters over which Centre supervises. The State government is responsible for the posting and transfer of the personnel of these services. In promoting the members of these services the State government will be guided by the service rules and regulations laid down by the Home Ministry of the Government of India.[15]

The Centre cannot intervene except in cases of national emergency[16] or when a particular State comes under the spell of the President's rule.[17]

The foregoing analysis of the problems and of the situation will show that the states have no constitutional authority to participate in the recruitment, training and allocation of the members of these services borne on the (states) cadres. However, the Centre, despite its overall authority over them, and its disciplinary control over them, will not attempt to influence the States in a manner prejudicial to the administrative autonomy of the States. But there is one important and interesting aspect incidental to this problem. The members of the All-India Services borne an any State cadre at least once (or twice) during their service will have to go to the Centre and work there for a period which is normally not less than two years. Their going to the Centre to serve there for a short period will not automatically transfer them to the Centre's cadre and they will continue to be borne on the state cadre. Their period of absence from service in the State and their tenure of service at the Centre will be deemed to be on foreign service.

It goes without saying that notwithstanding the fact they are borne on the State cadre, so long as they work on deputation basis at the centre, they will have to, ipso facto, submit themselves to the Centre's overall supervision and administrative control.

There is one very significant point concerning the Constitution of All-India Services which critics have not analysed. It is provided by statutory rules, that one third of the total number of posts of the All India Services borne on the state cadre should be filled by State authorities by promotion from among the members of the State Administrative Services (and Police Service). This means that if there are about 200 posts of the All-India Services borne on the State cadre, 66 or 67

---

15 Under the existing arrangement it is incumbent on the part of the State governments to comply with the rules and regulations, under the All-India Services Act, 1951 made by the Union Home Ministry in promoting members of the All-India Services that are borne on the States cadre.

16 *See*, Articles 352 and 353

17 *See*, Article 357.

of these 200 posts will be filled up not by appointing candidates directly recruited by the Union Public Services Commission (U.P.S.C.) but by promoting officials belonging to the state services. In choosing officials from the State services to fill up the promotion quota in the All-India Services the State authorities are generally guided by such factors as seniority, administrative efficiency and competence and considerations of social justice. Thus, in this sense and to this extent the State authorities are allowed to participate in the constitution of the All-India Services. In respect of the officers of the All-India Services borne on the State cadre, there is fundamental difference between the members directly recruited by the UPSC and allocated by the Centre, and the officials promoted by the state authorities to these cadres. In the former category the directly recruited candidates, officials by exercising their option help the authorities to allocate them to the Centre or State where they would like or intend to service. But in the latter category, the officials of the State Public Services promoted to the All - India Services have no option to exercise but to serve in the State to which they belong.

There is a good deal of exaggeration in the fears and misgivings expressed by critics about the power given to Council of States concerning the constitution of the All-India Services. There is no need to be too apprehensive about the implication and effects of Article 312. A careful perusal and analysis of this Article shows that the power it has conferred on the Council of States is permissive and not obligatory. It says that if the Council of States passes a resolution supported by a majority of not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so, Parliament may by law provide for the creation of one or more All-India Services common to the Union and States.

It is important to note that both the Centre and States have a very sacred constitutional obligation to utilise effectively the public services, including the All-India Services, as the dynamic agents of change to accomplish the goals of welfare state and to usher in a new social order based upon justice-social, economic and political. The manner in which the All-India Services have functioned, the cautious and sparing manner in which Parliament has legislated to create other All-India Services, and the constitutional and administrative experience in the post-constitution period show that the All-India Services have not conducted themselves in an unbecoming manner to incur the odium that they are anti-thetical to the federal system of government, nor have they done anything deliberately and wilfully to endanger the principle of administrative autonomy of the States.

It is gratifying to note that the Sarkaria Commission,[18] after having examined all aspects of the All-India Services, in the background of the recommendations, observations and suggestions of the Administrative Reforms Commission as well

18 Government of India, Report of the Commission on Centre-State Relations 220 (1988)

as the views expressed by the various States and also the recommendations of the Estimates Committee, has recognised and emphasised the vital necessity of continuing, strengthening and expanding the All-India Services. In arriving at this mature conclusion the Sarkaria Commission has been very much influenced by the rapidly expanding development activities and their pervading impact on administration. While quoting with approval the considered views of late Sardar Vallabhai Patel '..This institution is meant to be worked by a ring of service which will keep the country intact',[19] the Commission has reiterated the indispensability of these services for maintaining the country's unity. Touching on the controversy of generalist versus specialist, it rightly pointed out the necessity of yielding place to greater specialisation in the concerned areas of public administration, and gearing up the training and career development policies for effectualising this objective. It has rightly opined that disciplinary control should nurture the best service traditions, and weed out the undesirable elements from these services.

19 *Ibid* at 225.

BOOK REVIEWS

'IN THE PUBLIC INTEREST'- Essays on Public Interest Litigation and Participatory Justice, by *Mario Gomez*, Legal Aid Centre - University of Colombo, Colombo, pp. 209.

*Savitri Goonesekere**

This volume of essays introduces the Sri Lankan legal community and students to an exciting development in the sub-continent - the jurisprudence on social action litigation. It is the first publication of its kind, and a timely contribution in a year that has seen many violations of human rights as well as both rhetoric and action on the theme. Participatory justice and delivery of justice within the community through the involvement of various actors as well as the people, is specially relevant in a situation where South Asian countries have grown cynical of law and the legal system. There is a general sense that post independence governments in South Asia have often failed to keep their commitments under Constitutions to realise the basic and fundamental rights of their people.

Mario Gomez presents, in an easy and relaxed writing style, the basic principles, ideas, and concepts associated with the jurisprudence of social action litigation. The book is informative and stimulating. It focuses on the Indian experience and recent innovative developments by the Supreme Court of India in the area of fundamental rights. It also introduces comparative material from the United States raising issues in regard to the difference in approach between public interest litigation as it has developed in America and the broader scope of social action litigation in the South Asian context. Important Sri Lankan cases are analysed from the perspective of the vision of justice and access to justice that is inherent in the concept of social action litigation.

The range of new legal ideas that had to be developed to accommodate the concept of distributive justice, in a radical departure from the 'received' Anglo-American jurisprudential traditions has been examined. The author has also discussed in some detail the supportive mechanisms that must be developed within the legal profession as well as the community if the courts are to assume an activist role in the delivery of justice.

The concept of social action litigation as it has developed in India, is in some ways part of a judicial tradition that originated in the British Lord Chancellors' courts centuries ago. Critics at that time dismissed the development in equity as a device to foster uncertainty in the law and expand judicial discretion. Equity,

* Colombo University

it was said, varied with the Lord Chancellor's foot. A similar criticism has been directed at social action litigation when it seeks to interpret the power of judicial review so widely as to fuse the administrative and judicial role and places the courts in a political and executive arena within the country. The author addresses these criticisms and argues that the courts must exercise a wide jurisdiction and ensure only that "justice is done". His passionate conviction that this is the sole rationale for vesting any authority in the courts, sometimes leads him to generalisations that are not supported by a close scrutiny of the Sri Lankan cases and judgements he discusses.

The book would have benefitted from a discussion of comparative developments in Pakistan and Bangladesh since social action litigation has now become a familiar concept to many lawyers and activists and students in the Asian region. The prospect of forging the new equity that the author advocates in the context of social constraints against activism, involvement and mobilisation on issues could also have been examined with recent examples of these constraints. Such discussions would have strengthened the comparative law components of the book, as well as the discussion on social action litigation.

An extensive bibliography on the topic has been included in the book and this will be very useful to students and researchers who do not find it easy to access these materials in Sri Lanka. 'In the Public Interest' is a useful contribution to Sri Lanka's sparse legal literature. It is non-legalistic in its style and should also attract a readership of non-lawyers interested in issues of law and public policy.

The book has been published by the Legal Aid Centre of the University of Colombo which Mr. Gomez helped to establish with dedication and commitment in the crucial first years of the project. Centres of this nature help to integrate research and legal activism into academic programmes in law and contribution both to staff and student development. The publication is a reminder of the importance of that integration for the well being of the legal profession as well as legal education.

TEXT BOOK ON CRIMINOLOGY, (1991) by *Katherine S. Williams,* 1991, Blackstone Press Limited, London. pp. XVII + 365, Price £ 16.95 in U.K.

*S.V. Joga Rao**

The book under review written by Katherine S. Williams undoubtedly deserves appreciation as it would throw light on the subject of Criminology from different dimensions. The author has made it very clear that the purpose of writing this book is to introduce students to the broad study of Criminology. This book contains 17 chapters. Broadly speaking, the focal theme of this book can be divided into three parts, namely, (a) Criminology (b) Criminal Etiology and (c) Theories of Criminology.

The first part, Chapter 1-5 concentrates on (a) Definitions, Terminology and the Criminal Process (b) Public perceptions and misconceptions of crime (c) The extent of crime: a comparison of official and unofficial calculations and (d) Victims, Victimisations and Victimology. In the second part, Chapters 6-12, the author has analysed (a) Influences of physical factors and Genetics on Criminality (b) Influences of Biochemical factors and of the Central and Autonomic nervous systems on Criminality (c) Psychological theories of Criminality (d) Mental disorder and criminality (e) Intelligence and learning (f) The sociology of criminality and (g) Anomie, strain and juvenile subculture. The third part Chapters 13-17, focusses on (a) Control theories (b) Labelling, phenomenology and Ethnomethodology (c) Conflict theories and radical criminologies (d) Positivists explanations of female criminality and (e) Women's liberation and feminist theories.

Throughout, the treatment of the subject is quite logical and recent research advancements have been incorporated at appropriate junctures. Particularly the information pertaining to 'Influences of Bio-chemical factors on criminality and women's liberation and feminist theories', is quite informative.

As a whole, it would be a worthy addition to the existing literature on criminology.

---

* Assistant Professor (Senior), NLSIU, Bangalore.

Dr. AMBEDKAR AND EMPOWERMENT: CONSTITUTIONAL VICISSITUDES, by *K.I. Vibhute* (Ed.), 1993, University of Poona, Pune, pp. LXIII+ 304, Price Rs. 200/-.

*Dr. A. Jayagovind**

The book under review is an anthology of essays on Dr. Ambedkar's contribution to Indian social and political life. The book was brought out by the Department of Law of Poona University and carries the articles by the leading academicians from the various Indian Universities. Justice P.B. Sawant of the Supreme Court of India has contributed a learned foreword highlighting the various aspects of Ambedkar's philosophy. The other contributions are organised under three heads: constitutionalism, social justice and federal equilibrium. Upendra Baxi, S.P. Sathe, N.R. Madhava Menon, T.K. Tope, Justice V.R. Krishna Iyer, etc., are some of the notable contributors. S.K. Agrawal has given a good introduction to the book.

Prof. Upendra Baxi's article, which was the inaugural oration on Ambedkar's centenary celebration at Madras University in 1991, requires a special mention for, unlike most other articles, it covers the entire spectrum of Ambedkar's life and mission rather than narrowly focusing upon his role as the architect of Indian Constitution. His call to backward classes to derive inspiration from Ambedkar's towering intellectual achievements rather than wallowing in mediocrity is extremely relevant to the present context. His analysis of Gandhi - Ambedkar conflict on the issue of separate electorates for the Depressed Classes is incisive, but somewhat incomplete from Gandhiji's point of view. Given the bitter experience of Congress regarding the separate electorate for muslims, Gandhiji's opposition to any such demand from other sections was understandable. Ambedkar's arguments for separate electorates for the Depressed Classes could well be countered by his own deposition before Simon Commission wherein he had opposed the idea of separate electorates as inimical to sectional as well as national interests. In brief, Prof. Baxi gets carried away by his own logic without considering the opposite point of view.

The same criticism could well be made against most other contributions to the volume. In my view, to point out that quite a few of Ambedkar's ideas have proved to be counter-productive over a period of time, does not in any way detract from his monumental achievements. For example, his extreme emphasis upon socialistic economy and centralisation of political process cannot stand the scrutiny of time. The learned writers dutifully quote his statements rather than subjecting them to critical review.

As for Ambedkar's ideas on social justice, there are several articles including an exhaustive piece by S.P. Sathe on "*Indra Sawney* v *Union of India*". But it

---

* Associate professor, NLSIU, Bangalore

must be pointed out here that Ambedkar's idea of depressed class was confined to "Ati Sudras" (or Scheduled Castes and Tribes); and though, as the Minister of Law, he was responsible for the introduction of the concept "other backward classes", he did not develop that idea. One can derive little guidance from Ambedkar's life and work regarding today's raging controversy, namely, Mandal Commission report. In fact, his categorical statement that the reservations to services should be confined to minority of available posts indicates that he viewed reservation as an ameliorative and integrative process rather than empowering and confrontational process. The stark reality that the concept of "backward class" has become a pawn in vicious electoral politics has hardly been touched by any of the learned contributors.

Some competent analysis of umpteen number of backward class commission reports in the light of Ambedkar's ideas would have broken the repetitive monotony of the contributions which narrowly focus upon judicial interpretations. Notwithstanding the verdict of Supreme Court, the fact that many eminent sociologists had denounced the methodology of Mandal Commission report should not be ignored. In brief, if only there had been more balanced and critical appraisal of the ideas that go with Ambedkar at present, the effort would have been more worthwhile. Ambedkar himself might have liked it, for Ambedkar, the great iconoclast that he was, would not have liked himself to be treated as an icon.

TOWARDS GENDER JUSTICE by *S.P. Sathe*, 1993, Research Centre for Women's Studies, S.N.D.T. Women's University, Bombay, pp. 88, Price Rs. 40/-.

*Asha Bajpai**

This is a small monograph which contains three lectures delivered by Dr. S.P. Sathe in the memory of the late Dr. P.B. Gajendragadkhar at the University of Bombay between 3-5 February 1993.

This is intended to be the first book in the Gender and Law Series. The book has just three Chapters which are organised as follows:

Chapter I	-	Pursuit of Gender Justice: Historical Perspectives.
Chapter II	-	Sexism, Constitution and Judicial Process.
Chapter III	-	Empowerment of Women: Legal Strategies.

The Introductory Chapter traces the historical growth of legislation and social interaction from the colonial rule till the famous *Shah Bano* Judgement of 1985. This Chapter unravels the colonial policy of not interfering with religious beliefs and traditions based on imperial self-interest. The colonial legislations relating to rape, adultery and other provisions in the Indian Penal Code reflected the patriarchal ideology and Victorian morality.

An interesting insight is given in the Rakhmabais legislation in 1985-88 and how in the last quarter of the nineteenth century there was a bold interaction between law, social change and judicial activism. The author points out that the attitude of the State even after independence showed reluctance to undertake social reform through legislation by citing the success of Muslim orthodoxy in getting the law altered by passing of the Muslim Women's (Protection of Rights) on Divorce Act, 1986. To quote the author, "In 1985 Rakhmabai fought against male hegemony and in 1985 Shah Bano did the same. Rakhmabai ultimately succeeded though the law did not favour her because the social modernism of the higher castes among the Hindus could withstand the resistance of the Hindu status quoists. Shah Bano was not so fortunate since though the law was on her side, the Muslim Orthodoxy succeeded in getting the law altered to her disadvantage".

Chapter II undertakes an examination of the Constitution and the judicial decisions. Several cases like the *Air Hostess case*, the case of *Neera Mathur v LIC, Sowmitri Vishnu v India*, and the *Pati Parameswar case* have been cited as instances of judicial bias and gender discrimination in spite of constitutional guarantees of equality. Here the author observes that 'gender bias is deep rooted and is often reflected in the legislative

* Assistant Professor, NLSIU, Bangalore

and judicial behaviour'. He further adds that the instances are of bias among judges who constitute the elite of High Courts and Supreme Court and wonders how much it would be among the judges of the lower courts.

In the concluding chapter the book specifically suggests ways how law can create empowerment of women through legal strategies by using three methods:

a) It can cause empowerment directly by conferring rights on the person whom it intends to empower or by imposing liabilities on other persons towards the person to be empowered.

b) It can cause empowerment by strengthening the institutional infrastructure for enforcing such rights and liabilities; and

c) It can cause empowerment by supporting, stimulating and monitoring attitudinal and value change in society.

There is one strain common to the entire book under review and that is gender justice.

Several of the above issues have already received a much more elaborate treatment in law books and journals. For those who want a very broad overview of the status of women and law in India, the book is recommended. It is written in a simple style, so that it could be useful to non-law persons. An ably compiled almanac of issues and events that influence the cause of gender justice.

HARASSED HUSBANDS, by *Kusum*, 1993, Regency Publications, New Delhi, pp. 62, Price Rs. 100/-.

*Prabha Kotiswaran**

This is a short book on a topical subject, "harassed husbands" . It has as its central thesis: provisions aimed at safeguarding the interests of women and maintaining family peace have through enforcement and court procedure resulted in an increased number of broken marriages. Atrocities against women ought not to be tolerated. However, beneficial laws and procedures are not to be used to harass men.

For example, married women have (mis) used beneficial dowry provisions in the case of non-dowry related problems. Similarly, false complaints have been made under Sections 304-B and 488-A of the Indian Penal Code, 1862 leading to permanent social stigma and loss of employment of the husband. In addition, the media and enforcement agencies ensure that the husband is pronounced 'guilty' and treated as such even before being tried.

Briefly, Chapter 2 deals with cases of matrimonial cruelty against men. Chapter 3 highlights how penal provisions could be used as double-edged weapons and the role of women's cells in the police, media, parents and relatives in doing so. Chapter 4 relates to provisions on maintenance and custody. Conclusions and recommendations are contained in chapter 5. Appendices include case studies of three harassed husbands and a proposed Bill namely 'The Protection of Rights and Dignity of Married Men Bill, 1993.

Evidently, the book is based on two premises:

(1) That law is the central and authoritative means of dispute resolution;

(2) Over identification of law with ideals of justice and fairness without considering the vagaries and irrationalities that inform the enforcement of the law and court litigation.

As a liberal afterthought the author adds that 'many a guilty may go unpunished but a single innocent ought not to be punished'. That the author empathises with the single innocent, the harassed husband, is acceptable but the above assumptions render her on slippery ground throughout the book. The harassment of no individual, be it a woman or a man, ought to be condoned but the unseen agenda of the book moves way beyond preventing the harassment of husbands.

More specifically, harassment conceptually has not been elaborated on. Indications as to the magnitude of the problem, if any, are not forthcoming. Individual decided cases have been heavily relied on, constituting no pattern as such to strengthen the author's thesis. The result is unwarranted generalisations minus the support of sound, verifiable field information.

---

* IV Year student, NLSIU.

More problematically, the law and the legal system have been viewed as objective, neutral and capable of dispensing justice as and when the situation demands, irrespective of the sex of the litigant. However, the law does reflect male experience and patriarchal norms. Even if it ensures formal equality, in terms of enforcement, the most beneficial of laws have had a differential impact on women and men. Such fundamental questions have not been agitated at all. For example, the author endorses the view of the Delhi High Court that the birth of an illegitimate child within six months of marriage is an instance of cruelty against the husband. What is not addressed is that legitimacy is a site of sexual politics around which the patriarchal family and institutions of private property revolve and are reinforced.

Yet another instance is that courts grant the husband's plea for divorce on the grounds partly of the wife's refusal to conform to gendered roles assigned to women in our society. Thus such attempts of (say by refusing to do the household work) by women in their day to day struggles are pitted against the 'rights' of the husband, to the privileges they receive as men, husbands and bread winners.

The highlight of the book is the innocuous Bill in the appendix which has the potential of bringing to a nought the struggle of Indian women for equal rights. While justice for women and men is a laudable goal, the serious repercussions and retarding effect such law reform will bring about for women have to be considered. It appears dangerous to even suggest substantive law reform in the light of the preceeding arguments. More so, because the book draws from experiences of urban, middle-class, upper middle-class educated women and the consequences of their supposed 'liberation'.

The impact of the book is contained in the popular imagery it reflects of some women as being irrational, hysterical, vengeful, difficult - to-live-with and nagging individuals.

The book is a starting point for it draws to our attention the highly gendered world we live in and how men also pay a price for the same. Only, women suffer more and in more numerous ways. Indeed, the problems on the way towards a just and humane society would have to be managed creatively.

In conclusion, one is tempted to react to the endeavour in Susan Falvdi's words,

> '.....the antifeminist backlash has been set off not by women's achievement of full equality but by an increased possibility that they might win it. It is a pre-emptive strike that stops women long before they reach the finish line'.

CRIMINOLOGY VICTIMOLOGY AND CORRECTIONS, by *V.V. Devasia and Leelamma Devasia,* 1992, Ashish Publishing House, Delhi. pp. XIII + 208, Price Rs. 300/-.

*S.V. Joga Rao**

The Book under review, is a collection of select articles in the area of 'Criminology, Victimology and Corrections'. Professor Sukumar Base has written a detailed and instructive foreword, mainly focussing on

i) Ancient Indian views on Criminal Law and Criminology

ii) Western views on Criminology and

iii) Criminology in the current decades.

The book has been divided into thirteen chapters. In the first chapter on "Man and Murder", the authors have given a vivid account of various theoretical paradigms of the phenomenon of criminal homicide. The analysis includes early studies on classical theorists like Beccaria, Jeremy Bentham etc, Bio-psychological studies of Lombroso, Sheldon, Lorenz and Adrey and Sociological studies of Reckless, McCord and McCord. In conclusion, the authors opined that "The various approaches to the theory and causation of criminal homicide complete each other, each with its own intellectual history and often with powerful support and substantial body of empirical study. However, the efforts to formulate an adequate theory should continue as yet there is no uniform theory on the subject acceptable to all".

In the second Chapter on "Eysenck's Theory of crime and personality: An appraisal", the authors have given critical account of Dysenk's Theory of crime and personality mainly focussing on (a) Dimensions of personality (b) Heredity and criminal behaviour (c) Predictability of criminal behaviour (d) Limitation of personality Testing (e) Conditioning of behaviour and (f) Environment and crime. In the third chapter entitled "A functional analysis of white collar crime", the authors after discussing the nature of the problem felt that the etiology of white collar crime has received very little consideration in current sociological theory in India.

In the fourth Chapter on "Study of Juvenile Delinquents as a System of Social Disorganization", the authors from a functionalist perspective have analysed the problem from the view point of (a) Delinquency as Dysfunction (b) Delinquency as sub-culture (c) Delinquency as conflict and (d) Delinquency as alienation.

---

* Assistant Professor (Senior), NLSIU, Bangalore

In the fifth Chapter on "Youth in Poverty Groups and Culture", the authors have mainly dealt with the extent of youth crime and specific characteristics thereof like (a) Criminal youth gangs and (b) Young rapists and murderers. The sixth Chapter on "College students and collective violence" has looked into the etiological information pertaining to this problem, though quite peripherally.

The seventh Chapter has dealt with "Role of Victim in Crime". In this the authors have probed into (a) The concept of victimology (b) the major issues and aims of victimology (c) the victim-offender relationship (d) the pertinent aspects of victim precipitation and (e) victim compensation.

Chapters eight to thirteen focus on 'corrections'. In these chapters pertinent issues in the areas of (a) Prison sub-culture and prisonization (b) Social work with offenders in correctional settings (c) Probation (d) Parole (e) After care and (f) Capital punishment.

Undoubtedly, the authors deserve appreciation from one and all who are concerned with these areas of scholarship. However, quite clearly, the reader may not find a continuous thread in all the articles falling under the ambit of three distinct branches. The authors could have taken care to see that there are linkages in the selected articles. But for this observation, the book would be an interesting addition to any library. Every article is followed by a list of detailed references. The get up is quite attractive, printing is good, but price is definitely not within the reach of many. The title somewhat appears to be misleading.

AN INTRODUCTION TO LEGISLATIVE DRAFTING, by *P. M. Bakshi*, 1992, N. M. Tripathi Private Limited, Bombay, pp. 160, Price Rs. 90/-.

*G. S. Sri Vidhya**

An attempt by Prof. Bakshi to theorise a practical subject, essentially dependent on individual nomographic ability - has resulted in "An Introduction to Legislative Drafting".

The author prefaces his fourth edition by stating that legislative drafting in India has gained a high degree of skill and expertise.

The subject, essentially an art is also a science in so far as it has a certain set of rules which have to be observed by all draftsmen. By theorising these rules, the author guides the draftsmen towards qualitative improvement. Legislative drafting is *dei sub numine viget* (flourishes under the will of God) and is hence the by-product of a gift - a gift of an alert and creative mind.

Chapter 1 takes the reader to the origin of the subject found in the ancient codes. A range of qualities like clarity, consciseness, certainty etc., which are the cornerstones of a good draft are listed in Chapter 2. The message *Lege Toutum Sc Vos Scire* (Read all if you would know all) is the essence of Chapter 3. It discusses the plethora of materials and sources that a draftsman should know.

Chapters 4 to 8 classify the statutes into various types. It guides the reader to draft, right from naming the statute to enacting the clauses. Other chapters in the book deal with the theoretical aspect of drafting, best exemplified in Chapters 3A, 15A, 19A, B, C and 22A. These chapters focus on aspects of constitutional and administrative laws.

Chapter 19A deals with the procedure relating to a Parliamentary Bill. Chapter 19B relates to enforcement and publication of the same. The author tries to impress upon the readers that the Bill should be carefully drafted as it would be closely scrutinised. However, it is unlikely that a person who is eminent enough to be a draftsman should be fed on basics like the fact that a Bill goes through three stages of reading, it should be published in the official Gazette etc. The aforesaid statement gains more credence considering that the author starts with the presumption that the draftsmen are well trained.

Another drawback of the book is arrangement of the chapters. Chapters on the same subject have been placed far apart. For example, the qualities of good drafting are in Chapter 2. These are elaborated in Chapters 9 and 10.

---

* V year student, NLSIU.

It should be mentioned that the author debunks the myth that a complicated draft is a good draft. He opines that the language should be simple and the clauses, short. The extra information can be filled by adding more sub-clauses. He advocates that legislative jargons like 'notwithstanding', 'aforesaid' etc., should be avoided - a point to be noted and followed in the future. He also instructs the draftsman to take care of the small things like perfection in punctuation, prudence in policy outline, precision in provisions etc. The greatest asset of the book is the apt examples attached to every chapter from various statutes. This and the cases cited serve to help better understanding of the subject.

The author concludes that a perfect draft is an impossibility. He suggests the Court to adopt a more sympathetic view by considering the difficulties in drafting. Alternately, he points out that if draftsmen are careful in avoiding inherent contradictions and obvious loopholes, the problems of the Court will reduce.

Prof. Bakshi gives a good idea of the intricacies of drafting. The model clauses in Chapter 23 and exercises in Chapter 24 will definitely prove to be helpful. The author's strength lies in his simplicity. For a beginner, "An Introduction to Legislative Drafting" is the best book.

THE INDIAN CONSTITUTION AND INTERNATIONAL LAW by *P Chandra Sekhara Rao*, 1993, Taxmann Publications, New Delhi, pp 250

*M.K. Ramesh**

'The Indian Constitution and International Law' is the effort of a scholar whose understanding of international law ranges from practical experience in international diplomacy, representing India in United Nations, pursuing and advocating Indian policy perceptions in the Ministry of External Affairs to law making in the Ministry of Law, Justice and Company Affairs. It is claimed that the book "explains with great thoroughness the basic concepts of International Law and examines their relevance to the numerous provisions of the Constitution of India, which have a bearing on issues of Public International Law". The author explains that the purpose of the book "is to ascertain the place of International Law in the Indian Constitution" and that it stresses on the judicial approach to the subject. The reader is thus made to learn about the extent of reception of International Law into our legal system and the respect accorded to it in the constitutional governance of an important third world country.

The book is divided into three parts. While the first part deals with the basic structure of International Law, the second part deals with the linkages between International Law and Municipal Law and the third - which constitutes half the book, quite rightly so - concentrates on International Law in the Indian Constitution. The work is well documented with a host of cases decided by international judicial bodies. The practice of States is well reflected in the decisions of British, American and Indian courts. International instruments finding place in the work provide useful reference material to a researcher in International Law.

While subjects, sources, basis and jurisdictional aspects of International Law appropriately find place in the part on its basic structure, the rationale of having Directive Principles of State Policy as the opening chapter of the work appears incongruous True, Part IV of the Constitution under Article 51 lays down the basis on which India's foreign policy is fashioned and its respect for international obligation rooted. But, to have that as one of the aspects of the basic structure of International Law, in the presence of the true bases found else where in the part, appears out of place.

While referring to Art. 51 (d) of the Constitution, the author observes that the clause did not display adequate understanding of the system of settlement of international disputes as required under Art. 1 (1) of the Charter of United Nations, Indian practice never shared any bias in favour of arbitration as a mode for settlement of disputes. He considers the distinction drawn between "International Law an treaty obligations" in Art 51(c) of the Constitution as "uncalled for and somewhat misleading".

---

* Assistant Professor (Sr) NLSIU.

The Chapter on 'Sources of International Law' appears to have an impersonal ring to it, in the sense that it makes no reference to Indian law and practice. Such a reference would have been in the fitness of things as the title to the book indicates.

Dr. Rao makes a pertinent observation that the 'Panchasheel' (the five principles of peaceful co-existence) that inspired the Non-aligned movement constituted the quintessence of International Law found in the purposes and principles of charter of United Nations.

While dealing with State jurisdiction, adverting to the recognition and application of foreign laws in a conflict of laws. The author refers to a few decisions of the Supreme Court to explain the Indian position. (Like, *Satya v. Teja Singh*, AIR 1975 SC 105 & *Surinder Kaur v. Harbax Singh*, AIR 1984 SC 1224). It would have been more appropriate had he referred to the more recent decisions of the Supreme Court in *Y. Narasimha Rao v. Venkatalakshmi*, as it clearly elucidated the current Indian stance in this regard.

On the part of the relation between International Law and Municipal Law, one finds details as to Anglo-American practice, the British Act of State, the Foreign Act of State and Facts of State. All the expositions are invariably elucidations of British and American practices. Nowhere in that part, could one find any mention to Indian position. No doubt, the author has reserved nearly half the book, (Part III) to explain the Indian position. But a clear compartmentalisation of the positions of each of these states as is done here does not help one to compare and appreciate the relative positions and prejudices.

All the same, Part III is the real fulcrum of the work. It gives vivid details of constitutional bases, respect for treaty obligations, their incorporation into municipal law and the manner in which they are interpreted to internalise the principles into Indian milieu; the status of customary rules of International law in the municipal legal sphere; the recognition accorded to decisions of international conferences; Act of the State before and after the inauguration of the Constitution and facts of state and their evidentiary value. Combining of Part II and Part III, it is believed, would not only have given a better perspective to the reader as to the areas of similarly and distinction between the practices of India and the other countries, and at the same time enhanced the value of this research effort.

Considering the situation that very little has been written by Indian authors on International Law, referring on the relation, the jurisprudential bases and points difference and departure between International Law and the fundamental law of our land as is attempted by the author, is a very welcome effort.

Verily, a very useful work, that should adorn the library of every institution imparting legal knowledge.

THE LAW RELATING TO INJUNCTIONS IN INDIA: by *Woodroffe* - 2nd Revised and enlarged edition by *Salil K. Roy Choudhury* and *H.K.. Saharag*, 1992, S.C. Sarkar, Calcutta,pp. 380, Price 250/-

*L. Vishwanathan**

This treatise on the Law of Injunctions written by Sir John George Woodroffe, was first published in the year 1890. It has seen five editions by the author and a revised and enlarged edition by the present editors, the second edition of which is under review.

The Editors in the preface to this edition, have taken credit for including material on injunction against television serial exhibition, public interest litigation, pollution and against disclosure of confidential information, knowhow, etc. They have, however not foreseen the possibilities of violation of civil rights by satellite invasion and its impact on the efficacy of injunction as a legal relief in an era of globalisation.

In Chapter I the meaning, form and effect of injunctions are considered. While looking at temporary injunctions, the Editors have critically examined the practise of granting '*Status quo*'. In certain places in this chapter and other chapters, the Editors have mechanically referred to the illustrations in various legislations. Analysis of the same would have rendered the book more helpful.

The Editors ought to have taken sufficient care to avoid repetition while attempting to give a detailed consideration of the rules governing injunctions in Chapter II. It is a welcome feature that the discussion of English principles and case law is accompanied by a comparison and consideration of Indian law at appropriate places.

Chapter III deals with the practice relating to injunction. This could serve as a guide for practitioners especially for law graduates who do not get the requisite support in procedural aspects in a classroom. While dealing with Mareva injunctions in Chaper V (a Mareva injunction restrains the defendant from removing his assets outside the jurisdiction of the courts pending the hearing of the action), the Editors have sought to trace a similar relief in the Indian Legal System by reference to Order 39, Rules 2 and 5 and Order 40 Rule 1 and Section 151 of the Civil Procedure Code.

While dealing with Anton Piller Orders (an Anton Piller order is an extraordinary form of exposive order permitting an application to enter premises for purposes of inspection), the editors have made a bald statement that it could be covered by the wide powers of the Civil Courts in the Civil Procedure Code and the Specific Relief Act. Instead, they could have pointed out that an Anton Piller Order is the same as a relief under Order 39 Rule 7 read with Rule 8 (3).

---

* V Year B.A.,LL.B.(Hons) NLSIU, Bangalore -72

In Chapter VI while dealing with contractual and trust obligations, an appropriate combination of the substantive law (The Indian Contract Act) and the Procedural Law (Specific Relief Act and the Civil Procedure Code) makes reading worthwhile.

It is noteworthy that in Chapter IX the book does not blindly trace English Law in relation to landlord and tenants. A classification between agricultural and non-agricultural facets of the relationship has been made. The rules of English Law may be referred to with advantage in the case of waste by non-agricultural tenants, but in other cases, the decision will not be of assistance because of the varying geographical factors.

It is unfortunate that the most important areas which the Editors should have concentrated has not been given adequate treatment. Chapter XI on injunctions against infringement of confidentiality fails to sustain the interest of the reader. The legal regime relating to Industrial Designs has been completely left out. Moreover, the Editors have deemed it fit to fill the chapter with mechanical reproductions of various standard published texts (duly acknowledged of course) on these areas. Considering the fact that injunctive relief remains the easiest, simplest, comparatively inexpensive and a very effective form of relief and considering the fact that these areas are poised to be the most litigative areas in the future, the Editors ought to have given serious and original consideration to this section.

For a person looking for a working knowledge of the traditional law of injunction, this is a book to be read. But for the readers who are looking for something more, in terms of a creative use of the traditional legal relief for problems of a complex modern society, the 2nd revised and enlarged edition of the book running to 380 pages (including model form of plaint and applications - however suspect they may be with regard to the varying practice of courts situated in different states) priced at Rs. 250 does not give an answer and remains a relic of the past.

(1994) 6 NLSJ 189

LIVING ISLAM by *Prof. Akbar S. Ahmed*, 1993, BBC books Ltd, Wood Lands, London, pp. 255. Price £16.99

*Justice V.R. Krishna Iyer**

'I write and record and analyse the reality of Islam to-day. I cannot invent or create something that does not exist', so begins a rare book, a religious travellogue, a truth told by a Sunni Muslim, frankly and fearlessly. The author, Prof. Akbar S. Ahmad, is my friend who hides nothing, humanizes everything and, be his religion what it may, reveals a soul of gold, an impatience with myths and lies fobbed off as Islam which, literally and spiritually, means submission to God. Reading these pages is an inward pilgrimage, a higher discovery whose reward is the sincerity of the quest itself, not a proselytization. I see more of the truth about the Prophet of Islam, and more of my proximity, as a sort of Hindu, to the Muslim faith after reading this work. The whole truth is God, Science, Universal Spirit. Partial perceptions lead to bleeding conflicts and religious, ethnic butcheries everywhere, proving A.N. Whitehead who said: 'There are no whole truths; all truths are half-truths. It is trying to treat them as whole truths that plays the devil.' Anyway, Akbar S. Ahamed, far from marketing half-truths as whole truths speaks straight, concedes, asserts, but never scores a point by arrogant insistence or by painting a lie with a fanatic brush. Let us read, assent and dissent but always with sensitive sincerity. No New World Human Order can survive unless such a spiritual - material travel is undertaken.

C.E.M. Jod, a great thinker of his time wrote a book "Liberty To-day' and the opening page contains the following sceptical note:

> "The struggle of reason against authority has ended in what appears now to be a decisive and permanent victory for liberty. In the most civilized and progressive countries, freedom of discussion is recognized as a fundamental principle." The quotation is from Professor Bury's *A History of Freedom of Thought*, published in 1913. In this book he tells us how freedom of thought was established once and for all in the nineteenth century, and expresses the view that the struggle for liberty may now be regarded as closed. "Well, that is very nice, indeed - if it is true", comments Lytton Strachey in his review of Bury's book. "But, after all, can we be quite so sure that it is true? Is it really credible that the human race should have got along so far as that? That such deeply rooted instincts as the love of persecution and the hatred of heterodoxies should have been dissipated into thin air by the charms of philosophers and the common sense of that remarkable period, the nineteenth century?"

Since that book was published, decades of change have overtaken the world - the October revolution and Stalin, the Cold War and McCarthy, the collapse of

---

* Retired Judge, Supreme Court of India.

the Soviet Union and its dismemberment and the emergence of a unipolar world and the U.S. using the U.N. to gain its world supremacy under guise of a New World Order. Meanwhile the Middle East countries with Islam and Oil opulence have become a Power, at once rich and uni-religious. The Muslim presence is everywhere and a grotesque image is projected about its alleged obdurate obscurantism. Funds flow into other countries from Saudi Arabia and Iran with Kumeini raj and a death sentence on Rushdie having spread a scare about the Muslim faith. This perhaps is a cruel caricature of one of the finest faiths in the world which has civilised regions which were once barbarous, divinised countries, once ugly with inhuman rule of life and offered a sanctuary of beautiful brotherhood, egalitarian sharing and caring and a godward disposition rooted in universal fraternity. Unfortunately, the Gresham's Law of finer faiths pushing out the more savage has mired Muslim culture, since its glorious truth has not been properly interpreted and propagated among non-Muslims so as to make them realize the profound justice and humanism and devotion to the higher values which Islam, in its quintessence, embodies. '*Living Islam*' undertakes this task of spreading Islamic light. The magna carta of mankind consisting of Universal Declaration and the two International Covenants and many subsidiary instruments are more a printed wonder of culture, but, judging by ground realities, a departure from the worth of the human personality to callous killings with lethal weapons motivated by brutal ambitions of maximum material gains perverting science and technology towards this end.

Cultural pluralism, multi-religionism and macabre materialism *et al* are writ large in our human planet which, with each passing day, shrinks into a gory global village, what with the terrorism of hegemonistic politics, Super-Power pursuit of world authority and role of planet-wide gendarmerie.

Competitive technological discoveries which, wisely used could well make for abundance on our good earth, now does multiply the lethal potential to condition and control mass minds into sadistic pleasures, callous fanaticisms, hard hatreds and 'pious' genocide. Currently, we have so many Gods and faiths that frictions, tensions and rival versions of worship ignite belligerence, with the weapons market fuelling intoxicated killings. Above all, the hedonist - materialist conquest of the finer human spirit and social justice is becoming a fatal phenomenon on the international plane. The post-modernist materialism is qualitatively different from the past, magnified, as it is, by the blood-shot eyes of thanatoid technology and profit-friendly armoury. The great Prophets, Seers and Sages blessed mankind with sublime visions of Creation and handed down revelations rooted in love, compassion and brotherhood. But this composite cultural heritage is under invasion by imperialist powers and multi-national corporations which have no body to be burnt, no soul to be damned and only maximum money-making as the operational objective. So much so, if mankind is to live together on our dear planet earth, a new manifesto of global humanism and spiritual fraternity is a categorical imperative. Together we must resist the structural adjustments and armed intimidations forced on us by the power-drunk America Inc. plus their G

-7 allies. Otherwise, our mental-moral values will be wiped out by ghastly weapons stored by the Pentagon and other Western armouries. To interpret Islam to the West and to Hindu and allied faiths is the desideratum if a comity of denominations is to gain ground and instead of mutual butchery, join hands to defend those sublime values which are the world's common cultural heritage. '*Living Islam*' by that remarkable Muslim Prof. Akbar S. Ahmad is a book in sparkling style seeking to tell the West and the rest the essence of the noble faith Islam as the Quran and the Prophet's hadiths expounded. Swami Vivekananda, that cyclonic sadhu, interpreted the Vedanta to the world and sowed the seed of a new World Spiritual Order.

Any student of the dialectics of contemporary history will realise the supremacy of deadly technology and the capability of cultural subversion which the West now possesses. The higher values, which all great religious and good persons share, are in peril because of the arrogance of the only Super-Power which shapes the U. N. and shakes the nations as the sole master of the World Economic and Military Order.

If peace is to reign on earth, if world brotherhood is to be actualised as a reality, if spiritual nexus through shared humanism, compassion and tolerance is to preserve societies with divergent religions together, we must dive deeper into the wisdom of defending the ethos, identity and adaptability of each religious community, in the context of the post-modernist technology and value debasement. Equally importantly, intolerance, arrogance, fanaticism and insularity of religions must be jettisoned and a new morally acceptable *modus vivendi* be fashioned so as to sustain, without war or internal blood-feud those credal fundamentals which each religious community considers too vital to be abandoned.

Religious Pluralism and Realism

No single religion has demographic dominance in the world to-day nor, indeed, is numerical strength decisive when sabre-rattling mood takes over control of godist - fundamentalists. Universal brotherhood is the broad creed but butchery fuelled by religiosity is a frequent reality. A billion muslims kneel daily before Allah and follow the teachings of the great Prophet Muhammad. An equal number may perhaps worship a miscellany of deities in the Hindu pantheon. The Buddha and Jesus also have a large but dispersed number of 'votaries'. But Islam, as a living religion, spread out from Samarkand to Stornoway, stands out strikingly, even provocatively, as a fighting faith with a global following. Historically, there is considerable confusion about the blind bigotry, prosyletising propensity with sword in hand, and obnoxious practices like four wives at the same time, women damned by purdah from visibility and condemned to indignity, and jihad as a death-dealing road to heaven, killing kafirs with holy savagery. Likewise, other competing faiths practise violation of human rights and wage raging battles against muslims. It is an illusion to hold that mankind can be farmed out among major religions and proselytization by conquest will establish

stable supremacy. Indeed, to-day while Gods battle against each other, the great challenge to all religions is the militarist-materialist mentality of certain Powers against the values of all religions. The craze for sensual pleasures and affluent satisfactions (I call it the diseases of affluenza and yuppiedom) are the true enemy of human progress; and a vibrant humanism, with mutual respect among religions *inter se*, is the categorical imperative of mankind's survival. This dialectical analysis takes us to the need for inter-religious dialogue, amity and understanding, giving up aggressive superiority and obscurantist fundamentalism. If religions turn market-hungry and seek to capture customers by authoritarianism, victory will ultimately belong to the only Super-Power leaving Popes and Ayatullahs, Acharyas and Archbishops to succumb to chaos in the cosmos. My thesis, then, is that we should sit back to a new mood and temper of humility towards each religion. A global democracy among the faithfuls of diverse theologies, an elimination of hostility between Muslims and Kaffirs, believers and heathens, higher castes and out-castes and similar frictional camps must generate a demilitarised zone determined to live together with reverence for each other and abjuring aggressive infallibility for each one's faith. The task of tolerance, reverence and cordial togetherness is the desideratum. No denomination is an island, and religions must live in fellowship in the wider continents.

My submission is that Operation Illumination of Islamic Basics is the first step to remove the misunderstanding gathering against that great religion and pave the way for an entente cordial with other noble, global godisms, and even non-believing yet the finest humanists. Here comes the necessary relevance of Akbar S. Ahamad's lucid, lovely, luminous, literary piece titled *Living Islam* which fulfils the fundamental objective of telling the world, especially the West, what Islam means, what the Prophet's vision was and why muslims everywhere stand for higher values and a better life for all, rather than bloody wars, conversion by sword and intolerance of all other godward paths. Global monopoly even in religion is an aggressive theological imperialism which is the opposite of Islam. For, in terms, Islam means not conquest nor power grab nor conversion sword in hand. In Arabic, Islam imports 'submission' to the Will of God (Allah). If one has the patience to read the true values of Islam, most of the prejudices will melt like snow in the sun. The core values Akbar S. Ahamad postulates, as integral to Islam, are "the respect for knowledge, for justice, for compassion towards the less privileged, for a healthy family life, the need to improve the here and now. The last is significant. Islam, unlike some other religions, does not reject the world. The Muslim ideal balances matters of the world (dunya) with ideas of religion (din), a good Muslim must participate in both. This goes a long way towards explaining the power and popularity of Islam in to-day's world". The five pillars of Islam, as the Cambridge Encyclopedia puts it, do not contradict the existence or obligations of other religions and confine themselves to what a good muslim's religious duties are:

(1) "The shahada (profession of faith) is the sincere recitation of the two-fold creed: 'There is no god but God' and 'Mohammed is the Messenger of God'.

(2) The salat (formal prayer) must be performed at fixed hours five times a day while facing towards the holy city of Mecca.

(3) Alms-giving through the payment of zakat (purification) is regarded primarily as an act of worship.

(4) There is a duty to fast (saum) during the month of Ramadan.

(5) The Hajj or pilgrimage to Mecca is to be performed if at all possible at least once during one's lifetime. Sharia's is the sacred law of Islam, and applies to all aspects of life, not just religious practices."

Prof. Akbar S Ahmad has done great service to Islam and the West and the rest, by writing this admirable book. It's excellence of presentation, elegance of diction and humanism and tolerance in chapter after chapter wins my profound admiration and imparts to every reader a new sympathy and view of beauty which can rarely be surpassed in persuasive power, especially when the subject is sensitive and flammable.

Once we grasp the Islamic fundamentals as Ahamad expounds with charming simplicity, much that is associated with it as bigoted, obnoxious or obdurately feared, both in the West and Bharat is myth, not truth; distortion, not divine essence. Oftentimes, the concept of Jihad projects in the non-muslim mind the image of holy war waged with haughty fanaticism. But while Jihad means struggle, the holy Prophet identified it in the sublimest sense. For him, the greatest Jihad was "the struggle to master our passions and instincts", not mere physical confrontation, involving slaughter. Just listen. Did not Krishna in the Bhagavat Gita tell Arjuna, as he steered the chariot in the midst of battle, that struggle to control one's passions by total submission to Him was the highest path to follow? Physical struggle is a gross approach while the inner struggle of the soul to master the evil forces and passions is the ultimate object. The Bible too speaks of the inner struggle to overpower vicious tendencies.

Superficially read, there are apparent reasons for misunderstanding concepts current in Islam and apt to prejudice the Western mind or other Eastern religions. To misunderstand is easy when one's fixations are formed by a rival faith. Let us look at the matter with an open mind and discover, in Shavian words: 'There is only one religion, though there are a hundred versions of it'. Tolerance and Truth promote comity among great religions. The opium is not religion, it is communalism that sprays poison and spews violence.

Akbar S. Ahmad, with intelligent perception and selectivity, deals with notions like Ummah, Fatwa, Mullah, Shahada and so on, which suffer misapprehension in the Western mind. The concept of the Ummah is brotherhood, simple and inevitable in our pluralistic world where unity and identity of the community is

its very strength. Hindutwa spells Hindu brotherhood. Christendom invokes the collective body of Christians world-wide. Illustrations from religions like Zionism and other coherent body of faiths can be copiously given, without any evil slant implicit in the concept of cultural identity. I do not see anything vicious about the Ummah more than as an expression of communal identity without ferocity. Blood-thirsty Islamic aberrations here and there cannot balckbrush the whole religion. The special circumstances of such outbursts also need study. The exception does not prove the rule. Democracy, with minority settings, seeks similar expression among tribes and groups with linguistic, cultural and ethnic identities and beliefs by a coherence and autonomy, not out of hostile separatism, nor to coil up like a serpent to sting but to cling happily together as a sign of belonging to one another in fellowship. Not only muslims but many groups have this healthy community sense with common ethos. What is mischievous is violent hatred which the Prophet abhorred.

Take again the concept of *fatwa* which has become a hateful word after the Ayatullah Khomeni pronounced death sentence on Salman Rushdie, the author of the *Satanic Verses*. Personally, I detest this ayatullah authoritarianism. But this extra-constitutional fiat is not the essence of Islam. I even regard it as incompatible with the cosmic compassion of the Prophet. Indeed, in many religions, such savageries of sacerdotal supremos are known, though rarely. When scepter and mitre get mixed up, authoritarian excesses are not uncommon. Even so great a model King and avatar as Sri Rama commanded that innocent Sita be condemned into exile. And yet Rama was a paradigm of royal virtue. Was not Jesus brutally nailed to death biblically on the cross with the sanction of Jewish high priests? We cannot damn a whole religion and its divine teachings because someone in the hierarchy has acted with barbarity. Moreover, a *fatwa* is *not law* with State sanction. Here again Ahamad explains that a *fatwa* means no more than a *formal opinion* on a point of Islamic Law and does not enjoy the status of enforceable law unless validly ratified in a Judicial Forum. Ayatullah Khomeni did not and could not pass death sentence on Rushdie in law. He merely expressed an extremist view mixing up his religious authority with the regal functions. Such extra-constitutional commands we find, though under exceptional situations, in the Sikh community Buta Singh, a former Home Minister, voluntarily underwent a humiliatingly 'lawless' sentence recently of washing others' feet as expiation. We cannot, for that reason, criminalize Sikhism containing gems of godly teachings and sublime mandates. Many are shocked by the Khomeni demand for the head of Rushdie but Ahamad has done the apologetic explanation with dexterity and convincing jurisprudence. Even so, this ayatollah demand for Rushdie's blood has cast a stain on a gracious faith. Ahamad has taken pains to compare Khomeni's *fatwa* with Dante's Divine Comedy with an adroit narrative power. When Islam, in splendorous civilization (philosophy, science, arts) stunned medieval European culture and Christian religion, resistance rose. And long later when Iran was appalled by Western vulgar culture, Islamic resistance erupted. Ayatollah attacked this cultural debasement seen through Islamic lens.

Ahamad goes on:

> *"Fearful of America's irresistible cultural and political advance in their country, the ayatollahs decided that the best strategy lay in total rejection of the foreign. Because the USA had set out to Westernize Iran, it became the embodiment of evil: the USA was given the title the Great Satan. It was the reverse side of the Christian-Muslim of Dante's time, with a new locality and in a different age. Imam Khomeini's fateful fatwa, condemning Salman Rushdie for his novel The Satanic Verses (1988), needs to be set in this historical context."*

Another charge, usually made against Islam, is that it is an evangelical religion encouraging conversion. Ahamad admits without equivocation that Muslims do believe in conversion. Is this charge peculiar to Islam? Christian priests too go round and convert, as Kerala and the North East of India and many other parts of the world testify. In a sense, Hinduism technically permits conversion and reconversion, although the evangelical emphasis of Muslims and Christians operating to embellish their strength is not there. However, Ahamad points out that *Dawah* (conversion) is carried out not by Government but by private organisations working on low-key basis. Even so, it must be stated both against Christianity and Islam that in India proselytisation is a sore point of tension and has resulted in militant Hindu organisations resisting this trend. Maybe, the best thing would be to drop organised conversion as a religious activity but to leave to individuals, in exercise of their conscience, to change faith of their own free will after some test of sincerity by a judicial authority.

We are often confounded by names like Mullah, Sheikh, Imam, Ayatullah and the like as breeders of bigotry and instigators of fundamentalism. Ulema merely means a religious scholar and the gradations are neatly explained by Ahamad which dispels the notion that there is any tyrannical control for these religious heads. An Imam is but a senior figure incharge of a mosque and an ayatullah, a seniormost scholar in the country. Pir and Faquir are likewise words of religious significance even as Wali is a Sufi Saint. Caliphs, Sultans and Shahs have regal import, not religious authority. A careful study of these terms in the Islamic lexicon removes prejudices and indeed, similar functionaries are found in every major religion. Islam does not have priesthood and even the Prophet is no founder of Islam but only a messenger of God. Even the expression 'fundamentalism', semantically speaking, has an innocuous as well as noxious sense. Only extremists who refuse to think or reason but cling tenaciously to formularies, rites and rituals deserve to be called fundamentalists as a dangerous species. Alas, there are many such in all religions, perhaps Muslims have an overdose and suffer a backlash. Vivekananda, that cyclonic Sadhu, dared and fought Hindu fundamentalists. So did Naryanan Guru. Ambedkar was a victim of Hindu bigorty and changed over to Buddhism courageously. But never will perish the great truths of advaita and the profound philosophy which made Schopenhauer state:

> *"In the whole world there is no study... so beneficial and so elevating as that of the Upanishads .... (They) are products of highest wisdom... It is destined sooner or later to become the faith of the people." And again: "The study of the Upanishads has been the solace of my life, it will be the solace of my death."*
>
> [*Discovery of India - 4th Edn. Pages 92-93*]

Some pseudo-Sankaracharyas and saffron-clad Swamis turn chauvinist, irrational and asuric, spiritually speaking, even like some sheiks and ayatollahs run amok chanting Arabic. The prophet has to be measured by his glorious resurrection of humanity, even as Jesus and Krishna should be. Prophet Muhammad is not regarded as the sole fountain of Islam. "Muslims believe that there have been over one hundred and twenty four thousand prophets who spread the message of God. Such figures, ... include people like Plato and Buddha....". The universalism of Islam, in the prophet's vision treats even a slave as a brother and opposes every villain even of noble birth. Read for instance:

> *"When Muslims encounter conflict the Quran has also said: 'To you your religion and to me mine' (Surah 109: Verse 6) and 'let their be no compulsion in religion' (Surah 2: Verse 256)" - (Page 32 of the Book).*

One Muslim imperative is that Muhammad was the last prophet of God, but Ahmadiyyas assert that there can be prophets even later. This controversy is not a relevant answer to the query that Islam is a glorious faith. The Hindus, on the highest scriptural authority, state that Truth is one but wise men see it from different perspectives. Likewise, says Ahamad:

> *"Muslims believe that there are many paths to God and although theirs is the last and final path, there are others which may also be valid. Indeed the Quran goes out of its way to emphasize that Christians and Jews - the people of the Book - are to be treated with special respect" - (Page 33 of the Book).*

What a paradigm of noble tolerance.

It is sensible to observe that Christianity and Judaism are incorporated in their pure form in Islam. Thus, indignant exclusivism is not an attribute of Islam. Advaita shares the faith of the Muslims - so too Arya Samaj - that the one central feature of their religion is that there is only one God. So too universal brotherhood. So much so, Swami Vivekananda did proclaim:

> *"I believe it is the religion of the future enlightened humanity. The Hindus may get the credit of arriving at it earlier than other races, they being an older race than either the Hebrew or the Arab; yet practical Advaitism, which looks upon and behoves to all mankind as one's own soul, was never developed among the Hindus universally.*

On the other hand, my experience is that if ever any religion approach to this equality in an appreciable manner, it is Islam and Islam alone."

[Complete Works of Vivekananda - Vol. VI - p.417]

Issues of contemporary relevance where Islam is apt to be opposed by the West, why, even by the Hindus and other religions, need our compelling attention since the problems of the present mar convivial relations and possess divisive potential unless differences are dissipated by reasonable, not dogmatic, grounds. For Indians especially, Hindu-Muslim cordiality, through enlightened appreciation of each other's values, is significant. However, in many parts of the world Muslims face encounters. Gulf wealth and consequent arrogance of immense opulence and tainted trends cannot defeat such challenges. Masterpiece like *Living Islam*, explaining moot points and die-hard prejudices, can be the only way to conquer ignorance. Akbar Ahamad, with unreserved frankness, unfolds the flag of rational explanation.

Muslims are suspects in the West as guilty of fundamentalism, ferocity and infliction of brutal criminal punishment in the name of Justice and terrorist training. Saudi Arabia decreed stoning to death a princess for marrying a commoner. It is demoniac violation of human rights. But it must be remembered that a British King had to give up his throne to marry a commner! In medieval Hindu reign, the harshest punishment on Shudhras and the lightest on the Brahmins for the same offense were prevalent, till the British imported their rule of law. *Sati,* where a young wife must die on her husband's funeral pyre, was abolished by law by the British, but persisted in practice in Rajasthan till the other day. Other instance of Christian women being discriminated against and Hindu women, through the Devadasi system, being religiously offered for quasi-prostitution, hurt the conscience of humanists everywhere. The point I drive home is that clerically sanctioned barbaric syndromes somewhere cannot be good ground for damnation of a religion everywhere. Draconic Saudi severity in criminal sentencing is a disgrace to humanity. Many other Islamic States are far less brutal. Judgment must be based on overall general practice and the finer teachings. So viewed, the anti-Islamic allergy of the West or Hindu India is not founded on universal features. The Great Prophet, the Holy Quran and Islam as a religion are more sinned against than sinning. With all that, contemporary laws and social sinisterness in some Muslim countries and communities are far in excess of U.N. human rights instruments. They have 'miles to go' and 'promises to keep'. Even the U.S. and Bharat have shortfalls, less in extent though.

We cannot wish away from the world a billion Muslims nor an equal number of Hindus and Christians, Buddhists and other religions especially when the soul of such faiths is sublime. A universal re-appraisal of inter-religious relations and promotion of detente and dialogue among communities is inescapable in our one-world. From this desideratum must emerge an illuminating flood of 'comity

literature', at once accurate and scientific, rooted in the fundamentals of Truth, righteousness and mercy and promotive of that fraternity world-wide sans which future shock awaits the inhabitants of the earth. I regard Prof. Akbar Ahamad's excellent work "*Living Islam*" as a beautiful beginning of this cosmic movement of humanist holism in our burgeoning world order.

Polemics and Panaceas

A few more controversial issues deserve to be touched upon. The marriages of the Prophet, the four wives theory of Islamic law and the triple talaq have come in for severe criticism; so too the idea of the Ummah as confined to Muslims only. The last may be dealt with first. Indeed, all creation comes within the ken of Islam - not only our planet, but the Universe or Universes. Says Ahamad:

> *"The universalism of Islam is reflected in its attitude towards matters of statehood. THroughout history Muslim rulers have been tolerant of other religions when their empires have been secure and stable - Ottomans, Mughals, the Umayyads in Spain."*
>
> *"The relations between Muslims and Jews were reflected in the treaty the Prophet made with them in Madinah. The first of its kind, it allowed them free trade, free travel, and freedom of thought and expression."*
>
> [*Page 34 of the Book*]

The Middle East is a scene of bitter battles between Israelis and Arabs. But that is irrelevant to the Prophet's glory. Just look: he signed a treaty between Muslims and Jews allowing free trade and free travel and freedom of thought and expression. "A good Muslim must balance the world (Dunya) with the principles of religion (Din)".

This synthesis reminds us of the spiritual and the material in Hindu theology, and its unitive understanding.

Space constrains me from dealing with the false impression that a Muslim can marry four wives and can divorce the wife at the male's pleasure. In fact, Islam virtually enjoins monogamy upon Muslims and departure therefrom only a detestable exception. So it is that a number of Muslim countries have codified the law wherein the practice of polygamy has been either totally prohibited or severely restricted. (I have dealt with this question while on the Bench in Kerala). Indeed, among the Hindus, polygamy prevailed for long - even Sri Rama's father, King Dasaratha had three wives - and when monogamy was enforced on Hindus, noises were made that religion was in danger. The Court overruled the objection. Even regarding divorce, Islam regards it as the most hateful thing before Allah. As for Hindus, divorce, even when the woman suffered most, was not her right until the statute ameliorated the situation. Indian Christian women are discriminated against even now in the matter of divorce and until recently these women, in parts

of Kerala, were denied equality. The fact is that the great Prophet found, in the desert lands, a dissolute people with women deprived of rights and he rid Arab society of these intolerable vices. He humanised Arab society, although the picture projected by prejudiced minds is the opposite, 'the undone vast' vis-a-vis women still survives. Compassion is the heart of Islam and the attributes of Allah are mercy, peace and justice. The highest attributes are reflected in Bismillah ar-Rahman ar-Rahim which bring out the beautiful attribute of the Beneficent and the Merciful. The magnificent ideas writ large in the Quran are condensed by Ahamad thus:

> *"The spirit of compassion which is reflected in the two names is crucial to Muslims, who are told: 'Be foremost in seeking forgiveness' (Surah 57: verse 21); 'Be quick in the race for forgiveness from your Lord' (Surah 3: verse 133); and, in the next verse, 'Restrain anger and pardon men' (Surah 3: verse 134). 'When they are angry, even then forgive', advises the Quran (Surah 42: verse 37)."*

Human beings are God's finest reflection, the culmination of creation. The title of vicegerent is an extraordinary vote of confidence and bestowed on the species because of its capacity to think and reason. It is to fulfil this destiny that *ilm*, knowledge, is so emphasized; *ilm* is the second most-used word in the Quran after the name of God. Human beings are told to use their mind and think in at least 300 places. Numerous sayings support this. The Prophet said, 'The first thing created by God was the Intellect.' Ali is quoted as saying:

> *'God did not distribute to His servants anything more to be esteemed than Intelligence.'*

The universal nature of humanity is underlined in the Quran. God's purview and compassion take in everyone, 'all creatures'. The world is not divided into a a North and a South, an East and a West. On the contrary, these divisions are obliterated: 'To Allah belong to the East and the West. Whether so ever ye turn, there is Allah's countenance' (Surah 2: verse 115). Again and again, the Quran points to the wonders of creation, the diversity of races and languages. God cannot be parochial or xenophobic.

The Quran suggests an ideal of social behaviour (as in Surah 17, 'The Children of Israel'). Be kind to parents, kin, the poor and the wayfarer, it exhorts. Do not be a spendthrift, do not kill, commit adultery or cheat, it warns. Boasting and false pride are condemned and honesty praised. But when humans err, and if they are sincere, 'God forgives those who repent' (verse 25). Corruption is discouraged: 'Seek not mischief in the land. For God loves not those who do mischief,' (Surah 28: verse 77). Humility is encouraged: 'Nor walk in insolence through the earth. For God loveth not any arrogant boaster' (Surah 31: verse 18)."

[Page 37 of the Book]

Muslims have no Monopoly

It is not my purpose to apotheosize Islam nor even to defend some of its traumatic trends found in Saudi Arabia where the most holy and hallowed spot and black stone (Kabah) remains as a celestial magnet, drawing Muslims from all over the world. There are pernicious features in the practices of Muslims, but there is sublime enlightenment in the Quran and the hadiths which, in moral splendour, compare with the best in the Greek Nomos, the Hindu dharma, the Buddhist Dhamma and Confusian Analects. For me, the noblest heights of the human soul are found in the Upanishads. For my Muslim friends the finest values shine in the Quran, and for many in all religions Jesus and the Bible are spiritually lustrous. Today we must remove the veil of distortion and accept cultural pluralism as at once good and necessary. The pity is that petro-dollars and market-friendly capture of territotires are the new yankee religion.

The sensitive issues where Christians and Hindus look at Muslims as clerical artists of injustice turn, *inter alia*, on women and priesthood. So far as the West is concerned, early Muslim conquest colour their views and the Hindus do not forgive the Moghul conquest and other invasions robbing temples and what not. Europe's memory of Islamic victories, attended with bloodshed in the centuries after Islam, has, perhaps, left indelible imprints. But Christians also had conqured Muslim countries, the scars and wounds of which are still poignantly bleeding. When we assess the values of Islam and other religions, we cannot mix up conquerors and their religions. Many wars have been fought by Christians against Christians; equally so, Muslims have fought Muslims although both the kings were muslims. Christianity and Islam are not culpable. It is the ruthless rulers who are guilty of waging war, not Jesus Christ and Prophet Muhammad. Hindu Maharajas have waged wars against other Hindu maharajahs but the Vedas are not guilty for that. Islam spread to many countries and continents not with the sword in had but kneeling before Allah. There are European Muslims, Hindu and Sikh Americans, Krishan-conscious foreigners. India has been the Hindu home but has been the peaceful habitat of 200 years of Christianity and Islam of 1000 years. Ashoka, the rarest of the rare of emperors, abjured violence and preached peace and freedom for all faiths. Many Hindus go to temples chanting universal prayers but practise what is contrary in actual life. Sunday Christians are anti-Christ on all other days and Muslims are not exception. Many who live in Muslim society pay only lip service to the notions of piety and faith and often disguise materialist greed with religious rhetoric. George Bernard Shaw, in one of his plays is bitingly cynical: "I am a Millionaire, that is my religion". Thus there are many who worship Mammon but pretend to be Christians, Hindus and Muslims. Even otherwise, there are fanatics who hate every other religion. However, let us look at the truth of Islam's teachings free from noxious memories of history. This very exercise, objectively performed, will help build bridges of understanding and exorcise the ghosts of prejudices lingering within. It is unfortunate, again as Ahamad points out, that the Gulf war of 1991 and America's global hegemony (ultimately making a profit out of its victory by collecting contributions from

various countries, including so far away a country like Japan), has made Islam appear as a symbol of dictatorship. It was not a war between Muhammad and Jesus but between President Saddam, a dictator, and President Bush, the worlds imperial super-power. Everyone who hated imperialism supported Iraq (not Saddam). Not merely Muslims but Hindus and Christian Buddhists, opposed the U.S. mass killings, even though they were disgusted with Saddam's dictatorship. People everywhere hated the imperial arrogance and destruction by the US war machines. Islam was not involved in the war and America was grabbing oil under the guise of defending Kuwait.

I wonder if the Muslim League of India sheds tears over Bosnian butchery. Similarly the BCCI is often associated with Islamic fraud of fund. That scam had nothing to do with Islam although the top echelons of the Bank were Muslims. Khomeini's fatwa against Rushdie was an aberration on both sides and could not be treated as the criminality of Muslim Imams.

If follows that we have to study the Islamic faith which is difficult for the West or, for that matter, many Hindus because of Pakistani incitement to terrorism in Punjab and Kashmir. Even here the *people* of both the countries have friendly relations. It is *power politics*, not Islam versus Hinduism which creates this costly, cannibalistic estrangement and investment in defence weaponry. This proposition holds good whether the wrangling godists be Christians, Jews, Hindus or Muslims.

How religious hostility can pollute the loveliest truths is seen from the dark lens turned on Taj Mahal by bigoted obscurantists. Ahamad's words are poignant:

> *"If there is one romantic monument instantly recognized throughout the world that speaks to all peoples irrespective of colour or nationality or race it is the Taj Mahal".*
>
> *"It was the symbol of love, of romance, of imperial luxury and extravagance; a symbol that was both Muslim and human, that spoke to her of her identity and, above all, that expressed human love, the love of a husband for a wife."*
>
> *"Shah Jahan's selection of white marble with which to build the Taj was by no means an innovation. His genius rather is expressed in the overall concept and design of the mausoleum, in its power and execution. Both formally and symbolically he brought together fresh ideas in the creation of the Taj."*
>
> *"Of the many historical mounments created by the Muslims probably the most famous are the Taj Mahal in Agra and, in Delhi, the Qutab Minar, the Red Fort and the Juma mosque. The Muslim inspiration and source of their creation has never been in doubt. But extremist groups are claiming that the first two, with a long list of other Muslim monuments, are of Hindu origin. The Muslims, these Hindu*

groups say, forcefully appropriated them, adding Quranic verses and calligraphy to give them an Islamic character; it is time to restore them to their Hindu character (Ahmed 1993).

Although few serious Indian historians, whether Hindu or Muslim, give credit to these arguments, they have some support (Oak 1965). They are also beginning to gather a popular bazaar following."

(Pages 95, 191 and 192 of the Book)

Omega

I conclude with a caveat. We, of various faiths, must accept a condition of State and Society that in all matters, which do not infringe on religion, secularism is an inflexible rule of life. "Render unto Caser what is due to him and to God what belongs to him', is the biblical tenet, which, if imaginatively read, forms the foundation of secularism. Our world is but one, our religions are many. Inevitably, religion must keep within its bounds and the State must secularly respect all religions equally and operate only where the fundamentals of religion have no play. Secularism is not a 'vacuous word' or a 'phantom concept'. Civilised life, with its richness of diversity, finds it finest hour only when our poly-religious universe shows high mutual respect and leaves to 'Caesar', i.e. the State, all aspects of human affairs which have functional impact on material facets of life. We must never abandon, however, that the sublime values and universal truths which Buddha, Krishna, Christ, Muhammad and Gandhi embody must guide the governance of mankind in secular affairs. In that sense, Truth is indivisible and binds all religions to create and sustain a world of peace and progress.

FORM IV

(See Rule 8)

1.	Place of Publication	:	BANGALORE
2.	Periodicity of is Publication	:	Annual
3.	Printer's Name	:	National Printing Press 29/1, II Main, 3 Cross Pothalappa Garden Adugodi, Bangalore -30
	(Whether citizen of India) (If foreigner, state the country of origin)	:	Yes
	Address	:	29/1, II Main, 3rd Cross Pothalappa Garden Adugodi, Bangalore - 30.
4.	Publisher's Name	:	Dr. N. R. Madhava Menon Director National Law School of India University
	(Whether citizen of India)	:	Yes
	Address	:	National Law School of India University Nagarbhavi, Bangalore - 560 072.
5.	Editor's Name	:	N. R. Madhava Menon
	(Whether citizen of India) (If foreigner, state the country of origin)	:	Yes
	Address	:	Director, National Law School of India University, Nagarbhavi, Bangalore - 560 072.
6.	Name and addresses of individuals who own the newspaper and partners of shareholders holding more than one per cent of the total capital	:	National Law School of India University Nagarbhavi Bangalore - 560 0762.

I, Dr. N. R. Madhava Menon on behalf of National Law School of India University, Bangalore hereby declare that the particulars given above are true to the best of my knowledge and belief.

For National Law School of India University

Sd/-

N. R. Madhava Menon

Date: April 18, 1994

Acknowledgment

The Director, Members of the Faculty and Students of the National Law School of India University place on record

their deep sense of gratitude to ***Mr. G. Vasantha Pai****, Senior Advocate, Madras, in gifting to the National Law School of India University, a collection of law books, law reports and digests to perpetuate the memory of his father, the late revered* ***Shri K.J. Guna Pai****, Advocate . Besides the gift of a 'treasure' a further donation of a sum of Rs. 1.00 lakh (Rupees one lakh only) was given for updating the library.*

Deeds speak louder than words and the gift of the Law Library which belonged to the doyen of the Madras Bar is an enrichment to the University collection of books and an eloquent reminder of the heights reached and kept by great men of law.