THE BANARAS LAW JOURNAL

Vols. 18 & 19 January 1982-December 1983 Nos. 1 & 2

LAW SCHOOL DIMOND JUBILEE ISSUE

BANARAS HINDU UNIVERSITY
VARANASI-221 005

BANARAS HINDU UNIVERSITY

Visitor — The President of the Republic of India (Ex-officio)
Chancellor — Dr. Vibhuti Narain Singh of Banaras
Vice-Chancellor — Dr. Iqbal Narain
Registrar — Sri R. C. P. Sinha
Librarian — Sri H. D. Sharma
Dean, Faculty of Law — Professor M. C. Bijawat

LAW SCHOOL

The Faculty Staff

Ansari, A. H., *B Sc., LL.M (Banaras)*	Lecturer
Banerjee, P. N., *B.Sc., LL.M (London)*	Reader
Bijawat, M C., *M A. LL.B. (Banaras) LL.M., J S D. (Yale)*	Professor
Chaturvedi, M.N., *M A , LL M. (Banaras), LL M. (Yale), S J D. (Northwestern)*	Professor
Chauhan, V.S , *B A., LL M (Lucknow)*	Lecturer
Dharma Pratap, *M Sc., LL M (Banaras) D.Phil (Oxon)*	Prof. Emeritus
Dhokalia, R. P., *M A , LL.B (Allahabad), Ph D. (Manchester) (on leave)*	Professor
Jaiswal, R. S , *B A., LL M. (Banaras)*	Lecturer
Jariwala, C. M., *B Com., LL B (Banaras), LL M , Ph. D. (London)*	Reader
Krishna Bahadur, *M A., LL. M , LL. D (Lucknow)*	Professor
Magotra, V. P., *LL M (Krukshetra)*	Lecturer
Malviya, R. A., *M A., (Lucknow) LL B (Allahabad), LL M. (Banaras)*	Lecturer
Mehrotra, Arjun Kumar, *B. A., LL. B.*	Part-Time Lecturer
Misra, R. K., *M A , LL M (Lucknow)*	Professor
Nirmal, B. C., *B Sc (Allahabad), LL M (Banaras)*	Lecturer
Pandey, B. N., *LL.M (Banaras)*	Lecturer
Parasuraman, *S., M.A., B.Com., LL.M. (Banaras)*	Reader
Rai, S. P , *B Sc , LL M (Banaras)*	Lecturer
Ramjee, *B A , LL M (Banaras)*	Lecturer
Sampath, B. N., *B Sc , B L (Mysore), LL.M. (Osmania)*	Professor
Sankhala, U. C., *B Com , LL.M (Rajasthan)*	Lecturer
Shaukat Ali, *B.Com. (Hons.) LL M. (Banaras) (on leave)*	Lecturer
Singh, M. P., *B Sc , LL M (Banaras)*	Lecturer
Singh, Parmanand, *LL M. (Lucknow), Ph.D. (Delhi)*	Reader
Singh, Sukh Pal, *B. Sc., LL. M.*	Lecturer
Singh, S. S., *M. A., LL. M.*	Lecturer
Singh, V N., *M A , LL M (Lucknow)*	Reader
Singh, Yogendra, *B.A., LL.M. (Banaras)*	Reader
Srivastava, Awadh Bihari Lal, *B. A., LL. B.*	Part-Time Lecturer
Srivastava, M. N. P., *B Sc., LL M. (Banaras)*	Lecturer
Srivastava, P. P., *LL M.*	Lecturer
Surendra Nath, *M A , LL B (Banaras), LL.M. (North-western)*	Reader
Trivedi (Km.) Abha, *B A (Hons.), LL M. (Banaras)*	Lecturer
Verma, D. P., *LL.B (Patna), LL M (Dalhousie)*	Lecturer
Verma, G. P., *M.A., LL.M. (Allahabad)*	Reader
Verma, S. K., *B.Com., LL.M. (Banaras)*	Reader

(*ii*) *Research Assistants*

Haque, Mohammad Nasimul, *B.Sc., LL.M. (Banaras)*
Sinha, Vinod Behari, *B.Com., LL.M. (Allahabad)*
Srivastava, Amar Nath, *B.Sc., LL.M. (Banaras)*
Srivastava, K.N., *M.A., LL.B.*
Tiwari, Janardan, *M.A., LL.M. (Allahabad)*

THE
BANARAS LAW JOURNAL

Cite This Volume

18 & 19 Ban. L. J. (1982-83)

Tara Printing Works, Varanasi

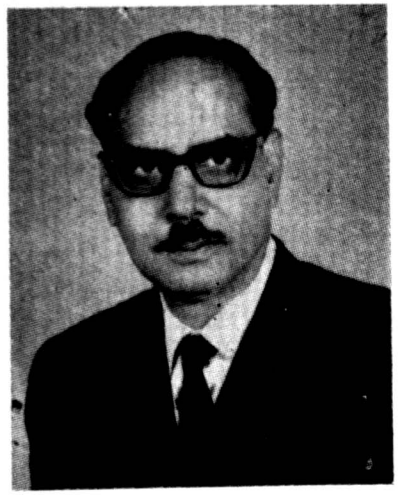
THE BANARAS LAW JOURNAL

Vols. 18 & 19 January 1982—December 1983 Nos. 1 & 2

CONTENTS

ON THE RETIREMENT OF

PROFESSOR ANANDJEE



Professor Anandjee's contribution to Indian legal education in general and Banaras Law School in particular hardly needs any comment. A born optimist given to persuasive speech and suave manners, Professor Anandjee was a visionary who changed the very complexion of the Indian legal education. With ceaseless effort, he toiled in the prime of his career to build a great edifice without bothering for a moment about his own research output and consequent personal glory. When he laid down his office, it was the end of an era. Generations of students and teachers who pass through the portals of this Law School will think of him and recollect the lines of Longfellow :

Lives of great men all remind us
We can make our lives' sublime
And departing leave behind us
Foot prints on the sands of time

LEGAL EDUCATION AND LEGAL SYSTEM : SOME SUGGESTIONS

SATISH CHANDRA*

It is a matter of pride and privilege for me to be associated with the Diamond Jubilee Celebrations of the Law School of the Banaras Hindu University. This great University founded about 67 years ago, has maintained the high traditions and has been one of the foremost Universities of our country.

The Law School commenced part time teaching of law in 1923. At that time the Dean of the Law Faculty was Pt. Madan Mohan Malviya, the founder of this University. After him Sir Tej Bahadur Sapru became the Dean and remained so for nearly 15 years. The Law School was nursed and nurtured by such eminent statesmen and jurists. It has grown from strength to strength and has flowered into a full time teaching faculty.

The Faculty of Law in this University as elsewhere is much bigger, than other faculties. With such large numbers, it is difficult to maintain proper standards. Specialized teaching requires specialised teachers, smaller groups and huge funds. Higher education should not be and cannot be taught en masse. It has to be selective, not only as to the content of education, but also as to the recipient thereof, their needs and aspirations.

Nearly two years ago I took up the issue of Education in Law. It was emphasized that like Medical and Engineering education, legal learning should be treated as a specialized and an exclusive field of education. Generally Law course was considered as a course of the last resort. When one had nothing better to do, he joined Law, day or evening classes. The students were generally not serious. After passing Law those who got no service or other outlet joined the profession of law. Experience of Judges in the District and High Courts was that the new entrant to the Bar was normally devoid of professional ability and efficiency. There was no effective quality control.

---

* Chief Justice, the Allahabad High Court Allahabad. *The Diamond Jubilee Inaugural Speech.*

I made several suggestions. Practically all the Vice-Chancellors of various Universities, the Bar Council and the University Grants Commission etc. generally accepted the idea. They are now introducing the three or five-year course.

But it appears that one important aspect has as yet not been given serious thought. That is numbers. As I said earlier higher education can be effective only if it is selective. With the present infrastructure it cannot be en masse. I still maintain that the entry to the Law course for the Bar should be by a stiff competitive examination, for a limited number of seats. This is not a new idea. There is a tough entrance examination for Medical, Engineering, Chartered Accountancy, etc. courses. This will check the stifling over crowding in the Bar.

The method of teaching may also need a drastic change. These days no more than 25 per cent of Law graduates join the Bar. The Law education is, however, confined to the making of a practising lawyer.

The Legal education should cater to other outlets also : like legal advisers or Labour Relations Officers to Corporations and official departments and companies. The Universities may adopt short 6-month or one-year courses to enable the student to help people who have work in Government offices where permits, licences or supplies are given. There a puzzling maze of forms and procedures baffle a citizen. Professional help is surely needed. Similar is the case with Income Tax, Sales Tax, Excise Departments. These are in a way specialized fields which can be catered to by the Law Schools, without much difficulty. This way the legal education may become more effectively distributive.

The Law School of Banaras University is a pioneer in imparting clinical legal education. Under it a Legal Aid Cell has been opened in the premises of the Law School. There free legal advice and aid is given to the poor and needy. The students attend courts and the chambers of senior lawyers. The Dean and other authorities of the law school deserve high praise for this enterprise. They may consider holding legal aid camps at the village level.

The administration of justice which operates the system needs a revolution. Not long ago Chief Justice Mirza Hammedullah Beg pointed out that the legal system has undergone two revolutions and is in need of a third.

The first revolution in our legal system consisted of the introduction of Anglo Saxon principles of jurisprudence by codification of laws—civil and criminal. The theocratic mould of ancient Hindu and Muslim laws were broken by an introduction of principles of British Common Law and statutory laws. The ancient Hindu and Muslim laws were confined to some aspects of personal law only. The powers and procedure of courts, the law of contracts, all aspects of property, etc. were codified and the Codes were made applicable to citizens, Hindus or Muslims or anyone else. The first revolution therefore brought about systematisation and secularisation of principles of law and administration of justice.

The second revolution in the basic structure of our legal system was introduced by the framing of the Constitution, which governs our country since 1950. This inclined the legal system towards a Democratic and Socialistic pattern. Part IV of the Constitution indicated the Directive Principles of State Policy with a view to build a socialistic welfare society. This entailed conferring of vast new administrative powers on the Bureaucracy. Their actions often infringed the peoples' Fundamental Rights guaranteed in Part III of the Constitution. The enormous growth of population in the last 30 years, and their awakening to their rights coupled with an equally vast growth of Law in the form of statutory legislation and rules and regulations, led to a flood of litigation. This litigation raised new varieties of problem. These developments require a shift in the basic legal approach and major surgery in the methodology of Courts. That is why it is said that we are in need of a third revolution.

It is difficult for me to deal on this occasion with the details of the measures of reforms needed in the working of the Judiciary. Suffice to mention a few.

The machinery of Administration of Justice should emphasize specialization and Division of Labour. The arguments must be short and the judgment shorter. The procedure should be suitably curtailed. There should be one appeal on facts and only one more on law. Article 136 of the Constitution may be confined to constitutional law and conflict of decisions in various High Courts. The last Court namely the Supreme Court should not be loaded with mundane civil and criminal matters. There may be provision for compulsory arbitration, like the system prevailing in the State of Pennsylvania. It is voluntary

arbitration by a panel of three lawyers who are paid by the state. Roughly the same pattern followed in Japan and Norway called conciliation procedure.

The basic structure of the Judiciary is sound and workable. I do not agree with those who castigate the administration of justice as based on an alien imported system, not suited to the genius of our Society. No reason has been mentioned why it is not suitable. No concrete alternative formula has been suggested.

Those who blame the Judiciary forget that it is not the whole but only a segment of the legal system. The legal system means the involvement of not only the Judiciary but also of the Legislature and the Executive. All three are bound up together. They move as an integral system. You cannot change one and find improvement.

The entire system is based on the British model. Our Parliament and the Legislature function and follow the same legislative procedure as has been followed by the Parliament of England for the last several hundred years. Though the country is independent from the British Raj for several decades, the Executive of our Republic has not appreciably changed from the British style. The Judiciary goes along with the other two wings of the legal system, i. e., the Legislature and the Executive. In the premises, to single out and castigate the Judiciary for being ill-suited or out of tune of the national ethos, is neither fair nor correct.

BANARAS LAW SCHOOL : A LEGEND

MAHESH C. BIJAWAT*

Shastyabdi or the completion of sixty years among Hindus, which is marked by the performance of several religious ceremonies, is an occasion for rejoicing for all that the almighty has bestowed in the past and seek his benediction for a happy future. Institutions are no different from individuals in this regard except for the fact that they have a longer life span than the mortals. The celebrations marking such an occasion afford us an opportunity to recall and review the past which while giving a sense of satisfaction at the achievements made so far also enable us to determine our future aims and objectives in the light of our experiences. It is with this object that we are recapitulating briefly the history of our Law School with a view to project the future perspective for achieving the goal of excellence.

The Faculty of Law was one of the earliest faculties to be instituted in 1916 by the Banaras Hindu University under the Deanship of that well known legal luminary Sir Rash Behari Ghose. However, arrangements for regular teaching could only be made in 1923, namely, from 4th August 1923. The College had, indeed, a very interesting infancy with the classes being held on Saturday evenings and Sunday mornings. Such an arrangement was devised initially in view of the fact that the part-time Professors who were leading members of the Allahabad Bar had to commute between Allahabad and Varanasi for delivering lectures to the students. Despite these limitations the first batch produced at least two eminent judges of the Allahabad High Court, one of whom, namely, Mr. Justice Balram Upadhyaya who very appropriately inaugurated the Diamond Jubilee Celebrations on 4th August 1982. It is also interesting to point out in this regard that Sri Ram Ugra Singh who was a party to that 'cause celebre' relating to academic litigation was also a student of the first batch. Subsequent batches have not lagged behind in producing legal luminaries, administrators and particularly the political leaders of the national stature.

It may be pointed out at the outset, that the Law College, Banaras Hindu University was one of the first few Law Colleges in the country which opted for full time law teachers, a tradition which blossomed fully in sixties. With the result, Banaras Law School, has, today, the

* Professor of Law, Head and Dean, Faculty of Law, Banaras Hindu University, Varanasi.

largest band of law teachers in the country who are imparting instructions in law in one centre and pursuing the goal of excellence in the field of law.

The history of the Law School, more or less, fits into three distinct phases, namely, (1) from the time of inception to 1960, (2) from 1960-72 and (3) from 1973 onwards. The first forty years of the Law School (which was designated as Law College at that time) was a steady period when the Allahabad lawyers who initially had taken care of the teaching handed over their responsibility to a small group of distinguished law teachers who had taken to law on a full time basis and who had been discharging their responsibility superbly in spite of the pressure of work on them. This has to be particularly taken notice of by the modern teachers who complain of the teaching load, that four full time teachers (the number hardly exceeded during the first forty years) practically handled all the subjects on law for both the first and the second years of the LL. B. courses. The singular dedication with which these outstanding law teachers like Professor L. R. Siva Subramanian, Professor, G. B. Joshi and Professor V. V. Deshpande taught their thousands of students during decades could hardly be equalled even today even though we have many more facilities than these teachers had at that time. It is a matter of great distinction and pride to this Law School that Professor G. B. Joshi had been invited twice by the Calcutta University to deliver the Tagore Law Lectures an achievement which has not been accomplished by any other law teacher in this country.

It is submitted with respect without casting any reflections on the calibre of the above great law teachers that during the first forty years the Law School stuck to the usual traditional law courses which had almost become stereotyped all over the country and there was hardly any innovation in the course contents and the methodology. However it was left to Professor Anandjee who took over the leadership of the institution in 1959 to herald a new era in the history of the Law School. With his intimate knowledge of the working of a great American Law School, namely, the Yale Law School, from where he took his doctoral degree, Professor Anandjee obviously felt that much was needed to be done in the Banaras Law School in terms of revising the law courses, the methodology of law teaching and the examination system. However, he perceived within a short duration of his stay in the Law School that mere tinkering of the courses here and there within the existing framework of the legal education of those times would hardly meet the

challenges of the changing times and something more drastic had to be done to overhaul the entire system of legal education. It is with this object in view that Professor Anandjee initiated activities in the Law School to take up the task of transforming the shape of legal education at the national level. Some of us who had been with him when this process began in the Law School could hardly believe at that time that the ambitious scheme which we had been preparing in this Law School could bring about such a drastic transformation of the legal education in the whole country. Despite several obstacles in our way, some of which appeared to many of us to be almost insurmountable, this Law School, under the leadership of Professor Anandjee could impress upon the Bar Council of India, the premier body which regulates legal education in this country, about the inadequacies of the legal education to meet the challenges of the times and particularly the need to do away with the part time approach to legal education The initial reticence of the Bar Council of India gave way before the persuasive arguments of Professor Anandjee and the Bar Council of India finally gave us the green signal to launch the three year full time course in law. It has to be confessed that some of us, who launched the three year full time course two decades ago, were ourselves doubtful about its country wide acceptance.

We are aware that the experiment in legal education has brought in its wake a host of new problems with which the Law School is continuously grappling. One such problem may be mentioned here. For instance, the introduction of Semester system which is a prerequisite for effecting several changes in the curriculum, though initially well received has, of late, given rise to several problems. The existence of annual academic year in other courses of study resulting in temperamental inability of the student to get used to a new rigorous Semester system when he enters the Law School, the dislocation of academic sessions due to various factors beyond the control of the Law School, and the partial retention of the principle of 'outside examiners' have all generated numerous difficulties to put the system itself into jeopardy. We are also aware of the fact that even though we are the pioneers in introducing so many papers on methodology, still there is lot to be done for the success of the programme.

With the decision of the Bar Council calling for the introduction of a new five year course in law after the 10+2, our courses of study are again in a state of flux. The Law School is making sincere efforts to

switch over to the new programme without losing the advantages, it has made during the last two decades.

Some notable achievements of the Law School need to be emphasised here. The Law School has assiduously built up an excellent library and particularly its international law collection, is comparable to some of the best available in this country. It is true that in comparison to the collections of Law Schools in many countries of the West our collection is meagre, but in the Indian context we can be proud of our Library collection despite various constraints by which we are handicapped. The Law School has been publishing a first rate research journal, namely, the Banaras Law Journal for the past eighteen years in which articles of reputed jurists and scholars from all over the world have appeared. Indeed it is no mean achievement to maintain the quality of the journal and its periodicity in our country especially in the light of the absence of financial viability and adequate logistical support. Enthused by the success of our journal the Law School has launched a new experiment last year under the editorship of Dr. Krishna Bahadur by publishing the Banaras Law Studies on the pattern of year books of well known Universities.

The Clinical Legal Education Programme started under the directorship of Professor R. P. Dhokalia with its accent on free legal aid and legal literacy has been gradually growing from strength to streugth attracting the attention of people from all over the oountry who are keen to launch this programme. It is gratifying to note that students of this programme have handled the cases before courts so effectively (of course, under the guidance of a dedicated group of C. L. E. P. Teachers' and some lawyers of the local Bar), that they have succeeded in many cases even beyond our expectations and there is a heavy rush in this programme which we are unable to cope with. The Law School is grateful to U. G. C. for sanctioning Rs. 30,000/- towards the legal aid programme and we hope with the growing success and popularity of the programme, the University and the U. G. C. would provide much more grants in the future. The Law School has also taken up during the last few years a programme in the field of rural legislation and the University has been kind enough to institute a centre for rural legislation.

A word of appreciation needs to be said with regard to the Current Law Forum, which during the last two decades has arranged the lectures of eminent judges, educationists, jurists and academics. It has

also acted as a forum for inter-disciplinary dialogues with eminent intellectuals in their respective fields.

Last but not the least, it is necessary to say a few things about the fact that it has on its staff eminent teachers specialized in various branches of law having to their credit a large number of research papers published in national and international journals. Perhaps very few Law Schools in this country could rival us in terms of academic output and it is heartenning to note that at least three of our Professors have to their credit books and monographs published abroad and others have long list of publications.

With a dynamic band of law teachers, a select student body. a well equipped library and well planned academic programmes, the Law School is determined to take great strides in the near future and restore to the legal education its rightful place in the society It is no wonder that the Banaras Law School has become a legend and let us strive to maintain that image.

THE CONCEPT OF LAW OF NATIONS IN ANCIENT INDIA

NAGENDRA SINGH*

(1) Universality of application

If the concept of the Law of Nations comprises a body of rules whether customary or written, which the states in their intercourse with each other consider as binding, it would perhaps not be quite accurate to observe as Oppenheim has done, that International Law "in its origin is essentially a product of Christian civilization and began gradually to grow from the second half of the middle ages."* Apart from the fact that the Christian civilization may not have quite enjoyed a monopoly in regard to prescription of rules to govern inter-state conduct, it is submitted that the concept of Christendom itself hampered the development of international law on the broad basis on which it exists today. For example, the principle that the rules of civilized conduct among nations applied to states within Christendom alone and nothing of a binding nature could govern the relations of a Christian state with a non-Christian state, did lasting damage to the development of the correct concept of modern international law which recognises political entities irrespective of their religious beliefs. Even in the thirties of the present century, Mussolini's Italy when using expanding bullets in its war with Ethiopia took the plea that as the latter was outside Christendom, the recognised rules of warfare could not apply to the Italo-Ethiopian conflict of 1936. Even the concept of the mediaeval Muslim Law of Nations outside India was not universal in character since it was "primarily concerned with regulating the relations of entities and nations within a limited area and within one civilisation."** However, ancient India and subsequently the later medieval India under Muslim rule remained fortunate in being free from such prejudices which would limit the application of the law of nations to one's own civilization itself.

If we make a probe into the history of ancient India we find that no distinction between believers and non-believers was recognised in

*Judge of the International Court of Justice.

* Oppenheim, *International Law*, Vol 1, 8th Edition 1955, p. 6

** Majid Khadduri, *War and Peace in the Law of Islam*, 1955, p. 43

regard to inter-state conduct (in ancient India) and even when the former were involved in a death struggle of war with the latter or whether the war was fought within or without Aryavarta or whether it was a just and righteous war (*Dharma Yuddha*) or an unjust war (*Adharma Yuddha*), it was expressly enjoined by the sacred laws of Dharmasastra that all beligerents at all times and in all circumstances adhere to the accepted rules of warfare.

(i) A study of the Smrits would undoubtedly reveal that ancient India had a highly developed system pertaining to the laws and rules of war based on considerations of humanity and chivalry. The rules of warfare applied even if the struggle was in the nature of a civil war which is again in conformity with the modern concept of recognition of belligerency and insurgency. Again, the general rules of warfare as prescribed by the Code of Manu which came later (200 B. C.–100 B. C.) or other law-givers were governed by the principles of humanity and chivalry. For example, Manu lays down : "one who surrenders or is without arms or is sleeping or is naked, or with hair untied (i. e. unprepared) or is an on-looker (non-combatant) must never be killed," irrespective of whether the opponent was a believer or Arya or a yavana (alien non-believer) or whether he was fighting a just war or not* The dictates of humanity coupled with consideration of universality of application irrespective of creed helped the development of law of war in ancient India on a basis as it is known today.

(ii) Again, the distinction between combatants and non-combatants and the rule forbidding weapons of war destruction was not only formulated but there are examples of its recognition in ancient India.

(iii) A classic example of the observance of the rules of warfare is to be had when Lakshmana in the war against Ravana, the demon King, was forbidden by Rama, the King of Ayodhya, to use a weapon of war which would destroy the entire race of the enemy including those who did not bear arms, because such destruction en masse was forbidden by the ancient laws of war even though Ravana was fighting an unjust war

* *Manusmrti*, VII, 91, 92

न च हन्यात्स्थलारूढं न क्लीबं न कृतांजलिम् ।
न मुक्तकेशं नासीनं न तवास्मीति वादिनम् ।।
न सुप्तं न विसन्नाहं न नग्नं न निरायुधम् ।
नायुध्यमानं पश्यन्तं न परेण समागतम् ।।

with an unrighteous objective and was classed as a devil-demon himself and hence could be considered outside the then world of civilisation.* Another such example is to be found in the Mahabharata when Arjuna observing the laws of war refrained from using the "Pasupathastra", a hyper-destructive weapon, because when the fight was restricted to ordinary conventional weapons, the use of extraordinary or unconventional types was not even moral, let alone in conformity with religion or the recognised laws of wafare**. This unique concept contributed to inter-state law in the field of beligerent relations has yet to win recognition at the hands of the sovereign states of the world though jurists are prepared to press for its acceptance today.

(iv) Moreover, the Indian customary laws governing inter-state conduct desscribed by Smrtis and based on principle of chivalry governed the conduct of administration of enemy occupied territory and also prescribed the treatment to be meted out to the defeated enemy king in the following words of Manu :

> "When a king has conquered a foreign foe he shall make a prince of that country (not of his own) the king there, and (*Vishnu* adds, III. 49) he shall not destroy the royal race be of ignoble birth. He is to honour the gods and the customs of the conquered country and grant exemption from taxation (for a time) (*Manu* VII, 201).*"

The above treatment was prescribed for the enemy king, irrespective of whether he belonged to Indian or foreign civilisation as is clear from the treaty signed between Seleukos and Chandragupta Maurya in 305 B. C. when the former accepting defeat retired and concluded a humiliating peace.** However, Chandragupta accorded to Seleukos

* *Ramayana, Yuddha Kanda Sloka* 39.

तमुवाच ततो रामो लक्ष्मण शुभलक्षणम् ।
नैकस्य हेतो रक्षांसि पृथिव्यांहन्तु महंसि ।।

** *Mahabharat, Udyog Parva*194, 12.

यत्तदंधोरं पशुपतिः प्रादादस्त्रं महन्मम ।
कैराते द्वन्द्वयुद्धे तु तदिदं मयि वर्तते ।।

* *Cambridge History of India*, Vol : I,, P. 290.

** Vincent Smith,. *Erly History of India*, p. 125.

जित्वा सम्यूजवेदं देवान् ब्राह्मणश्चव धार्मिशन् ।
प्रदद्यात्परि हारांश्च ख्यापयेद भयानि च ।।

the treatment of an independent foreign sovereign. The rules governing this particular aspect were so well known and well-established that the Macedonian world conqueror, Alexander the Great, learnt of them in detail while waiting on the banks of the Hydaspes in the summer of 326 B. C; planning to fight-with the Indian King Paurava or Poros. It is possible that Alexander having heard of the chivalrous rules of warfare recognised by the Indian warrior class had perhaps made up his mind before the battle began to treat Paurava according to the Indian concept of the law on the subject. Thus after the battle of Hydaspes had been fought and won, victorious Alexander summoned in his presence the defeated Indian King Paurava, and enquired of him how he should be treated. The Indian king replied, "Act as a King". The victor not only confirmed the vanquished prince in the government of his ancestral territory, but added to it other lands of still greater extent and by this method secured a grateful and faithful friend.

Thus the first essential characteristic of the concept of the law of nations in ancient India was its universality of application irrespective of limitation of religion or civilization. To the state in ancient India, Islamdom, Christendom, Greekdom or Aryandom would have made no difference as far as inter-state relationship was concerned which is such an essential feature of the correct concept of the Law of Nations whether we think of the world of today, yesterday or of tomorrow.

(v) The contacts of the ancient Indian civilization with states or political entities professing a different civilization were many and self-established. The institution of *Rajduts*,* i. e., sending of ambassadors or envoys for ad hoc work or for short sojourns in the courts of other states, even if the modern concept of permanent embassies was not known then, was not confined to states of the Indian group but was in vogue in relation to the Greek states that had come into existence on the northwest border of India in the wake of Alexander's invasion of 326 B. C. While both Christendom and Islamdom confined official inter-state relation within their sphere of belief and no instances of any marked importance have come to light indicating exchange of ambassadors with countries outside their pale of civilization, India had not only such ambassadors accredited to foreign countries but received foreign

* The Code of Manu not only allots a distinct time in the programme of a monarch for discussions with foreign ambassadors and consideration of their reports but describes in detail the qualifications of a good envoy and the functions he is required to perform. *Manusmrti*, VII, 63-66, 153

envoys to Indian courts as evidenced by Megasthenes who came to the court of Chandragupta Maurya in 303 B. C. representing the kingdom of Seleukes Nikator.*

(2) Lex as Rex and Pacta Sunt Servanda

The second distinguishing characteristic of ancient India is the supremacy of dharma or law so vital for the well-being of the community of states. In fact, the supremacy of law and the sanctity of treaties constitute the two basic principles which remain a sine qua non for the growth of law among states. If the conditions necessary for the origin and development of international law are examined, it will be found that first, there must be the existence of separate political units, howsoever looseknit they may be, whether tribal or confederal, so long as they (a) are independent of each other ; and (b) have their own governmental machinery with an appropriate organ as a mouth-piece like the Vicapati or the King, and the rest can be left to the human social instinct for developing inter-unit relations and the consequent need for their regulation. (This aspect is described subsequently when dealing with the concept of Cakravartin—narrated as the fourth distinguishing characteristic of ancient India which continued to dominate the entire course of the Indian history including the British period right up to 1947). Secondly, but in no way less important than the first condition, is the basic need for an atmosphere of respect for law and a general feeling for due observance of agreements solemnly entered into without which no amount of extensive or intensive inter-state relationship would give birth to a law of nations as such. It is this important aspect which needs elaboration and is discussed below.

The concept of dharma or law as identified with danda or sanction lies at the root of the origin of the state and society as Manu holds that the Lord (creator) gave birth to his own son-danda, the Protector of all creatures, as incarnation of the law itself, formed out of the Glory of

* Vincent Smith, *Early History of India Including Alexander's Campaigns*, Oxford University Press, 1924 pp. 124-5. It is clear that in 312 B. C. Seleukos recovered possession on Babylon and a few years later he assumed the legal style and title. He has been conventionally described as King of Syria and was the Lord of Western and Central Asia. Thus Megasthenes represented a separate independent kingdom. See also *The House of Seleukos* by Bevan

** *Manusmrti*, VII, 14

Brahma Himself.* Thus danda which in its crude concept is the basis of the theory of force, is admitted only in its highly elevated legal concept of dharma implying sovereignty and linking itself with the moral order not merely of human society but of the entire universe. Thus naked force no longer remains the ultima ratio of kings but a weapon for the implementation of dharma or law. Sukraniti points out that dharma is enforced through danda and both combined become the embodiment of the highest virtue in preventing aggression.** Thus Manu's equation of danda with dharma (Dandam Dharmam Vidurbudhah) means the supremacy of dharma or law which has the highest sanction of danda behind it. The king and the entire political order under him have to serve dharma and bow to law at all times. Again, danda divorced of dharma could no longer be a weapon in the hand of the king which meant that dharma alone was sovereign. Dr. Mukherji has aptly described this position as follow :***

> "The true sovereign of the Hindu state is dharma, the law and constitution, which is upheld and enforced by the king or supreme executive as danda.***

Dr. Kane has also come to the same conclusion after a very careful research of the ancient text. He summarises the position thus.****

> "The Dharmasastra authors hold that dharma was the supreme power in the state and was above the King who was only the instrument to realise the role of dharma.@

Thus in both political and legal theory, the supremacy or sovereignty of law was well established and recognised as such. It is difficult to talk of political practice which may quite often have deviated from the theory but that does not cast any reflection on the theory as such which is so well enunciated and clearly recognised by the Srutis and the Smrtis, the two main sources of Hindu Law.

If the theory of brute force based on Machiavellian tactics has been advocated in Arthasastra by writers like Kautilya, its position in

* *Manusmrti*, VII, 14

** *Sukraniti*, IV. 48

*** Presidential address given by Dr R. K. Mukherji at the 25th session of the Indian History of Congress. Gwalior. See also Dr. R. K. Mukherji, *Chandra-Gupta Maurya and his Times* p. 49.

**** Dr. P. V. Kane, *History of Dharmasastra*, Vol. III, p 241

@ *Sutra Kama*, 1, 2, 14.

strict law has to be examined in relation to the principles of Dharmasastra. As already mentioned, several authorities including Yajnavalkya can be quoted to establish that in the case of a conflict between Arthasastra and Dharmasastra the latter was to prevail over the former. In fact, the supremacy of Dharmastra was so well established that all important literature on Arthasastra itself recognised dharma or law as the highest objective. Thus Kamasutra states that Dharma is the highest goal and Kama is the lowest of the three Purusharthas.* Even Kautilya's Arthasastra categorically states that "in any matter where there is a conflict between Dharmasastra and practice or between the Dharmasastra and any secular transaction, the King should decide the matter by relying on dharma alone.** Similarly, Yajnavalkya Smrti and Narda in Vyavahar matrka state that Dharmasastra rules are to be preferred to the dictates of Arthasastra.*** As the words "Arthasastra" connote all literature on the science of polity and statecraft, the subordination of all state policies to dharma or law is of the highest importance for a correct appreciation of the legal position in ancient India. The legal theorists who interpreted the sacred law in ancient India realised the deeprooted conflict between dictates of raison d'etrea and rationes leges. Mitaksara goes to the extent of giving an illustration as to how lex was to prevail over all political considerations which the principles of Arthasastra could put forward. Thus, for example, a conflict may arise if Arthasastra or the science of polity as such (not confined to Kautilya's work) declares that a king should endeavour to make friends with his subjects as the acqisition of friends is superior to the acquisition of gold and land, and the rule of Dharmasastra* is that a king has to dispense justice among his subjects being free from anger and avarice and in accordance with the dictates of law of dharm. In such circumstances, if an appeal comes before a king for decision. he must act according to law or dharma even though he may lose the friendship of a person if the King's decision goes against the latter. This example should establish beyond doubt that where principles of Arthasastra or the science of polity prescribed Maceiavellian tactics and adoption of act completely divorced from rule of fairplay and morality, the latter could not prevail over the code of conduct prescribed by dharma or law.

* *Arthasastra*, III, 1.

** *Yajnavalkya Smrti*, 1, 39

*** *Arthasastra*, translated by Shama Sastri, p. 461

* *Art hasastra*, translated by Shama Sastri, p. 461,

Even Kautilya distinguishes a dharmavijaya which is just conquest from asuravijaya or unrighteous conquest or lobhvijaya which is conquest undertaken for sheer greed.* Kautilya does not hide his complete disapproval of asura or lobhavijaya which fact is often forgotten by Western writers who often see only the praise for the many acts of perfidy which Kautilya advocates to attain success in war and politics and ignore the considerations of dharma or law of which Kautilya was not completely devoid.

Lastly, we may examine the concept of the supremacy of law in relation to the ultimate end or objective of the state. In the Brhaspatya Sutra, the ultimate fruit of polity is described as the attainment of dharma as the first and foremost item and artha and kama as the second and third.** The raison d'etre of the state in ancient India, therefore, was the upholding of law and the creation of conditions of peace, order and happiness for which Divinity had prescribed dharma as the doctrine, the king as the executor of it and moksa (salvation) attained by dharma as the ultimate goal of all.

Thus viewed from all angles and every viewpoint, dharma or law ranked supreme in ancient India first in the context of the origin of the state where dharma and danda get identified since law without sanction is meaningless and if law is to be supreme it must have the supreme sanction behind it, and there is no entity higher than law itself when the state and society are created. Secondly, when the state expands or in its inter-statal relations wages wars guided by the principles of artha, there is a limitation imposed by dharma that wars fought in a righteous cause are alone justified. The sanction given to undertake just war as against unjust, basically upholds the principle of supremacy of dharma as against artha. Thirdly, in the peaceful existence of the state when it maintains law and order and dispenses justice internally, the king as the sovereign power is subjected to Dharmasastra, and it is lex which is crowned as rex and not otherwise. Lastly, the end of the state itself is dharma and not artha or kama. Thus from the origin to end dharm alone prevails. This basic idea governs all the theories of ancient India though quite a number bring out prominently the concept of force and the administrative principle which led to the elaborate organisation of defence, an essential limb of state machine. Thus whatever has been stated in the previous pages must necessarily be read in the context of

* *Ibid*, p 461.

** *Ibid*, II, 43

the theory of the supremacy of law which was meant to regulate inter-state conduct as much as the internal governance of a state. The word 'Law' could perhaps be used, in a loose sense at least, to indicate the governance of inter-state conduct even if proper international law in the modern sense did not exist.*

The second principle essential for the growth of inter-state or international law is the observance of the rule pacta sunt servanda. When inter-state contact begins, according to ancient writers on polity, there is bound to be either indifference, agreement or difference. As differences have generally to be settled whether by war or by peaceful methods such as negotiation, they often end in some sort of agreement reached amicably or otherwise. It is of the essence of law that such agreements duly reached between states on the basis of accord or friendship or even after war should be respected else there would be the negation of law ab intio. There is abundance of authority in ancient India which attaches the highest importance to the maintenance of agreements reached either in writing or by word of mouth. Even Kautilya asserts that "peace depending upon honesty or oath is immutable both in this and the next world."** In this respect he goes a step further than his teacher in discarding the principle of obtaining hostages as security to cement the binding nature of treaties. Kautilya remarks, "it is for this world only that security or a hostage is required for strengthening the agreement.***

In short, therefore, the existence of an atmosphere which held law as supreme and respected agreements between states as inviolable must be said to furnish the necessary condition for the healthy development of international law however different it may be from the modern concepts of today. In this connection, it is essential further to examine the first condition relating to existence of independent political units particularly because the concept of Cakravartin conflicts with the continuance of separate political entities and, therefore, appears prima facie, to spell the eclipse of inter-state conduct.

(3) The concept of Cakravartin and the historical development of law among States in Ancient India.

* As the word 'nation' occurs in a special sense in modern literature it is perhaps safe to describe the regulation of relationship between two independent states in ancient India as inter-state law rather than international law.

** *Arthasastra*, translated by Shama Sastri, p. 381

*** *Ibid*

There are certain pre-requisites for the origin and development of law among nations. First and foremost, there should be separate independent political units with their own governments howsoever primitive the latter may be, whether tribal, feudal, monarchical, republican or oligarchical. Secondly, there must be the urge or need for intercourse among them. It is the growth of intercourse which requires regulation and herein lies the raison d'etre of international law. However, in order that such regulation may come to force of law, the third basic condition for the growth of international law would appear to depend upon the nature of sanction developed in the sphere of governance of inter-state conduct.

In the socio-political order which existed about the dawn of human civilization, it would be premature to expect the existence of sovereign independent states in the modern sense described by jurists of today as "international persons". It is true that intercourse among non-sovereign states cannot ever be said to be governed by international law. However, in the early growth of the law itself which was bound to be associated with the growth of political units, the regulation of intercourse among states would appear to fall within the purview of international law provided always that there was legal equality among those units and the essential feature of their independence was not lacking. As intercourse is between governments of separate political entities, emphasis must be placed on the need for the existence of a governmental organ even though the general structure of the state may be loose being tribal or feudal provided that the Government functioned as that of an indendent unit. The latter aspect is important because if a unit existed and developed intercourse on a subordinate basis with another unit, the relationship would be as between a vassal and a suzerain and hence not on the inter-statal or international plane. Thus the existence of tribal society in the Vedic times and the concept of Cakravartin or paramount ruler of a world state in the age of the epic wars and as described in the puranic literature appear to disturb the conditions necessary for the development of international law. However, on closer scrutiny it could be demonstrated that the tribal set-up of Rgvedic society could be no hindrance to the development of a law among states since several tribal units existed independent of one another and they had a governmental organ in the form of a king. Similarly, the concept of Cakravartin in the later era did not prevent the existence of units on the basis of legal equality and, in any case during the stage of attainment of the ideal of Cakravartin, there, was bound to be inter-state conflict helping the

process of development of law among states. As international law in its earliest form can trace its existence to the origin of the state itself, the development of the concept of the political state is linked up with the history of the development of international law. A brief historical sketch, therefore, would not be out of place if it could indicate the different conditions which governed the various stages in the development of law among states and nations.

(i) Vedic Age (400 B. C.–1000 B. C.)*

According to Keith and Rapson, "the earliest documents which throw light upon the history of India are the hymns of the Rgveda."** From the scanty information provided by Vedic literature on the political organisation then prevailing, it appears that there were separate tribes in existence which had their own governmental organ in the shape of the King and there was plenty of intercourse between them often giving rise to strained relations leading to warfare. Thus the distinguishing feature of the Vedic age was the growth of inter-tribal relationship.

Thus the broad pre-reguisites for the growth of inter-state law were present in the Vedic age. It was the existence of the governmental organ of the "Rajan" or King which by its very nature gave equality of status to the competing political units and fostered intercourse among them. Howsoever tribal a society may be in the age of the Rgveda, there is no dispute that the tribes were "certainly under kingly rule." As Keith mentions, "there is no passage in the Rgveda, which suggests any other form of government, while the king under the style 'Rajan' is a frequent figure. This is only what might be expected in a community which was not merely patriarchal—a fact whence the king drew his occasional style of vicpati, 'Head of the vic'—but also engaged in constant warfare against both Aryan and aboriginal foes."*** The functions of the sovereign on which most stress was laid related to his duty of protecting the subjects and "even the Rgveda despite its sacredotal characters allows us to catch some glimpse of the warlike deeds of such men as Divodasa, Sudas and Trasadasyu.**** As it appears that the tribal

* The dates adopted for the purpose of this chapter are those accepted by P. V. Kane in "*History of Dharmasastra*", Bhandarkar Oriental Research Institute, Poona, 1946.

** *Cambridge History of India*, Vol. I, Chapter IV p. 77.

*** *Ibid*, p. 94

**** *Ibid*, p. 95

set-up led to frequent warfare, the king was duly assisted by a hierarchy of officials including a regular Senani, the commander-in-chief of the army. Again, the rules of warfare provided the first subject needing attention since better experience had taught that wars fought without any regulation were likely to prove more damaging to both the belligerents. Thus as a matter of necessity and in the interests of all concerned, the regulation of warfare appears to have emerged as the starting point of a law destined to govern several other spheres of inter-state relationship. The one great historical event described in the Samhita of the Rgveda is the contest known as the battle of the ten kings. This conflict was perhaps between the Bharat King Sudas who was the Lord of the country, later known as Brahmavarta, and the tribes of the north-west. The victory of Sudas at Parushni records that King Anu and Druhyu fell in the battlefield but there was no conquest of territory since Sudas was compelled to return to the east of his kingdom to fight King Bheda who was assisted by three tribal kings constituting a grand military alliance against King Sudas. These and other incidents indicate beyond doubt that the basic conditions needed for the development of international law did exist even in the Vedic age in so far as there were independent political units with the institution of the king furnishing the necessary governmental organ for communication. It is difficult to state with precision whether the political units were fully sovereign in the modern sense but there is ample evidence that the King in ancient India was always regarded as the personification of the sovereignty of the people. Thus when a king entered into a transaction with another king, it involved relationship between two states and not between two individuals. It would perhaps not be inappropriate to conclude that the king represented his people and the organisation which governed them. The petty tribal principalities so often mentioned in Rgveda would thus appear to be externally fully sovereign in so far as their relationship with other similar units was concerned. That there was legal equality among them can hardly be doubted and this by itself satisfies the first essential condition for the origin and growth of a law of nations.*

(ii) The Period of the Epic Wars (1900 B. C.-1000 B. C.)**

The law of war received added impetus during this period and from the literature provided by the Mahabharata, it can be stated that the

* According to Dr Beni Prasad, *The State in Ancient India* (1904) p. 23, it was only after the 6th century B.C. that the concept of territorial sovereignty superseded the tribal concept of state in ancient India.

** Kane, *History of Dharmasastra*, p. 900

rules on the subject not only got crystalized and properly formulated but there was the necessary halo of sanctity developed round them in regard to their observance. This is apparent from both the Ramayana and the Mahabharata since even in the midst of the struggle, Bhisma and Karna referred to the sacred principles of warfare now given a distinct title of "Yudha Dharma". Another important feature of this age was the concept of Cakravartin developed on the basis of religious ceremonies like the Ashvamedha, the Rajasuya and the Vajapeya sacrifices. The one who was able to perform these sacrifices could best be described as an Emperor having under him a number of vassal kingdoms who owed allegiance, howsoever nominal it may be, to the imperial person. Thus there were several grades of rulers in ancient India. The word 'Rajan' occurs at numerous places in Rgveda and may be said to stand for an ordinary king. However, the word 'samrajya' which is used as an epithet of Varuna and of Indra may be said to connote the idea of an emperor having suzerainty over several kings. In the Satapatha Brahmana a clear distinction is made between a king (Rajan) and an emperor. It is said that by "offering the Rajasuya he becomes king and by the Vajapeya he becomes emperor; and the office of king is the lower and that of emperor higher.* This concept of Cakravartin or Samarajya or Ekarat was fully developed by the time of the composition of Aitareya and Satapatha Brahmanas. For example, the former mentions as many as 12 emperors of ancient India and Satapatha Brahmana mentions 13 emperors. Again, Panini defines 'sarvabhauma' as the lord of the whole earth. The famous Saskrit dicttionary 'Amarakosa' states" that a king before whom all feudatories humble themselves is styled 'adhisvara' or 'cakravartin' or 'sarvabhauma', "the last three words being synonyms. Thus, ultimately, all things considered, the word 'Cakravartin' stands for one who wields lordship over a circle of kings and not necessarily over all kings of the land. The fact remains that there were several Cakravartins and Maitri Upanisad mentions as many as 15 of them. It is, therefore, submitted that there was perhaps ample opportunity for the development of international law as between these imperial units which were co-equal in status. It is true that if there had been only one Cakravartin in the whole country, the relationship would not have been inter-statal but confined to that of vassals to a suzerain which is certainly derogatory to the conditions required for the development of

* See also E. B. Havell, *A short History of India*, p. li, for the date of King Dushratha or Dasarathe. Kane *History of Dharmasastra*, Vol. III, p. 65

law among equal political units. However, that was not the position in a law where Cakravartins apparently abounded.

Thus if the concept of Cakravartin did not conflict with the development of International Law in ancient India, there is ample evidence to indicate that it gave considerable impetus to the development of the laws of war. It may be true as Derrett puts it that the "Cakravarti-mirage" teased all rulers and, in practice posed an ideal before ambitious monarchs which resulted in constant warfare. However, in theory, the concept of Cakravartin was perhaps meant to provide lasting peace in as much as, in principle at least, it aimed at striving for one world government, taking the geographical area from the Himlayas to Cape Comorin as the Cakravarti Kshetram. The petty chieftains who accepted the allegiance of the Cakravartin did not lose their independence except for loss of control over external relations. They became protectorates or members of a loose-knit confederal empire in which they were internally sovereign. Thus the discipline imposed by the concept of Cakravartin ruled out perpetual petty warfare amongst the innumerable chieftains who exercised authority in the plains of ancient India. It is true, however, that the theory remained wide away from the practice inasmuch as no single Cakravartin rose to the position of establishing one world (country-wide) government. On the other hand, several Cakravartins grew up and the Mahabharata mentions as many as five empires of old with ever-increasing rivalry amongst them leading to frequent warfare which, in turn, necessitated enunciation of correct principles for regulating warfare and keeping it at the very highest level so as to prevent fall of humanity from chivalrous conduct. Thus proper restraints were placed on the inhumanity that a conqueror could resort to in the hour of victory. Yajnavalkya prescribes that it was the duty of the conqueror to protect the conquered territory in the same way as he would his own country and the conqueror was at all times to respect the customs, laws and usages of the conqured country. Again, Vishnu Dharma Sutra and Agnipurana also prescribe similar rules. Above all, however, is the celebrated verse of Karyayana in the Rajniti Prakasa wherein it is laid down that even when the vanquished king was at fault, the conqueror had no right to molest the country since the vanquished king could not have resorted to his unlawful acts by the consent of all his subjects.

Thus, on the whole, the distinct contribution of this period was the formulation of the laws of war more than a thousand years before the birth of Christ. Their proper codification may be said to take place in

Manusmrti (200 B. C.) when they were elevated to the sacred laws of Dharmasastra. However, even prior to this date, there can be little doubt, that the laws of war were well defined and recognised as Yuddha Dharma.

Thus the existence of wars between one Cakravrtin and another or between an aspiring Cakravartin and petty chieftains did bring about necessary conditions for the development of International Law particularly in the sphere of the law of war. Let alone the age of the epic wars, there can be little doubt of the existence much later of a family of states if not of nations since Rhys Davids* enumerates the existence of as many as 16 republics and several independent monarchies many more than republics in number flourishing even in the 6th century B. C. Ubi Societas ibi est Jus and the existence of comity of states with their constant contacts for which there is ample evidence fostered the development of rules to govern their inter-statal relations.

(iii) Alexander's Invasion and the Growth of International Law concepts (326 B. C. and after).

In the history of development of international law concepts in ancient India, the invasion of Alexander the Great may be said to mark the beginning of a new age in as much as political and diplomatic relations came to be established beyond the frontiers of India. The establishment of inter-state relationship based on contact with Yavana states was the direct outcome of Alexander's invasion since the kingdoms which he left behind him on the frontiers of India continued to exist much after he had departed for Greece. This period may, therefore, be regarded as remarkable in the growth of a new kind of inter-state relationship both in peace and war. With Megasthenes in Chandragupta's court and political relations with Seleukos who became the king of Babylon and Syria developing across, the frontiers of India, the institution of ambassadors, the legal formality and procedure of concluding treaties and their enforcement on a truly international plane and the observance of rules of warfare when the enemy hailed from quite a different civilization. An entire book could be devoted to describing interesting episodes bearing on international practice, but suffice it to say here that the Greek invasion followed by the establishment of Greek kingdoms developed concepts and codes in more spheres than one to regulate inter-state conduct.

* Rhys Davids, *Buddhist India* (1911), p. 23

Alexander may be said to answer the role of Cakravartin more appropriately than ever before both in regard to the autonomous vassals he created including Poros whom he reinstated and the extensive conquests he undertook. However, he was a foreign Cakravartin as he failed to penetrate the heart of Aryavarta.

(iv) The impact of Buddhism and Jainism (600 to 350 B. C.)

Again, though chronologically the birth of Buddha (563 B. C.) and his death (483 B. C.) had taken place well before Alexander's invasion (326 B. C.), the impact of Buddhism, as far as inter-state relationship is concerned, was felt more in the reign of Asoka (274-237 B. C.) than ever before. The greatest contribution of Buddhism, as far as we are here concerned, was the renunciation of war based on the principles of shunning violence at all stages and at all events.

Asoka took upon himself the responsibility for the spread of Buddism beyond the Indian frontiers and in doing so established deep-rooted inter-state relationship not only with the neighbouring countries such as Ceylon, but also with countries in Asia and Europe. The exchange of ambassadors and envoys did much to develop the legal concept of this institution which may not have been a permanent one as ambassadors are known today, but there is no doubt that they existed in full bloom and were fully utilised in ancient India to propagate national or state viewpoints whether religious or political since envoys are known to have stayed for months and even years in the courts of other countries for this purpose. If the Cakravartin concept is to be regarded as persisting in Indian history, Asoka may be accepted as the first Cakravartin and the one and the only of his own kind. His greatness lay in becoming a Cakravartin after imposing on himself a self-denying ordinance, namely, the renunciation of war in all inter-state dealings.* He built and extended his empire of peace on the basis of the sacred law of confederation of independent units of states or vassals which accepted Asoka as the politico-religious head and in turn renounced their right of war in their

* See the 13th Rock Edict of Emperor Asoka translated by Vincent Smith in *Ashoka, the Buddhist Emperor of India*, p. 24

The Edict declares as follows :—

"Directly after the Kalingas had been annexed began His Sacred Majesty's zealous protection of the law of piety (Dharmma Vijaya), his love of that law and his inculcation of that law. Thence arises the remorse of His Sacred Majesty for having conquered the Kalingas, because the conquest of a country previously unconquered involves slaughter, death and carrying away captive of the people". The Great King never waged war thereafter.

relationship with each other. Externally too the empire was wedded to peace and, as stated before, all inter-state relations were developed on that basis alone.

(v) The end of the Ancient World and the beginning of the Middle Ages (To 648 A. D. and after, the Rajput period).

In chronological order, the rest of the period of ancient history could be div ded into two broad categories. The first would cover the period beginning with the fall of the imperial Guptas to the death of Harsa (647 A. D.). The second would relate to the Rajput period of Indian history beginning with 647 A.D. and going up to the conquest of India by Sultan Mohmud of Ghazni in the 11th century A. D. This is no place to give a chronological account of the Gupta emperors or their great conquests or court splendours. In the pursuit of imperial expansion they came in contact with several states on the basis of both peace and war. The concept of Cakravarint was revived again and both Samudragupta and Chandragupta Vikramaditya performed Asvamedha sacrifices. War again came to govern inter-state relationship after the interlude of peace as the basis of state conduct furnished by Asoka. Samudragupta maintained diplomatic relations with the foreign Kushan princes of the north-west as well as with Ceylon. We have an example of how the Buddhist King of Ceylon, Meghavarna (352-379 A. D.), desirous of founding a monastery in India for his nationals, sent a mission to Samudragupta offering presents of gems and seeking permission to build a monastery on Indian soil. The required permission was given and King Meghavarn built a three-storeyed monastery which Hiuen-Tsang saw in flourishing condition in giving hospitality to pilgrims from Ceylon. Chandragupta Vikramaditya was also responsible for extensive conquests in pursuit of the Cakravartin ideal. Again, Harsa (606-647 A. D.) who was the last of the great emperors of ancient India, maintained diplomatic intercourse with the Chinese emperors. An incident which dates back to 647 A. D., immediately after the death of the king, deserves to be mentioned as it involved the violation of the principle of diplomatic immunity and its restoration with due apologies. King Harsa had sent an envoy in 641 A. D. to the Emperor of China and the latter had reciprocated by a Chinese Mission which came to the court of Harsa and stayed for considerable time. When it did go back to China in 645 A. D. another diplomatic mission returned the following year with Wang Hiuen Tse as the Head of the new Mission with an escort of 30 horsemen. However,

immediately after Harsa's death, the country was plunged into anarchy and one of his ministers Arjun usurped power and attacked the Chinese Mission. It is reported that members of the Mission were taken prisoners or killed and the property of the Mission was plundered. However, Wang Hiuen Tse managed to escape into Nepal and the succeeding year, with the help of the King of Tibet who had married a Chinese princess, descended into the plains and laid siege to the city of Tirhut. The usurper Arjun fled after fighting two battles in quick succession. On hearing this, Kumara, the King of Eastern India, who used to attend the religious assemblies of Harsa, while appreciating the violation of an important principle of law in molesting a foreign Mission, apologised for this gross misconduct and sent Wang Hiuen Tse gifts and abundant supplies of cattle which were accepted. It appears that Tirhut remained for some time subject to Tibet's control which at that time was a powerful state and, Vincent Smith records, was strong enough to defy even the Chinese Empire. It may be reiterated here that the diplomatic immunity of ambassadors was well established and duly recognised in ancient India. According to Valmiki, Hanuman was sent as Rama's ambassador and the doctrine of immunity from arrest and non-subjection to territorial laws was elucidated by Vibhisana, so clearly recorded in the passage in the Sundara Kanda of the Ramayana. Vibhisana states emphatically that according to the Smrtis, ambassadors could not be injured or killed and that Ravana had no right to molest Hanuman. Again, the Udyog Parve of Mahabharata describes in some detail the embassy sent on behalf of the Pandavas by Drupata. Sanjaya who was chosen as an ambassador by Dhritarashtra, was told by Krisna that, "though the Pandavas were ready to fight, they were always willing for peace". Latter on, when Krisna went to see Duryodhana on behalf of the Pandavas Duryodhana had an evil design to make him a captive. Dhritarashtra opposed this course by stating emphatically that it would be a violation of Dharmasastra to make an ambassador a captive. Moreover, in the Santi Parva, there is a description in the Rajdharma Kanda of the sacredness of the protection to be afforded to an ambassador.

With the death of Harsa, the ancient world may be said to come to an end as by 712 A. D. the armies of Khalif Walid under the command of Mohmmad Bin Kassem had entered Sind. The whole of Northern India had been divided into petty Rajput principalities which were often at war with each other and a new concept of inter-state

relationship was to develop with the onslaught of Islam. However, when warfare became common both within and from attack without, it has to be said to the credit of the Rajput kingdoms that did not depart from the principles of humanity and chivalry which had regulated warfare in ancient India. Thus when for the first time the Rajput states came in contact with the Central Asian invader professing a different faith, it was the Rajput who was still adhering to the laws of war as he had inherited them from the Srutis and the Smrtis. This amply demonstrated by the two battles fought in 1191 and 1192 A. D. by Prithviraj Chauhan of Ajmer against Mohammad Ghori. The development of the Law of Nations in mediaeval India constitutes a different chapter in Indian history and the evolution of concept of inter-state law takes a different turn in relation to ancient India which comes to an end.

IS THERE A COMMON LAW OF THE COMMONWEALTH

DERCK ROCBUCK*

1. What is the Commonwealth?

The Heads of Government of more than forty independent nations, most of those which now make up the Commonwealth, are meeting today here in India. They come from all over the world, except continental Europe.

Before the Second World War, the Prime Minister of the United Kingdom used to confer from time to time with the Prime Ministers of Australia, Canada, New Zealand and South Africa at what were called Imperial Conferences. From May 1944 the conferences were called Prime Ministers meetings and the five Prime Ministers were said to represent the British Empire and Commonwealth of Nations. The modern Commonwealth was born in 1947 when British rule ended in India. India and Pakistan became independent countries but chose to stay in the Commonwealth.

In 1948 there were eight Commonwealth members : the old five plus India and Pakistan and newly independent Ceylon. At their Prime Ministers' meeting they were careful not to use the words 'British Empire'. In 1949 the Prime Ministers meeting agreed that India could remain a member even though she had declared an intention to become a republic. The 1951 meeting dropped the word 'British' and the name is now just the Commonwealth (which is confusing for Australians who call their nation the Commonwealth of Australia). The members agreed to acknowledge the British sovereign as the symbol of the 'free association of independent member nations and as such the Head of the Commonwealth', but member countries and their citizens no longer needed to own allegiance to the British Crown.

As British colonies in Africa gained their independence they joined the Commonwealth, starting with Ghana in 1957, and many newly independent nations in Africa and the Caribbean, and Cyprus and Malta in the Mediterranean, joined in the 1960s. Nauru became a member in 1968 and other South Pacific states in the 1970s. Late in 1979 and

* Faculty of Law, University of Papua New Guinea, Papua New Guinea

in 1980 St Vincent, Zimbabwe and Vanuatu joined, then Belize and Antigua and Barbuda, and most recently the Maldives and St Chrisopher—Nevis.

The Maldives, Nauru, St Vincent and Tuvalu are called special members; they take part in all activities except Heads of Government meetings. The Commonwealth also includes one remaining 'self-governing state' and the dependent territories linked to Britain, Australia and New Zealand. Brunei is the self-governing associated state; Britain is responsible only for its external affairs and defence. In December 1983 Brunei will lose its client status and become a full member. Britain's colonies or dependencies are Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Montserrat, Pitcairn, It Helena and Turks & Caicos Islands. The Cook Islands and Niue are self-governing territories in association with New Zealand. The Tokelau Islands are a territory of New Zealand, not self-governing. Australia's external territories are Norfolk Island, Heard Island, McDonald Island, Cocos (Keeling) Islands and Christmas Island.

The countries of the Commonwealth show great diversity, especially in their economies. A quarter of the world's population lives in the Commonwealth, most of it in India, with nearly 700 million (compared with Nauru's 7,500). In 1977 India's per capita Gross National Product was US$ 160 : Nauru's US$ 12,000. Life expectancy at birth is 74 in Canada, 73 in Britain, 72 in Australia (brought down by the high infant mortality of aborigines). It is 41 in the Gambia, 46 in Malawi, Sierra Leone and Swaziland.

The members presumably belong because they value the Commonwealth as an institution. It stated its principles in 1971, which are subscribed to by all its members. Their headings are : 'We believe that international peace and order are essential to the security and prosperity of mankind; we believe in the liberty of the individual; we recognize racial prejudice as a dangerous sickness; we oppose all forms of colonial dominatian and racial oppression; we believe that thew ide disparities in wealth now existing between different sections of mankind are too great to be tolerated; we believe that international cooperation is essential'. It might be thought that such general statements of goodwill would not offend anyone, but South Africa left the Commonwealth because of the condemnation of its racist political system, and Pakistan left because some members recognized Bangladesh.

2. Does the Commonwealth have a Common Law ?

Can it be said that this unique collection of disparate elements—huge and tiny, rich and poor, of many differert political systems—shares something that can be called a common law ?

It is true that in English the expression 'Common Law' has more than one techincal sense; but here the phrase will be used for that system of law which grew from the Norman Conquest to be common to all England, administered through the royal courts, characterized by the doctrine of precedent and the parent of the legal systems of nearly all of the United States as well as most of the Commonwealth. The phrase can also be used more generally and vaguely, in other legal systems for the body of legal principle underlying the legislation, built up cauistically (though not necessarily from decided cases) to which lawyers in that jurisdiction refer. Examples are the Roman-Dutch law (in Botswana, Lesotho, Swaziland, Zimbabwe, South Africa and Sri Lanka), and even Islamic law, or Hindu law in Nepal, or adat law in Indonesia.

I am using the familiar technical meaning. *The* Common Law of England (and Wales and Northern Ireland but not, of course, Scotland) was exported to most countries of the former British Empire and there, if not exclusively then overwhelmingly, it is the basis of their law. The question is : how common is it to the Commonwealth as a whole ?

Britain acquired its empire in differeut ways. It conquered some countries which already had laws of their own and imposed its law upon them as far as it felt necessary. Other lands were uninhabited or considered to be populated by savages who had no law. The so-called settlers took with them the law of England, the Common Law, which-ever bit of Britain they came from. Nowhere was Scots law trans-planted. Other territories were said to be ceded by their rulers. It was sometimes far from clear what law applied and to whom.

For example, the legal history of what is now Malaysia is a compa-rative lawyer's dream—that is a student's (and practitioner's) nightmare. Academic arguments rage on many points and controversies about sources of law have important effects on contemporary commercial disputes. Whatever may have been the legal situation at the beginning, English law was eventually introduced by statute. A charter established a court in Penang in 1807, and introduced (so later cases held) the law of England as it stood in 1807 so far as it was suitable to local conditions

and circumstances. Singapore was founded by Stamford Raffles in 1819. He promulgated laws based on 'English legal principles' and appointed magistrates who were given wide discretions in regard to native customs. They had some knowledge of English law and its administration in England but almost none of local law, for which they appear to have had little respect. Malacca had been occupied by the Portuguese and then the Dutch and was at the time it was ceded in 1824 governed by a mixture of diverse Malay customary law; Islamic law; the customary laws of the non-Malays (that is, the Chinese); and some old Dutch laws. In 1826 a new court was set up for Penang, Singapore and Malacca, and English law was to be applied as it stood at 27 November 1826, subject to local conditions. But the Civil Law Ordinance 1878 introduced English *commercial* law by a continuous reception : 'Section 6 : In all questions or issues which arise....with respect to the law of partnerships, corporations, banks and banking, principles and agents, carriers by land and sea, marine insurance....and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by statute

As you would imagine this section admits various interpretations, not the least in respect of the meaning of 'mercantile law generally'. Note, it is not transactions which are described, nor is the law made applicable to certain kinds of persons, that is, merchants. The lawyer has to determine whether the law in question is 'mercantile *law*' or not. Is the law on anticipatory breach of contract mercantile ? All the cases are about trade. If you say yes, does it make a difference when the facts of the present dispute are about a private contract between members of a family ? Does the law change ? If it is not that imported from England under the Ordinance, what is it ?

In Papua New Guinea there is virtually no trace of the former colonial German law. The place of the Common Law is fixed by the autochthonous Constitution enacted on Independence. The framers of that Constitution wanted Papua New Guinea to have its own indigenous common law, made up from the cornucopia of customary laws—and there may well be more than five hundred distinct systems—what was worth keeping in the imposed Common Law (carefully stated to be that of England, not of Australia or any amalgam) blended and enriched and

distilled by the wisdom and creativity of the judiciary, who are given a clear mandate to reform and originate the law. The principles and rules of English common law and equity were adopted as at Independence day, 16 September 1975. There was to be no continuing reception. It was to be the Common Law unaffected by statutes, which were not adopted unless specifically mentioned.

It was a brave effort but has not proved to be so simple. What is the Common Law at Independence Day in the following situation ? Before 1975 the Court of Appeal in England clearly stated the law. In 1977 the House of Lords reversed that decision and stated the law to be the opposite. There is an artificial flavour to the attempts of some judges in Papua New Guinea to distinguish between a House of Lords' decision correcting what had been a misunderstanding by the Court of Appeal of what the Common Law had always been, and a House of Lords' decision which makes new law, the former being adopted in Papua New Guinea but the latter not. Moreover, what does it mean to say that the Common Law is adopted unaffected by statute ? What about the Statute of Uses 1535, which is not specifically adopted ? What are the rules and principles of English common law and equity without it ?

Nowhere is the reception uncomplicated, and the problem is often intractable where there is a body of pre-existing or customary law. This can be seen in many countries in Africa, and India and Pakistan still wrestle with the problems of their religious laws·

Of the 48 Commonwealth countries, 40 or so have acquired the Common Law in one way or another. In Canada, however, Quebec retains its French language, codes and legal system. In Sri Lanka and four countries near to South Africa (Botswana, Lesotho, Swaziland and Zimbabwe) the Roman-Dutch law is often *said* to take the place of the Common Law, but that is misleading. The Common Law has a greater and growing influence and the Roman-Dutch law has become etiolated. The Seychelles and Mauritius have a French tradition. In Vanuatu, the former French and British condominium of the New Hebrides, it appears that the French law and English law are now 'personal' laws but the Common Law is quickly ousting its rival, as the English language is prevailing over French. In Scotland the fight against the Common Law's encroachments goes on, led by academics and judges.

A superfical test, therefore, would show that most though not all of the countries of Commonwealth still share the Common Law. But

that conclusion would be doubly misleading. The countries which undoubtedly have the Common Law have different and diverging variants; but paradoxically the legal system of all Commonwealth countries share certain characteristics which are both converging and growing stronger. Those factors must be considered first, which are causing the divergence and the effects of those centrifugal forces must be measured. Then the centripetal forces must be assessed, the influences which are building a converging common law of the Commonwealth—or at least a systematically similar legal structure.

3. The Diverging Common Law

Throughout the Commonwealth there are influences at work which weaken the uniformity of the Common Law, if by that we mean the direct influence of the English Common Law. Canada is close to the U. S. A. in every way, and not only its jurists but all its people are greatly influenced by their large, powerful and dynamic neighbour. It would be tedious to list the evidence of that influence. In commereial law alone the correspondences are manifold.

India has always had many independent characteristics. One fundamental feature of the Common Law was the separate system of equity which does not exist in India. There is no distinction between legal *rights* and beneficial *interests*. The rights of beneficiaries under a trust, and the corresponding duties of trustees, are statutory.

Australian law has a life of its own, with a High Court of the highest quality, some large and some good law schools, and a Law Reform Commission which might be the envy of any nation. Some branches of its common law are more highly developed than that of England, for example the law of contract. New Zealand has led the common law world in a number of social experiments: the Testator's Family Maintenance legislation at the beginning of this century, which allowed the court a wide discretion to make provision for dependants from the estate of a testator who had willed his property away from his family; the Ombudsman; the comprehensive no-fault accident compensation scheme perfected in the last few years.

The most obvious breakdown of control is the dwindling jurisdiction of the Privy Council. At the end of the Second World War, all the countries of the British Empire had the Privy Council as their ultimate Court of Appeal. Now most Commonwealth countries have their own

national courts of appeal and few appeals go any longer to the Privy Council, Appeals can still go to Her Majesty in Council from only a few countries, including New Zealand, Hong Kong, Kiribati and some West Indies countries (Barbados, Bermuda, Dominica, Jamaica, Virgin Islands and St Lucia). Appeals from Malaysian courts go to their monarch, the Yang di-pertuan Agong, who asks the Judicial Committee of the Privy Council to advise him. Even one or two of the republics (The Gambia, Singapore and Trinidad & Tobago) retain the right to appeal to the Privy Council but they do not keep the Queen as their Head of State and they have no monarch of their own. In these cases the Judicial Committee of the Privy Council forgoes the niceties and itself allows or dismisses the appeal. The ultimate court of appeal for Nauru is the High Court of Australia. Cooperation among Pacific island countries is shown by the invitation to the Deputy Chief Justice of Papua New Guinea from the government of the Solomon Islands to hear appeals there.

Another strong central influence was in doctrinal wtiting, both textbooks and practical manuals. Reliance on English textbooks was waning, but the economics of modern publishing (and growing piracy) may artificially prolong it. Present government policies of making overseas (including Commonwealth) students pay very much higher fees at English universities has reduced the flow of Commonwealth students to study law, as have the changed policies of the Inns of Court.

The former control which came from the colonial system of Britain providing judges, many public and some private lawyers and most law teachers is disappearing fast in most parts of the Commonwealth.

Even at the pinnacle of constitutional abstraction there is a spreading weakness. It is true that the Queen is Head of the Commonwealth, for what that is worth as a symbol. But of the 48 countries of the Commonwealth only 18 keep her as Head of State; 25 are republics and 4 have their own monarchs : Lesotho, Malaysia, Swaziland and Tonga. Western Samoa has a head of state similar to a constitutional monarch.

If these forces are at work to weaken the grip of the English Common Law over the legal systems of the Commonwealth, is there likely to be a decline in the influence of the Common Law and would that mean the growth of separate indigenous legal systems, independent of the remnants of colonial control ? Perhaps, but there are other

that conclusion would be doubly misleading. The countries which undoubtedly have the Common Law have different and diverging variants; but paradoxically the legal system of all Commonwealth countries share certain characteristics which are both converging and growing stronger. Those factors must be considered first, which are causing the divergence and the effects of those centrifugal forces must be measured. Then the centripetal forces must be assessed, the influences which are building a converging common law of the Commonwealth—or at least a systematically similar legal structure.

3. The Diverging Common Law

Throughout the Commonwealth there are influences at work which weaken the uniformity of the Common Law, if by that we mean the direct influence of the English Common Law. Canada is close to the U. S. A. in every way, and not only its jurists but all its people are greatly influenced by their large, powerful and dynamic neighbour. It would be tedious to list the evidence of that influence. In commereial law alone the correspondences are manifold.

India has always had many independent characteristics. One fundamental feature of the Common Law was the separate system of equity which does not exist in India. There is no distinction between legal *rights* and beneficial *interests*. The rights of beneficiaries under a trust, and the corresponding duties of trustees, are statutory.

Australian law has a life of its own, with a High Court of the highest quality, some large and some good law schools, and a Law Reform Commission which might be the envy of any nation. Some branches of its common law are more highly developed than that of England, for example the law of contract. New Zealand has led the common law world in a number of social experiments: the Testator's Family Maintenance legislation at the beginning of this century, which allowed the court a wide discretion to make provision for dependants from the estate of a testator who had willed his property away from his family; the Ombudsman; the comprehensive no-fault accident compensation scheme perfected in the last few years.

The most obvious breakdown of control is the dwindling jurisdiction of the Privy Council. At the end of the Second World War, all the countries of the British Empire had the Privy Council as their ultimate Court of Appeal. Now most Commonwealth countries have their own

national courts of appeal and few appeals go any longer to the Privy Council, Appeals can still go to Her Majesty in Council from only a few countries, including New Zealand, Hong Kong, Kiribati and some West Indies countries (Barbados, Bermuda, Dominica, Jamaica, Virgin Islands and St Lucia). Appeals from Malaysian courts go to their monarch, the Yang di-pertuan Agong, who asks the Judicial Committee of the Privy Council to advise him. Even one or two of the republics (The Gambia, Singapore and Trinidad & Tobago) retain the right to appeal to the Privy Council but they do not keep the Queen as their Head of State and they have no monarch of their own. In these cases the Judicial Committee of the Privy Council forgoes the niceties and itself allows or dismisses the appeal. The ultimate court of appeal for Nauru is the High Court of Australia. Cooperation among Pacific island countries is shown by the invitation to the Deputy Chief Justice of Papua New Guinea from the government of the Solomon Islands to hear appeals there.

Another strong central influence was in doctrinal wtiting, both textbooks and practical manuals. Reliance on English textbooks was waning, but the economics of modern publishing (and growing piracy) may artificially prolong it. Present government policies of making overseas (including Commonwealth) students pay very much higher fees at English universities has reduced the flow of Commonwealth students to study law, as have the changed policies of the Inns of Court.

The former control which came from the colonial system of Britain providing judges, many public and some private lawyers and most law teachers is disappearing fast in most parts of the Commonwealth.

Even at the pinnacle of constitutional abstraction there is a spreading weakness. It is true that the Queen is Head of the Commonwealth, for what that is worth as a symbol. But of the 48 countries of the Commonwealth only 18 keep her as Head of State; 25 are republics and 4 have their own monarchs : Lesotho, Malaysia, Swaziland and Tonga. Western Samoa has a head of state similar to a constitutional monarch.

If these forces are at work to weaken the grip of the English Common Law over the legal systems of the Commonwealth, is there likely to be a decline in the influence of the Common Law and would that mean the growth of separate indigenous legal systems, independent of the remnants of colonial control ? Perhaps, but there are other

influences at work which will at least slow that process down and may in the end prove a stronger cohesive force.

4 The Real Common Law of the Commonwealth

What evidence is there, then, of a real common law of the Commonwealth ?

A. *The Legal System* : All commonwealth countries, including those with Roman-Dutch, Scots or French law have similar legal systems, sharing similar machinery of justice : similar hierarchies of courts, similar procedure and rules of evidence and usually judges chosen from the private practising bar rather than from a judicial service, who, whatever their differences, are so alike as to be interchangeable. There is a fraternity of Commonwealth judges, not perhaps as close as the members of the old colonial judicial service but close enough to allow transplants to take healthily across barriers of legal cultures and even more easily across national boundaries. The new Zimbabwe (Roman-Dutch) took Telford Georges from Dominica (Common Law). Seaton went from Bermuda (Common Law) to the Seychelles (hybrid). Benjamin went from Ghana (Common Law) to Botswana (Roman-Dutch). And it has become fashionable, though belatedly, to invite judges from some Commonwealth countries to sit on the Privy Council.

The bar, whether separate from the solicitors or not, is everywhere used to the adversarial system. It is quite usual for counsel from one country to plead in the courts of another.

Among academics the traffic has been even greater. Weare by no means unusual in this respect : England to New Zealand to Australia to England to Papua New Guinea, where, though nearly half of our law faculty colleagues are Papua New Guineans, the others come from Australia, Canada, Ghana, Scotland, Sri Lanka, Uganda, United States. West Indies and notably the Banaras Hindu University. Unfortunately, some countries which one would have thought had least need to be protectionist, such as Canada and the United Kingdom, no longer give work permits to foreign academics so easily, though the United Kingdom gives to those from the European Community.

B. *Commonwealth Institutions* : In addition to the judicial, professional and academic exchanges mentioned, there are many kinds of communications and exchanges of information fostered by the Commonwealth Secretariat. They find draftsmen to assist the smaller Commonwealth countries with new legislation. They arrange for

lawyers from one country to gain experience in another. They keep track of legal research and in addition to the research they do themselves they also prepare for and bring together conferences of legal practitioners and scholars on topics of common interest.

They are particularly good at helping law reformers. Through the entrepreneurial skills of the Commonwealth Secretariat Jamaica was able to adopt large parts of new family law which had been tried in New Zealand. After many years the Canadian province of Manitoba is moving to change its law on the powers of trustees to invest. The English way is to set out in the legislation a list of investments which a trustee may invest in. Not only are they very conservative, they are not very well through out. The better practice (introduced in California, not originally a common law state, in 1848) is to say that the trustee must act like a prudent trustee—a responsibility which obviously varies with time and place and circumstances. An Australian state, Western Australia, was considering the same change, not knowing of the activities in Manitoba. They got to know of one another's work because of the channels of communication provided by the Commonwealth Law Bulletin.

The Secretariat has prepared four of what it calls "accession kits" which are manuals to assist Commonwealth countries whose governments want to acceed to certain international conventions. So far they are confined to private international law and include :

(i) The Hague Conventions on the Service of Process, the Taking of Evidence and Legislation;

(ii) International Conventions in the Field of Succession;

(iii) The Hague Convention on the Civil Aspects of International Child Abduction;

(iv) International Conventions concerning Applications for and Awards of Maintenance.

The Commonwealth Law Bulletin carries news and scholarly articles on subjects of interest to all the Commonwealth countries, and is the best source of information and ideas for the legal scholar interested in Commonwealth law.

C. *Cases and Statutes* : *The Doctrine of Precedent* : Whatever may be the legal system in a Commonwealth country, cases are cited as authority. In fact, the Common Law doctrine of precedent which is perhaps the

fundamental criterion by which the Common Law system is differentiated from other families of legal systems, applies throughout the Commonwealth. Even where there is Scots or Roman-Dutch law, it is assumed that there is *some* common law and that legislation is a gloss on it. And what the judges say the legislation means is authoritative, in Scotland just as much as in England. Indeed English law, and law for all the Common Law countries of the Commonwealth, can be created from outside the Common Law system. What country is more vociferously not Common Law than Scotland ? Yet what case is more seminal in English law than *Donoghue* v. *Stevenson* [1932] A. C. 562 which created the modern English law of negligence ? It is a Scots case, decided on Scots law, by Scots (or at least non-English) judges. The majority in the House of Lords were Lords Thankerton and Macmillan, both Scottish lawyers, and Atkin, an Australian ! The dissenting minority were the English judges : Lords Tomlin and Buckmaster.

Judges in one Commonwealth country now more and more refer to decisions of courts in other Commonwealth countries. This happens even in England, where at last some realism has chastened the sort of arrogance that allowed the editor of the Revised Reports to show off his legal chauvinism in the preface to Volume 2, saying that he had been asked why no American cases were included in Volume 1 but had replied with Pericles (in Greek, of course) 'We do not make use of the laws of other countries; rather are we examples for them to follow'.

D. *Concepts and Vocabulary, Mythology and Manners* : In that last comes the most important component of the real common law of the Commonwealth because, though it is the most pervasive, it is the least tangible and the most difficult to describe. It is apparently unsubstantial but it is like the air we breathe. There is a shared vocabulary not only of learning but of the way we do things, if you like of ignorance. Our craft shares the same limits. We do not know anything else. We must be alike because we can think in no other terms. *The* book on equity which every commonwealth lawyer knows is Snell. Salmond (a New Zealander) on Jurisprudence is still a set book in some Indian law schools. The books on contracts are Pollock and Anson and Chitty and Cheshire & Fifoot. And this does not apply only to our generation. Cheshire taught Fifoot and Fifoot taught us and we have taught hundreds of Commonwealth lawyers and we all think in some of the same grooves, and it looks as though any change is going to come slowly.

And so the influence of the Common Law—for better or worse—still affects us all. For all those countries which have inherited it, it is important to analyse it and its impact scientifically before deciding the political questions, what to keep, what to develop and what to reject. There must in all countries be an indigenous thrust for reform, for making the law appropriate to the time and place. No answers can be taken ready-made from other jurisdictions.

LEGAL PROFESSION-ITS CONTRIBUTION TO SOCIAL CHANGE: A SURVEY OF THE PUNE CITY BAR

S. P. SATHE*
SHAILA KUNCHUR**
SMITA KASHIKAR***

India is engaged in bringing about profound socio-economic transformation through legal and constitutional methods. The Constitution of India visualises a new social order based on justice-social, economic and political;[1] it accords to the judiciary an important role of constitutional umpire as well as legal mentor of the nation.[2] The legal profession plays an important role in such developmental effort. The practising lawyers are expected to discharge such responsibility through the legal services they offer to the community. If the lawyers display innovativeness in the use of law and possess insights into the interaction between law and society, the judicial decisions are bound to be forward looking and socially meaningful. We, therefore, undertook a study of the lawyers on a micro level.

The purpose of this study is to make a survey of the lawyers and law students with a view to finding how far the composition of the bar, its recruitment patterns and attitudes and orientation of the lawyers towards the use of legal action are consistent with and promotional to the societal obligations of the legal profession. Social change here means a movement towards the constitutional ideals of equality, liberty and justice. It would also mean a movement from tradition to modernity, towards acceptance of liberal and secular values.[3]

This is a case study of a Mofussil bar. We chose Pune because it was easier to work there due to our location. Pune is a leading city in Maharashtra, next to Bombay in industrialisation, and known for its

* B. A., LL. M , S. J D (Northwestern, U. S A.) Principal, ILS Law College, Pune 411 004
** M. Sc., LL. M., Lecturer, ILS Law College, Pune 411 004.
*** B. A , LL. M., Advocate, Pune.

1. See Art. 38 (1) of the Constitution of India.
2. See *I T. Commr. Madras* v *R. M. C. Pillai*, AIR 1977 SC 489 at 497.
3. See Marc Galanter, "The Modernization of Law" in Myron Weiner (ed) *Modernization*, 1966, 163.

leadership in education and cultural activities and as a centre of social reform.

The total number of lawyers in Pune city in 1981 was 796.[4] Out of 796, 243 (30.52%)[5] responded to our questionnaires. In order to know the trend of future recruitment to the bar, we surveyed the Law students studying in the second year of the LL. B. course during 1980-81. Out of 557 students enrolled in 4 Colleges during that year 372 students responded to the questionnaires (66.78%).

We have tried to find the religion/caste, age and class-wise composition of the existing bar, the recruitment patterns and thereby the possible future composition of the bar. We made special efforts to find out barriers to career opportunities of the underprivileged groups and the efforts made to overcome them.

We have supplemented the questionnaire information by interviews with a small number of lawyers selected from among those who had filled in the questionnaires (21.81% of the questionnaire sample). Besides the practising lawyers, we also interviewed non-practising lawyers, retired judges, clients and other social workers in order to know more about junior-senior relationship, the practice of touting, lawyer-client and lawyer-judge relationships and the conditions in which the court system functions.

Our hypothesis is that if the composition of the bar does not show a change in class composition and a movement in favour of the non-privileged groups such as women and backward classes, it is poised against social change. If a large number of lawyers is earning a very paltry income and only a small number is affluent, it is indicative of the anti-social change disposition of the bar. Vertical mobility within the profession is another indication of a favourable disposition towards social change. Other background information regarding lawyers such as their academic background, the number of books or periodicals they buy, their reading habits, hobbies, political leanings and socialisation would also help us to assess the disposition of the legal profession towards social change.

4. Total number of lawyers who voted in the Bar Association Election in January, 1981.
5. Usually the lawyers have been most resistant to such surveys. See Brenda Danet, Kenneth B. Hoffman and Nicole C. Kermish, "Obstacles to the Study of Lawyer-Client Inter-action : The Biography of a failure". 14 *L & S Rev*, 905, 1979 905.

In proportion as the composition of the bar changes towards elimination or reduction of the existing class/caste domination, it is in tune with social change. Similarly, if the financial rewards are better distributed and there is vertical upward mobility, the bar is better disposed towards social change. It would also be relevant to see how far modernization has informed the lawyer-client, lawyer-judiciary and senior-junior relationships in the profession; fixation of fees; obsetvance of professional ethics; and lawyers' views on legal aid and delays in the administration of justice.

Religion and Caste Background of the Pune City Bar

Pune has always been known as a Brahmin stronghold. Lately, industrialisation and political change have led to cosmopolitization of the city. The legal profession has attracted the elites of the Indian Society since the beginning of the British rule. Brains who were the earliest to be exposed to English education were bound to dominate government service as well as professions like law.[6]

84.77% of the lawyers of our sample were Hindus and the remaining were Jains, Muslims, Christians, Parsis, Neo-Buddhists and Sikhs. See Table 1.

TABLE 1

Religion-wise Break up of the Lawyers

Religion	No. of lawyers	Percentage of the entire sample
Hindu	206	84.77
Jain	17	6.99
Muslim	8	3.29
Christian	6	2.46
Parsi	1	0.41
Neo-Budhist	1	0.41
Sikh	1	0.41
Not specified	3	1.23
Total	243	

6. See Peter Rowe, "Indian Lawyers and Political Modernization—Observations in Four District Towns" 3 *L & S Rev*, 219, 223 Nov. 1968-Feb. 1969, 219, 223.

TABLE 2

Caste-wise Break up of the Hindu Lawyers

Caste	No. of lawyers	Percentage of the entire sample
Brahmins	106	43.62
Hindu others	68	27.98
B. C.s	14	5.76
Caste not specified	18	7.4
Total	206	

Brahmins constituted the largest single group. See Table 2. They were 43.62% of the entire sample and their percentage rises to 63.33 among lawyers of the age group of 41 to 50 and it reaches 100 among lawyers above 81.

The Hindu Others[7] constituted 27.98% of the entire sample and their percentage varied between 36 and 34 upto the age of 60 but declined in the higher age groups. This indicates their late arrival in the profession. The backward classes[8] which constituted 5.76% of the entire sample were found only among younger age groups.

When we examined the sample from the point of view of the professional experience, we found that Brahmins were more numerous among lawyers with longer experience. Thus out of 43 lawyers who had practised for more than 20 years, 27 were Brahmins (62.79%) and out of 36 lawyers who had ptactised for more than 10 but less than 20 years 18 were Brahmins (50%).

14 out of 106 Brahmin lawyers came from families whose annual income was above Rs. 25,000/-, 7 out of 68 Hindu others came from families whose annual income was above Rs. 25,000. Only 2 out of 14 backward class lawyers belonged to this family income group. The

7 All Hindus who were neither Brahmins nor from backward class have been described as Hindu Others in this report.

8 Backward Classes consist of the Scheduled Castes, Scheduled Tribes, Nosadic Tribes and other castes classified as other Backward Classes by the State Governments This includes not only persons from Maharashtra but also those from other states who came to Pune for education and who were called "backward" by their States.

only non-Hindu falling in this group were Jains, Christians and Sikhs and their numbers were negligible. See Table 3.

TABLE 3

Religion and Caste	Family Income per annum					Total
	Below Rs. 5,000	Rs. 5,001 to Rs. 10,000	Rs. 10,001 to Rs. 25,000	Over Rs. 25,000	Income not specified	
Hindus						
Brahmins	15	31	34	14	13	106
Hindu Others	21	25	14	7	1	68
B. C.	5	5	1	2	1	14
Caste not specified	2	5	8	2	1	18
Jains	1	5	6	2	3	17
Muslims	3	3	2	0	0	8
Christians	0	4	0	1	1	6
Parsis	0	1	0	0	0	1
Neo-Budhists	0	4	0	1	1	6
Sikhs	0	0	0	1	0	1
Religion not specified	1	0	1	0	1	3
Total	48	79	66	29	21	243

Brahmins were also in large numbers among the higher professional income groups. 52.63% of those who earned more than Rs. 25,000 annually and 62.22% of those who earned between Rs. 10,000 and Rs. 25,000 were Brahmins. Their percentage decreased in the lower income groups. Hindu others constituted 26.31% of those who earned more than Rs. 25,000 annually and 28.88% of those who earned between Rs. 10,000 and Rs. 25,000. Their percentage increased in the lower income groups to 37.50 and 44.18 respectively. Backward classes were 10.52% among the lawyers whose annual professional income was over Rs. 25,000 and 2.22% among those whose annual income was between Rs. 10,000 and Rs. 25,000. Their percentage rose to 7.14 and 11.62 in the lower income groups. See Table 4.

TABLE 4

Religion and Caste	Annual Professional Income						Total
	No Income	Below Rs. 5,000	Rs. 5,001 to Rs. 10,000	Rs. 10,001 to Rs. 25,000	Over Rs. 25,000	Income not specified	
Hindu							
Brahmins	9	15	25	28	10	19	106
Hindu others	7	19	21	13	5	3	68
B. C.	2	5	4	1	2	0	14
Caste not specified	2	4	6	3	2	1	18
Jains	4	2	3	5	0	3	17
Muslims	2	3	1	1	0	1	8
Christians	1	0	4	0	1	0	6
Parsis	0	0	1	0	0	0	1
Neo Budhists	0	1	0	0	0	0	1
Sikhs	0	0	0	0	1	0	1
Religion not specified	0	1	1	0	0	1	3
Total	27	50	66	51	21	28	243

58 out of 243 lawyers had near relations who were practising lawyers. Out of these, 34 were Brahmins, 16 were Hindu others, 2 were Jains and 1 was a Muslim. The Backward classes had no near relations in the Profession.

The lawyers are divided between juniors, independents and seniors. 'Juniors' means those who work under a senior lawyer, an "independent' is one who works on his own and a "senior" is a lawyer with sufficiently long experience under whom other junior lawyers work.

60 out of 243 (24.69%) were juniors, 115 (47.32%) were independents, 14 (5.76%) were independents though they continued to assist their seniors (independent juniors), 50 (20.57%) were seniors and 2 (0.82%) were partners. Other 2 had not answered this question.

60% of the senior lawyers were Brahmins and 24% were Hindu others. Backward classes were 2%, Christians 4% and the Muslims and Jains were 2% each.

29 out of 243 lawyers had post-graduate degree in law (11.93%). Out of these, 26 were Hindus (89.65%) and Parsis, Jains and Christians were 1 each (3.44% each). Out of 26 Hindus, 14 were Brahmins, 5 were Hindu others and 3 were from backward classes.

Financial Background and Career Opportunities of the Pune Lawyers

A large number of Pune lawyers came from lower middle class background.

TABLE 5

Annual Family Income	No. of lawyers	Percentage of the Entire sample
Below Rs. 5,000	48	19.75
Rs. 5,001 to Rs. 10,000	79	32.51
Rs. 10,001 to Rs. 25,000	66	27.16
Over Rs. 25,000	29	11.93
Income not specified	21	8.64
Total	243	

TABLE 6

Sr. No.	Annual Professional Ineome	No. of lawyers	Percentage of the entire sample
1.	No Income	27	11.11
2.	Below Rs. 5,000	50	20.57
3.	Rs. 5,001 to Rs. 10,000	66	27.16
4.	Rs. 10,001 to Rs. 25,000	51	20.98
5.	Over Rs. 25,000	21	8.64
6.	Not specified	28	11.52
	Total	243	

Thus, if Rs. 25,000 family income is a line dividing the lower middle class from the higher middle class, 79.42% of our sample belonged to the lower middle class and 11.93% to the higher. As far as the professional income is concerned, only 8.64% of the sample was above Rs. 25,000. We found that there was a downward trend from family income to professional income.

TABLE 7

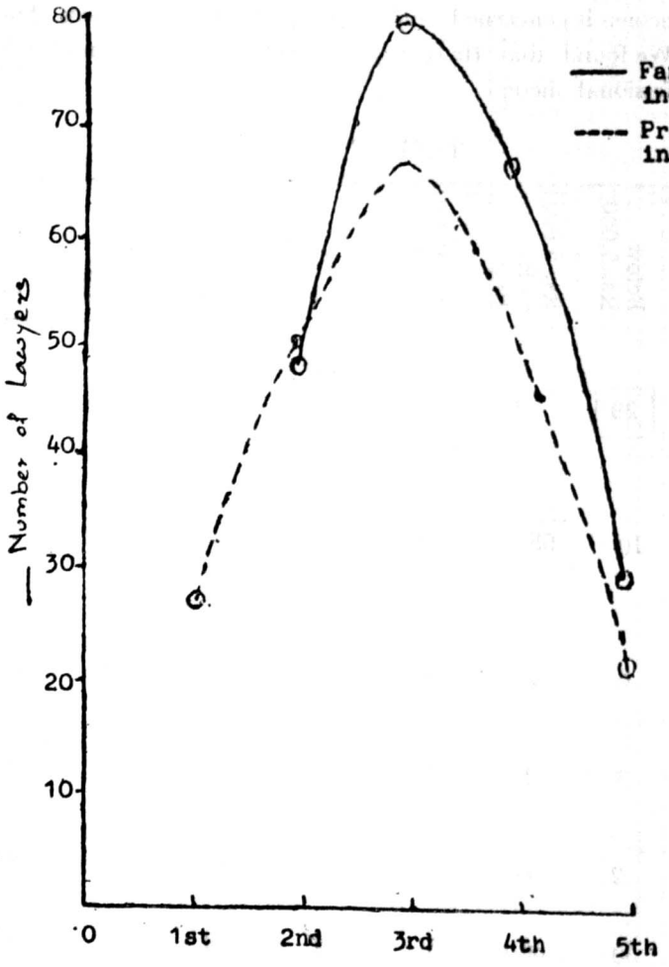
Family Income	Below Rs. 5,000	Rs. 5,0001 to Rs. 10,000	Rs. 10,001 to Rs. 25,000	Over Rs. 25,000	Income not specified	Income Nil	Total
Below Rs. 5,000	**29**	2	1	0	5	11	48
Rs. 5001 to Rs. 10000	10	**55**	3	0	7	4	79
Rs. 10001 to Rs. 25000	6	7	**44**	1	3	5	66
Over Rs. 25000	3	2	3	**20**	1	0	29
Not specified	2	0	0	0	**12**	7	21
Total	50	66	51	21	28	27	243

(The Horizontal table describes the family income and the Vertical Table the professional income).

Thus the number of lawyers whose professional income was in the higher income group was less as compared to the number of those who belonged to that group in terms of family income. The bracketed figures in the table show the number of lawyers who have stayed in the same income group as that of their families. Vertical mobility from family income to professional income is shown in the Graph.

GRAPH I

Vertical mobility from the family income to professional income



—Annual income groups

1st annual income group – No income
2nd annual income group – Below Rs, 5.000
3rd annual income group – Rs. 5,001 to Rs. 10,000
4th annual income group – Rs. 10,001 to Rs. 25,000
5th annual income group – Above Rs, 25,000

Generally the lawyers having longer experience had higher income. Age and experience of a lawyer often coincided. For example, 88 out of 92 in the age group of 21 to 30 years had practised for less than 5

years and 20 out of 26 in the age group of above 60 years had practised for more than 20 years. The senior lawyers usually earn more than the juniors and independents.

Having near relations in the profession makes the ascendency of a lawyer easier. It is an initial advantage with which a lawyer starts.

Satisfaction with the profession increases with the professional income of the lawyers. Although only 104 out of 243 said that they were satisfied, 203 (83.53%) wanted to continue in the profession. This was because there was nothing else to which they could branch off. 117 out of 243 wanted their sons to join the profession (48.14%) and only 53 wanted their daughters to join it (21.81%).

This survey shows that although many join the Pune City Bar, only a small number stays because the financial rewards are generally not very attractive. Upward mobility has been seen mostly among those who came from higher income groups and had near relations in the profession.

Women Lawyers—Sex Ratio in the Profession

Women constituted 14.4% of our sample (35 out of 243). This percentage was higher than their actual percentage in the Pune Bar. The female voters in the Bar Association elections were 61 out of 796 (7.66%) in 1981 and 70 out of 825 (8.48%) in 1982. The higher percentage in our sample is due to better response of women to our questionnaires.

Greater number of drop-outs among women as compared to men was found particularly between those below 40 years of age. This may be due to their preferring matrimony to law. Their absence in the higher age groups indicates their late arrival in the profession.

45.71% of women lawyers came from among Brahmins and 14.14% from Hindu others. 57.13% of women lawyers came from families whose annual income was above Rs. 10,000. The general percentage in this respect was 39.09. Thus the percentage of women lawyers coming from this family income group was higher than that of the entire sample.

3 out of 35 women lawyers said that their fathers were practising lawyers. 20 out of 208 male lawyers said that there fathers were lawyers. 8 out of 35 (22.85%) women lawyers and 50 out of 208 (24.03%) men lawyers had near relations (including father) as lawyers.

21 out of 35 women were juniors, 8 were independents and only 1 was a senior. These figures for men were 39, 108 and 49 respectively, out of 208. Thus women far exceeded man in the category of juniors and men far exceeded them in the other two categories.

Thus although women lawyers came from more affluent families and the percentage of men and women lawyers having near relations in the profession almost coincided, the women lawyers have rarely been able to move upwards in the profession.

Only 6 out of 35 women lawyers were satisfied with their professional experience (17.14%). 12 out of 35 (34.28%) women lawyers wanted their sons to join the profession and only 9 out of 35 (25.71)%) wanted their daughters to join it.

We interviewed 53 lawyer—9 women and 44 men. 15 said that women should join the profession and 7 said that they should not. 26 said that only such women having ample time and financial support from their families should enter this profession. According to some, the court atmosphere as a whole was not at all conducive to women lawyers.

Lawyers from Backward classes

14 out of 243 lawyers were from backward classes (5.76%)—11 males and 3 females. 5 out of 14 (2.05%) were in the age group of 21 to 30, 5 (2.05%) between 31 and 40, 2 (0.82%) between 41 and 50 and another 2 (0.82%) between 51 and 60. There was no backward class lawyer above 60 years of age.

35.71% of the backward class lawyers came from the lowest economic group and 14.28% were from the highest economic group. None had any near relations in the profession. A comparison of family and professional income shows a sharp downward vertical mobility. We found that out of 11, only 1 backward class lawyer was a junior whereas those who should have been juniors, considering their age, were practising independently. Why so ? Are backward class lawyers not accepted as juniors by senior lawyers ? Or are they not able to have access to them ?

12 out of 14 backward class lawyers were satisfied with their job (85.71%—much higher than the general percentage which was 42.79) This was so because their expectations from themselves were much more modest than those of the lawyers from advanced sections. 9 out of 14

(66.28%) backward class lawyers wanted their sons and 5 out of 14 (35.71%) wanted their daughters to join the profession (again higher than the general percentages which were 48.14 and 21.81 respectively). The fact remains that success in the legal profession very much depends upon one's social contacts—class, caste and relations, and so the backward class lawyers are bound to be at a great disadvantage.

Pursuit of knowledge, Social and Political Awareness and Motivation for becoming a Lawyer

Legal writing increases along with the annual family income of the lawyers. It was also observed that the lawyers who came from families having tradition of legal practice had done legal writing.

Out of 243 lawyers, 152 said that they had law library. Out of 152, 145 were males and 7 were females. It is observed that law library was larger with higher age groups, it also went up with family income and seniority in the profession. Out of 53 who were interviewed 22 had taught law. Out of whom 14 said that teaching helped them in the profession, especially for becoming more articulate.

Lawyers were asked how they chose the legal profession, whether in deference to family wishes or out of their own desire. Out of 243 lawyers 180 said that they took up law out of their own desire, 32 said that they did so in deference to family's wishes and 21 said that both family wishes as well as their own wish were behind their choice. One said that the circumstances were responsible while 9 did not specify any reason for choosing this profession.

Out of 180, who joined the profession out of their own desire, 37 had near relations in the profession.

TABLE 8

Correlation between Motivation and Near Relations in the Profession

Motivation	No. of lawyers having near relations (including father) as practising lawyers
Self Choice	37
Family wishes	11
Self Choice+Family wishes	8
Circumstances	1
Not specified	1
Total	58

Only 7 out of 53 lawyers whom we interviewed were members of political parties. 27 were sympathetic to one or the other political party, 26 were not to any. Only 2 lawyers said that membership in a political party helped them get professional opportunities,

Only 25 out of 53 lawyers had taken part in professional bodies like Bar Association or Court Library.

The above account shows that barring a small percentage, the lawyers in general are lacking in studious habits and political and social awareness. A lawyer devoid of proper socialisation would not be able to look at his legal tools in a creative manner.

Survey of the law Students : Trends of Future Recruitment

To know the trends of future recruitment to the legal profession, we made a survey of the Second LL. B. students. The reasons for choosing the Second LL. B. students was that there was a reasonable certainly that they would complete the course and that there was a greater possibility of their having some definite views regarding what they intended to do.

The total numbers of students enrolled in the Second LL. B. class in June 1980 in four different Law Colleges were as follows :

ILS	285
Symbiosis	195
Bharati	28
A. B. M. S. P.	49
	557

372 out of 557 students replied to our questionnaire (66.78%). 315 out of 372 students were males and 57 were females (84.67% and 15.32% resp.). 330 out of 372 students were below 30 years of age (88.7%).

320 out of 372 students were Hindus, 21 were Jains, 12 Christians, 13 Muslims, 3 Neo-Buddhists, 2 Sikhs and 1 Parsi. Out of 320 Hindu students, 118 were Brahmins, 148 were Hindu others and 18 were from backward classes.

When we compared the religion/caste figures of students with those of the practising lawyers, we found that the religion-wise percentages were almost identical. However, in caste-wise figures the percentage of Brahmins among the students is almost three-fourths of that among the lawyers, the percentage of backward classes goes down whereas that of the Hindu others increases among students.

TABLE 9

Comparative Religion and Caste Break up of Students and Lawyers

Caste	No. of Students	No. of Lawyers
Hindu Brahmins	118 (31.72%)	106 (43.62%)
Hindu Others	148 (39.78%)	68 (27.98%)
Hindu B. C.	18 (4.83%)	14 (5.76%)
Hindu not specified	36 (9.67%)	18 (7.4%)
Total Hindu	320 (86.02%)	206 (84.77%)
Jain	21 (5.64%)	17 (6.99%)
Muslim	13 (3.49%)	8 (3.29%)
Christian	12 (3.22%)	6 (2.46%)
Parsi	1 (0.26%)	1 (0.41%)
Neo-Buddhist	3 (0.8 %)	1 (0.41%)
Sikh	2 (0.53%)	1 (0.41%)
Religion not specified	0	3 (1.23%)
Total	372	243

145 out of 372 students came from families whose annual income was less than Rs. 5,000, 97 from families whose annual income was between Rs. 5,001 and Rs. 10,000, 92 from families with annual income ranging between Rs. 10,001 and Rs. 25,000 and 22 from families with annual income above Rs. 25,000. On comparison of these figures with the figures in the lawyers' sample we found that while the number from the lowest economic group (less than Rs. 5,000 annual income) had gone up, that from the highest group (above Rs. 25,000 annual income) had gone down. Among the incoming lawyers, we are likely to have more from the lower economic groups.

TABLI 10

Family Incomes of Law Students and Lawyers

Annual Family Income	Students	Lawyers
Below Rs. 5,000	145 (38.97%)	48 (19.75%)
Between Rs. 5,001 and Rs. 10,000	97 (26.07%)	79 (32.51%)
Between Rs. 10,001 and Rs.25,000	92 (24.73%)	66 (27.16%)
Above Rs. 25,000	22 (5.91%)	29 (11.93%)
Not specified	16 (4.3 %)	21 (8.64%)
Total	372	243

61 out of 372 had near relations in the profession. They were practising lawyers, judges, teachers of law or legal officers. Near relations of only 45 students were practising lawyers (12.09%). In the Lawyers' sample, 58 out of 243 had near relations who were practising law (23.86%). These figures show that there might be lesser number of lawyers with near relations in the profession in the future.

152 out of 372 (40.86%) came to law after graduation in Arts, 121 (32.52%) after graduation in Commerce and 53 (14.24%) after graduation in Science. 35 (9.4%) students had a Master's degree in their respective faculties, 43 (11.55%) did not specify their pre-legal degrees and remaining 3 (0.8%) were from other faculties such as Medicine, Engineering and Architecture.

About 93% of the students had chosen Law on their own and 280 out of 372 said that Law was their first choice (75.26%). 85 said that Law was not their first choice (22.84%).

208 students out of 372 said that they intended to practise law, 87 students wanted to take up jobs, 17 wanted to join teaching and research, 4 wanted to do teaching and research along with some other job, 56 students did not have any plans at all.

Only 23 out of 372 (6.18%) said that they had some experience of legal aid. 167 out of 372 (44.89%) students showed willingness to do social work but out of this 143 students said that they were not interested in legal aid. It is alarming to note that 325 (87.36%) students were not interested in giving legal aid.

Although 280 out of 372 students said that law was their first choice, it is common knowledge that a large number of law students drift to Law from other branches. Some do law as complementary to their main career. Those who are already employed, do law with a view to gaining promotion in their existing jobs. 55.91% of the students wanted to practise law. But the number of advocates enrolled every year is quite small (only 29 advocates were added to the Bar Association Election during the year 1980-81). Why so many said that they intended to practise whereas so few in fact actually seem to join the bar is because only those "with substantial financial family backing or with relatives established in practice at the court can even contemplate making a career at the Bar without extreme trepidation".[9] Poor financial rewards, long waiting periods, the chance elements and the increasing corruption are also other reasons why so few actually enter and stick to the profession.

These observations show that the incoming lawyers are likely to come from less affluent sections and lower castes and there would be less number of those having near relations as practising lawyers.

Professional Behavioural Standards, Senior-Junior Relationship

There are three types of lawyers in a mofussil bar—Seniors, independents and juniors.[10] We interviewed 53 lawyers from among 243 surveyed through the questionnaire—

Seniors	26
Independents	9
Independents/Juniors	9
Independent/partners	1
Juniors	8
	53

9. See Sunshine R. B. and Berney A. I., "Basic Legal Education in India : An Empirical Study of the Student Perspective at Three Law Colleges", 12 *J. I. L. I*, 1970, 39.
10. See Page No. 45 Para 2.

More than 50% of our interview sample was the senior lawyers. Although the choice was not intentional, it proved to be helpful since only seniors could throw light on the Senior-Junior relationship as it existed in the past and it exists now. The response of the junior advocates was less readily available. All of the 8 juniors interviewed said that their experience as juniors was very good. It should be noted, however, that 5 out of these 8 had their near relatives as their seniors. 4 out of 45 seniors or independents said that they had bad experience as juniors. 5 said that it was neither bad nor good. Others described it as good and very good. In more intimate talks we could make out that very few seniors were really helpful. Many a times juniors were exploited and discouraged. They were not paid for the work. A junior stays with his senior for a period varying between 1 and 5 years.

The practice of paying to the juniors was rather exceptional. Out of 17 juniors interviewed only 5 were paid some stipend and 22 out of 26 seniors said that they were not paid during the days of their juniorship. They could sustain themselves only on the financial support of their families—37 out of 53 lawyers interviewed had such financial support.

The juniors were mostly selected on the basis of personal acquaintance or recommendations of friends, relations or acquaintances. 21 out of 26 seniors interviewed said that caste/community was not a very important factor and yet 10 out of 27 juniors interviewed had seniors belonging to their own caste or community.

In Pune there are lawyers belonging to various religions and castes. We wondered whether clients had a tendency to choose a lawyer of their own caste/community. 45 out of 53 lawyers interviewed said that caste etc. of a lawyer did not matter. Clients prefer the most competent lawyer whom their purses permit. In petty matters, however, there was a tendency of going to a lawyer from one's own community.

Only 8 (15.09%) lawyers of our interview sample were exclusively servicing the lowest economic group of annual income below Rs. 10,000. It is significant that when 52.26% of the lawyers came from families whose annual income was less than Rs. 10,000 and 58.85% of the lawyers earned less than Rs. 10,000, only 15.09% of them should be available for servicing the income group to which such a large majority of them belonged.

This explains why legal aid has not made any significant advance. 45 out of 53 lawyers interviewed gave legal aid rarely, 5 never gave it and only 2 gave it quite often while 1 refused to answer. Often legal aid was given to poor clients introduced to lawyers by their friends/relations. Thus in the absence of any institutionalised legal aid, it is available to such poor only who have access to a lawyer through friends or relatives.

We heard many complaints of lawyers' unethical behaviour, and some stories of their helpfulness too. 4 out of 7 clients were not satisfied with the services rendered by their lawyers, 2 were satisfied and 1 did not answer.

We were told by many that the fees charged by advocates were excessive. 5 out of 7 clients said that the fees were fixed by a unilateral demand by their advocates. It is found that the schedule prescribed by the High Court is seldom followed. The lawyers did not follow even some other rates. 17 out of 53 lawyers interviewed said that the fees depended on the paying capacity of the client, 5 settled it by bargaining and 13 by unilateral demand. None of these 53 charged it according to some scheduled rates. 32 out of 53 lawyers said that the fees charged were excessive, 19 said they were not excessive and 2 did not answer. In spite of it the fees upto nearly 50% were sometimes required to be written off because of non-recovery.

The chance element plays much greater part in the legal profession than in other professions. Getting work is dependent upon the connections, caste, religion, etc. 5 out of 10 non-practising lawyers we interviewed said that religion/caste played an important role in getting clients.

Tout is a person who mediates between a client and a lawyer and takes money from both. The commission charged by touts could be as high as 50% to 75% of the fees. Under the legal Practitioners Act, 1879, touting is prohibited and punishable.[11] However, it is practised rampantly in all courts.

One of the reasons of such widespread touting was that many people were ignorant and helpless. If the legal aid movement grows there will be a significant check on touting. It can spread legal

11. S. 3 gives definition of tout and S. 36 provides for punishment and exclusion of touts—The Legal Practitioners Act, 1879; also Supreme Court Rules—Rule 13 Order 4.

awareness and take legal services to the door of the small man who is an object of exploitation by touts.

Lawyers wish to keep good relations with the judges/magistrates. If a judge is kindly disposed, lawyer's work becomes much easier. Lawyers tend to become assertive only when acting as a group. Individually they would want to remain on the good side of the judges/magistrates. 51 out of 53 lawyers interviewed told us that personal acquaintances with the judges was necessary and that it was cultivated. Many lawyers told us that corruption in the judiciary had increased in the last decade. They also told us that there was a practice of giving bribes to clerks and peons in order to get the work expedited or to obtain a suitable date. If a lawyer did not give this "speed money" his client suffered. Only 6 out of 53 lawyers interviewed said that they never paid such money but consequently they had to face the hostility of such staff.

Free legal aid is now being recognised as an important aspect of the "procedure established by law".[12] We found that lawyers possessed a very negative attitude towards legal aid. Only if legal aid is institutionalised it could be available to all irrespective of caste, sex, religion, personal relation or friendship and become more a matter of right than charity. Considering the fact that a large number of lawyers earn less than Rs. 10,000 per annum, it is no wonder that they are pre-occupied with the problems of survival. True, even those who are financially better off have also not shown greater enthusiasm for legal aid. Legal aid in India being a late phenomenon, the present indifference or hostility of a large number of lawyers should not be surprising. Efforts will have to be made to motivate them to give legal aid which will be possible if the lawyers and judges are exposed to the philosophy of legal services.

It is well known that due to delay justice is denied to many. In the interviews we inquired into the reasons for the delay in the administration of justice. 30 out of 53 lawyers admitted that lawyers were partly at least responsible for the delays, 25 thought that the government was partly responsible, 29 thought that the judges were partly responsible. 28 blamed the clients, 19 the present procedures and 6 the court staff. 2 held the government entirely responsible.

The legal profession at present has a very poor social image. There is a cut throat competition and various unethical practices such as touting, under cutting etc. are prevalent. The lawyers' views on legal

12. See *M. H. Hoskot* v. *Maharashtra*, AIR 1978 SC 1548,

aid, public interest litigation show their total ignorance of modern thought and ideas. Their professional behaviour as seen from their relations with the clients or the judges does not satisfy the test of professionalisation, which implies confidence in expertise and craftsmanship. We have come to the conclusion that the composition of the bar is status quo oriented. The financial rewards offered by legal career being so meagre, very few students of good quality are attracted to the legal profession. Since very few earn a lot and a large number of them remain on a very paltry income, the attitudes are not favourable to social change. Lawyers seldom display any deep scholarship or insights into the inter-action between law and society. Far reaching changes in the system of justice would be needed if public confidence in its integrity and usefulness is to be restored and strengthened. Some of such changes are—(1) re-organisation of legal education in order to provide for the exposure of the future lawyers to the dynamics of law and its inter-action with society (This is now being attempted by the Bar Council of India); (2) provision for orientation as well as refresher courses for the practising lawyers; (3) a comprehensive legal services programme which will facilitate access to justice and promote the proper legal culture of an egalitarian and liberal society; and (4) procedural reforms so as to eliminate the law's delays including de-professionalisation of dispute settlement in some areas (family, matrimonial matters).

THE WORKING OF FORMAL ADVERSARY PROCEDURE IN THE RESOLUTION OF MARITAL CONFLICT PROBLEMS IN INDIA

VIRENDRA KUMAR*

1. From Informal to Formal

In India, under the traditional law, whatever is continously and uniformally observed for a long time in any local area, tribune, community, group or family, determines the disposition of the normative rules of conduct in society.[1] Inherently, such rules are, to borrow the phrase of Professor C. K. Allen, "non-litigious" in character.[2] They are indeed, in our view, expressive of the classical statement of democracy : normative rules 'of the people', 'by the people', and 'for the people'. Perhaps, perceiving their very high degree of social acceptability and remarkable resilence, the Judicial Committee of the Privy Council could categorically state that, "under the Hindu system of law, clear proof of usage will outweigh the written text of the law."[3] Exhorting an European Judge, who was obliged to administer Hindu law, the Judicial Committee emphasized that his duty "is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governed the District with which he has to deal, and has there been sanctioned by usage."[4] A slightly distinct note is heard in this respect

* LL. M., S. J D. (Toronto), Professor of Laws, Panjab University, Chandigarh-160014 (India).

1. To this formulation of custom, there came to be engrafted two provisos, see notes 8-11, and the accompanying text, *infra*. They are enunciated by the Legislature as under :

   "Provided that the rule is certain and not unreasonable or opposed to public policy ; and

   Provided further that in the case of a rule applicable only to a family, it has been discontinued by the family." See Section 3(a) of the Hindu Marriage Act, 1955.

2. "Custom : Nature and Origin, "*Law in the Making*, 1961 at 67.

3. *Collector of Madura* v *Mootoo Ramalinga Sethupathy*, (1868) 12 M. I. A. 397, at 436 ; quoted in *Atmaram Abhimanji* v. *Bajirao Janrao*, (1935), 62 I. A. 139.

4. *Ibid.*

when it was held by the Privy Council that, when custom was proved to exist, it superseded the general law, which, however, still presumed to regulate all outside the custom.[5] A similar reference to usage came to be echoed in the early legislative enactments which provided for the administration of law, unless the usage was contrary to justice, equity and good conscience.[6]

However, customs or usages having the force of law shall be proved to exist only by "clear and unambiguous evidence."[7] "It is only by such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."[8] On the analogy of English law, where the condition of being ancient was considered to denote legally the time commencing from the reign of King Richard the First, that is A. D. 1189, it was suggested that, in India, the time of Permanent Settlement should be taken as the time limit.[9] On the strength of *Mitakashara*, however, the preferred view was that, whatever is beyond a century is immemorial or out of mind of man whose span of life according to the *Shrutis* extends to one hundred years only; accordingly everything previous to it must be beyond human memory and as such immemorial.[10] Apart from the application of these stringent standards and the highly technical methods of proof of custom, it was also emphasized by the Judicial Committee of the Privy Council that a custom, "being in derogation of the general rules of law, must (always) be construed strictly."[11] The same came to be applied, almost invariably,

5. *Neelkistodeb* v. *Beerchunder*, (1869) 12 M. I. A. 523. This principle was reaffirmed by the same board in *Tara Kumari* v. *Chatturbhuj*, (1915) 42 I. A. 192.

6. See Bombay Reg. IV of 1827, S. 26, and Act II of 1864, S. 15 ; Burma Act XVII of 1875, S. 5 ; Central Provinces Act XX of 1875, S. 5 ; Madras Act III of 1873, S. 16 ; Oudh Act XVIII of 1876, S. 3 ; Punjab Act XII of 1878. S. 1 ; Bengal Act VIII of 1885, S. 183.

7. *Ramalakshmi* v. *Sivanantha*, (1872) 14 M. I. A. 570. at 585-86.

8. *Ibid.* See also *Harpurshad* v. *Sheo*, 3 I. A. 259, at 285.

9. See Rishindra Nath Sarkar, Ed., *Golapchandra Sarkar, Sastri's Hindu Law*, 1940, 22.

10. *Ibid.*

11. *Hurpurshad* v. *Sheo*, *supra* note 8. See also *Durga* v. *Raghunath*, 18 C. L. J. 559. *Lachmi* v. *Sangram*, 14 . C. 322 ; *Punni* v. *Chat*, 21 C. 640 ; *Bhikabai* v. *Manilal*, I. L. R. 54 Bom, 780.

not only to local customs,[12] but also to class customs[13] and family customs.[14]

Taking it all in all, introduction of complex conditions as to the validity of customs and the rule of their strict construction, and, finally, reproducing them into writing[15] (though ostensibly done to facilitate their evidance , virtually led to the extinction of 'living law.' This also resulted in making custom, which was once upon a time in India *the* law, merely as an exception to the formal law of the legislature led by formal adversary procedure.

II Visitations of Formal Adversary Procedure

Under the formal adversary procedure we seem to be essentially concerned with, not what really happens in life but, what should or ought to happen. If something has happened what should not have happened in view of the formal normative rules of conduct, there arises a conflict problem. Through formal adversary procedure, such a conflict is keenly contested and, as if it were, an all out attempt is made to prove, 'what should not have happened' as 'what has not happened at all.' This may be instanced, in the resolution of marital conflict problems, through the perusal of a very recent case, *Shantaben* v. *Tulsidas* (1981).[16]

In this case, the appellant woman, after a couple of years of her marriage, developed intimacy with another man (respondent in this

12. Customs which are binding on all the inhabitants of a particular locality which may be the whole country, or a province, or a district, or a town, or even a village.
13. Customs those of a caste, or of a sect, or of the followers of particular profession or occupation such as agriculture, trade, mechanical art and the like.
14. Family customs are confined to a particular family, such as those governing succession to an impartible Raj, to *maths* or religious foundations.
15. Several records of customs and usages were perpared during the British rule in India under the direction of the Government. Notably among them are: *Wajib-ul-arz* (a written representation or petition) and *Riwaj-e-am* (record of custom)—prepared under the authority of public officer. In Punjab notes on customary law, as administered in the Courts of Punjab, by Charles Bulnois and W. H. Rattigan (1976), and the Punjab Customary Law by Tuppar (1881), are still relied on as evidence of custom recorded in them.
16. *Shantaben Tulsidas Sharma* v. *Tulsidas Madav Das Sharma*. H. L. R. 1981 Guj. 211 (D. B.), *per* M. K. Shah and D. H. Shukla, JJ. (Hereinafter simply cited as *Shantaben*)

case), who happened to be couple's bachelor landlord. This eventually led her to desert her husband, and just within a period of three-month desertion, she dissolved her first marriage through a customary divorce deed, and settled along with three children (one of them though born during the subsistance of the first marriage, yet alleged to be the son of the new man) in her new marriage, bore four more children and brought them up along with her adventurist husband,[18] who all along maintained a very high standard of living.[19] However, before the couple could pride themselves by celebrating the silver jubilee of their marriage, there appeared a marital "rift," mainly because in an application to the Department of Income Tax, purportedly to avoid the contemplated acquisition of his property by the Municipal Corporation, the husband, against the wishes of his wife, perferred his brothers to the children of the marriage as co-owners of his large income yielding "valuable immovable properties."[20] When the wife protested on that count, she was simply asked "to leave the house," because, "she had no legal right to stay there."[21] The situation precipitated when, after about two years separate living in one room of the same house, she claimed maintenance from the husband on grounds of his cruelty and desertion.[22] For negating the wife's claim, the husband furiously denied that she was "his lawfully wedded wife."[23] Curiously enough, the man denied neither "the history of unbroken cohabitation as husband and wife for 30 long years,"[24] nor the existence of four grown up children borne by her to him out of that cohabitation.[25] Indeed, the man immensely loved his children; else, how could he had "so affectionately maintained (them) all throughout."[26] And, yet, never minding the stigma of illegitimacy for his children that would directly

17. Section 29 (2) of the Hindu Marriage Act 1955 permits such dissolution of a Hindu marriage as is recognised under a custom, but only by way of an exception to the judicial divorce as provided under the Act.
18. *Shantaben*, para 6, at 216-17.
19. The household expenditure was to the tune of Rs 4,000.00 per month, and the husband maintained a car, had a personal telephone, and enjoyed the services of two domestic servants, *id.*, para 8, at 217.
20. *Ibid.*
21. *Ibid.*
22. *Id.*, para 1, at 215.
23. *Id.*, para 2, at 210.
24. *Id.*, para 32, at 218.
25. *Id* , para 2, at 216.
26. *Id* , para 20, at 217.

flow from his questioning the legality of marriage, the man doggedly pursued for decision on that count."[27]

Why ? Not because the man was required to pay separate maintenance to the woman under a court order, for that claim already stood rejected.[28] Perhaps, the man, through the manoeuvring of formal adversary procedures wanted to teach that woman by killing the 'wife' in her ! And the courts, as if it were helplessly, allowed him to pursue that course for ten years.[29]

It was "strenuously argued" for the man that, in order to be entitled to the claims of a lawfully wedded wife, what was required to be proved by the adversary woman, not merely the factum of her second contended marriage but also, the legal validity of that marriage.[30] Admittedly, she was already married. The validity of her second marriage would, therefore, rest on the legality of the customary dissolution of her first marriage.[31] Moreover, a custom operates in derogation of the general law. The burden, therefore, lies upon the party to prove the custom who alleges its existence.[32] In other words, "the law expects one who bases his right on a custom to plead it specifically and prove it beyond reasonable doubt."[33] The court, on its part, would construe custom strictly by enforcing the conditions required for its validity. In the light of these tringent requirements of the rules of formal adversary procedure, the man asserted that, "barring her own evidence, she has not done anything to prove the custom permitting her

27. *Id.*, para 20, at 217-18.
28. The finding of the trial court, rejecting the wife's claim for maintenance on grounds of the alleged cruelty and desertion of the husband, were already upheld by the High Court. See, *Id*, para 19, at 217.
29. The Division Bench of the High Court felt that once the appellant wife's claim for maintenace on grounds of respondent husband's cruelty and desertion was rejected, the issue on legality of marriage was not required to be decided. Their Lordships even indicated that the respondent should realise that "if the issue about the legality of marriage is decided in his favour, it would not only adversely effect the appellant but it would operate as a permanent stigma on his children also, whom he has so affectionately maintained althroughout despite his unhappy relation with the appellant....The respondent, however, thought it fit to pursue his prayer for decision on that issue. We must, therefore, now proceed to decide this question as it arises out of the Cross Objections filed by the respondent." *Id.*, para 20, at 217-18.
30. *Id.*, para 40, at 220, and para 55, at 225.
31. *Ibid.*
32. See *supra* note 11, and the accompanying text.
33. *Shantaben*, para 69, at 231.

to take divorce from her husband."[34] For instance, "she has led no evidence to prove that she was a Sikh and a Hindu which ought to have been proved considering the discrepancy between the contents of divorce deed and the averments of her in the plaint...."[35]

Two authorities of the highest court of India were cited by the man in support of the plea taken above. One laying down that, when a person, claiming a special right under a custom fails to prove its existence, the general law will apply.[36] The other authority relates to the kind of evidence which is required to prove a custom. "Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given.[37] All this implied that, before the adversary woman could claim to be the "legal wife", it was incumbent upon her to prove the dissolution of her first marriage not merely by oral testimony of witnessess but by "the documents of divorce in other cases which must have been executed in innumerable cases by this time".[38] "Now, it is well settled that, in order that custom should have the force of law it....must derive its force from the fact that by long usage it has obtained the force of law...."[39] And the adversary woman in the instant case "has not led any reliable evidence to prove her assertion regarding the prevalence of custom in the community to which she belonged whereby a divorce by execution of a divorce deed was permitted".[40]

Mere "cohabitation does not necessarily imply marriage, but marriage must be proved," was the second contention of the man.[41] In support of this assertion, an high authority of the Privy Council was

34. *Ibid.*
35. *Id*, para 69, at 231-32.
36. *Kochan Kani* v. *Mathevan Kani*, A. I. R. 1970 S. C. 1398 : "(W)hen a person claiming to inherit a deceased fails to prove the family custom under which he claims that right, the son of the deceased would inherit the property of his deceased father under the general law of inheritance." Cited in *Shantaben*, para 69, at 232.
37. *T Saraswathi Ammal* v. *Jogadambal and another*, AI. R. 1953 S. C. 201, cited in *Shantaben*, para 69, at 232.
38. *Shantaben*, para 69, at 232.
39. See *D. S. Meramwala* v. *B. A. Shri Amrala*, 9 G. L. R. 609, cited in *Shantaben*, para 69, at 232.
40. *Shantaben*, para 40, at 220.
41. *Id.*, para 44, at 222.

cited.[42] implying that without the proof of a legal divorce first, her cohabitation with another man amounted to "illicit connection"[43] (or "illegitimate intimacy"[44] and that she could not be converted by judicial presumption into a wife "merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her".[45] Moreover, since" (r) elations or conditions of persons or things once shown to exist are presumed to continue until the contrary is proved,"[46] the adversary woman continued to be the wife of the first man in the eye of law.[47] Logically thus, once it is shown that the parties were incapable of entering a lawful wedlock, in the absence of a proper legal divorce, the question of raising presumption of legal marriage from cohabitation should not at all arise.[48] All this is just an instance of the numerous visitations of the formal adversary procedure in the resolution of marital conflict problems.

Recapitulating the fact situation in retrospect we find that after 30 years of continued cohabitation, in her living separately from her husband (not of her own volition, but under forced circumstances), she did have a marital problem. In the hope of a resolution of that problem, she approached the legal order. Symptomatically, in terms of the formal adversary procedure, the problem crystalized in her claim for maintenance on grounds of desertion and 3ruelty. Her allegations of cruelty and desertion were decided against her, because she could not

42. *Mussumat Jariut-Oll-Butool alias Husein Buksha* v. *Mussumat Huseinee Begum*, 11 MIA 194.
43. *Shantaben*, para 45, at 222.
44. *Id.*, para 46, at 223
45. *Id.*, para 45, at 222.
46. *Id.*, para 47, at 223, citing A. I. R. 1927 Lah. 48.
47. *Ibid.*
48 *Id.*, para 50, at 224. This was asserted on the analogy of a case wherein it was held that a marriage between a Brahamin woman and a Shudra man could never be presumed notwithstanding their continued cohabitation See *Bai Kashi* v. *Jamnadas Mansukh Raichand*, 14 B. L R. 547, cited in *S antaben*, paras 49 and 50, at 223-24. For reinforcing the same position, there was cited A. I. R. 1929 Nag. 343, holding that "a presumption of a valid marriage cannot be drawn where the union between a man who is an Ahir and a Brahamin widow, who cannot prima facie contract a valid marriage," para 50, at 224. Other authorities cited for the same were: A. I. R. 1942 All 175, A. I. R. 1944 Mad. 362; A. I. R. 1962 A. P. 360. The burden of all these is that a presumption of legal marriage cannot be drawn where it is not possible to have a legal marriage between the parties. See paras 50, 51, and 52, at 224-25.

prove them technically as required under the law.[49] But could there be a greater cruelty to a woman than to be told by the man with whom she had cohabitated for 30 long years and borne four children to him that she was not his wife ?

Apart from the considerations of cruelty and desertion, the question which still remained unanswered is this. 'Did she get any maintenance ? If not, why ? Such a question, instead of being taken up and resolved in the perspective of marital life, is generally sought to be answered as a legal problem through the sustained treatment of the formal adversary procedure. In the case in hand, the Division Bench of the Highest Court of the State of Gujarat seem to settle the maintenance claim of the unfortunate wife by simply stating[50] :

> "....Since we agree with the finding of the learned trial Judge on the issues relating to desertion and cruelty, we do not find any reason to disagree with his final order by which he dismissed the appellant's (wife's) suit (for maintenance)."

The man was not only not rest contented by browbeating the wife's present maintenance claim but, it seems, in order to foreclose all such future moves, resentfully raised the bogy of no-legal marriage with her. Through the strategy of formal adversary procedures, he could drag her lawfully in law courts for ten long years. By innumerable innuendos, he could lawfully label (through the mechanics of precedents) "a mistress," "a concubine," "a prostitute," or could brazenly describe the 30 years continued cohabitation with him as "illicit connection" or "illegitimate intimacy." It is true that the court could eventually decide that she was the lawful wife of that man; but to what ends ? What did she get out of the holding of legality of that marriage ? After such a long drawn "keenly contested" bitter battle, what else was left of human relationship in marriage ? Hardly anything human and personal. Who is to blame ? Legislatures, laying down the formal adversary procedure ? Judges, operating that procedure ? Or perhaps, the whole legal order, including Judges, Jurists, Legists, Lawyers and Law Teachers ?

49. After discussing the evidence on record, their Lordships in *Shantaben* simply observed : "Since we agree with the finding of the learned trial Judge on the issues relating to desertion and cruelty, we do not find any reason to disagree with his final order by which he dismissed the appellant's suit." Para 19, at 217.
50. *Ibid.*

III. Formal Adversary Procedure : Limits of its Adaptations

A. Formal Adversary Procedure : Is it Intrinsically Inimical ?

Often it is stated that manifesting a human phenomenon within the confines of formal rules of a statute does not bode well for the future of society. It sets in a disturbing process. The most glaring example given of this process is that of : "the whole 'new sphere' of human rights where mechinical, impersonal, equalized rights and/or benefits are assigned to the masses as a whole or as atomized aggregates such as 'workers,' 'the aged,' 'Indians,' 'women,' and so on."[51] "It is so blatantly evident in cases of automobile insurance; in the 'small claims' court; in the 'classification' of prison inmates; in divorce proceedings; in the variety of court jurisdiction attempting to deal frequently (and unable to do so) with the same phenomena; in the mental separation of 'practicing lawyers' from 'justice'; from the ever increasing quantity of mechnical litigations swamping both courts and judges."[52] "All are leading to an ever growing necessity to develop a 'better' assembly-line form of 'justice."[53]

Implicit in these statements is the argument that in this world of "mega machine" of ours, there is hardly any scope left for human motivation of law either on the social or on the individual plane. On a similar score, recently in a Keynote paper for the All-India Inter-disciplinary Symposium on the Interaction of Science, Technology and Law in India,[54] it has been stated that, "in the legal way and the scientific way a high degree of abstract order serves the mass of the human society involved, with the result that the more impersonal the rules are, the less compelling they seem to the individual...."[55] This 'depersonalization' leads to the decline of moral and spiritual values,[56] showing up varyingly in "violence," "aggressiveness," "self-aggrandi-

51. See William A. Dyson, "Rediscovering the Lost Links between Private and Public Rules and their Implications for a New Understanding of Law," a paper presented at the Vanier Institute of the Family on April 16, 1974, at 2. It is indeed a very thought provoking paper, received by the courtesy of the Vanier Institute of the Family, Ottawa, Canada.
52. *Id.*, at 2-3.
53. *Id.*, at 3.
54. *See* R. P. Dhokalia, "The Interaction of Science, Technology and Law in India," 15 *Banaras Law Journal*, 1979, 8-16.
55. *Id.*, at 8.
56. *Id.*, at 9.

zement," "terrorism," "disintegration," and the like.[57] All this is tantamount to saying, it seems, that aggressive denial of all values is inherent in the abstract legal order. The values are said to be sacrificed when the "individuals" are put into atomised aggregates, such as 'men,' 'women,' 'judges,' 'lawyers,' 'small causes claims,' 'illegitimate children,' 'petitioners who are taking advantage of their own wrong,' petitions on ground of cruelty or desertion,' and so on so forth. Resentment against this so-called de-humanizing trend is aired in such catch words currently in fashion as "People are people, not things !" I am a person, not a robot, a sterotype , a role !"

In our submission, however, de-personalization, and the consequent de-humanization, and all that, are not the result of categorization or grouping,[58] which is characteristic of the abstract legal order. This may be readily realized through a common place experience. For instance, how do we recognize in a crow that she is Miss "X" ? If we were to recapitulate and recount the various steps of our mental separation process, wouldn't we identify "X", perhaps first as a "female" as distinguished from a "male", and then, an "adult" from a "child", "fair complexioned" from "wheatish", "thin" from fat", "bearing certain mannerism" ?—all these atomised characteristics eventually lead us to place her as Miss "X". Although these perceptions take place in quick succession, and almost in an indistinguishable manner, nevertheless, each perception, or, more precisely, each set of perceptions, distinct from the others, leads to progressive individualization. Similarly in the realm of law, the avid purpose of resorting to grouping and classification in the plan of formal normative rules is really to identify the social problem in the first instance with greater articulalion, objectivity and certainty, and then, through the continuing creative judicial process—the process of judicious application of those rules—to render the individualized justice.

In practice, however, often it is noticed, particularly at the level of the lower courts, that, the formal adversary procedure tends to foreclose future developments of the existing social order, giving rise to a feeling of robotization and dehumanization. Perhaps, this is some what naturally to be expected in an hierarchical order of judicial system wherein each court is obsessed by the feeling of 'being bound' by the decision of the higher courts. This feeling is accentuated by such statutory provisions as in Section 23 of the Hindu Marriage Act 1955,

57. *Ibid.*

directing the court that it shall grant relief *only* if it is satisfied that there exists a legal ground, "but not otherwise."

B. *Formal Adversary Procedure : Many Modes of its Adaptations*

As we progressively move from the lower to the higher courts, the adversary feeling of being bound by reason of *authority* becomes rarified and eventually replaced by the feeling of being bound by authority of *reason*. At the level of the highest court, there is maximum opportunity for judicial creativity. Normally, our higher courts—the courts of records—by applying the normative rules creatively, do overcome very many trappings of the formal adversary procedure. To show how they do it, considering a marital conflict problems in a few concrete cases would be better than any number of expositions.

Under the Code of Criminal Procedure 1898,[59] if a husband refused or neglected to maintain his wife, a Criminal Court had jurisdiction to make an order upon the husband for her maintenance. Since cruelty as such was not a ground for separate maintenance, the court was said to have no jurisdiction to make an order even if the husband treated her with cruelty. This limiting effect of the formal rules was made to yield by the Division Bench of a Superior Court by observing creatively.[60]

> "(T)hat is a very different thing from holding that no evidence of cruelty can be admitted in a proceeding under the section 488 to prove, not indeed cruelty as ground for separate maintenance, but the conduct and acts of the husband from which the Court may draw the *inference* of neglect or refusal to maintain the wife. A neglect or refusal by the husband to maintain his wife may be by words or by conduct. It may be express or implied. If there is evidence of cruelty on the part of the husband towards his wife from which, with other evidence as to surrounding circumstances, the Court can *presume* neglect or refusal, we do not see why it should be excluded. There is nothing in S. 488 to warrant its exclusion...."

58 *See* generally author's paper, "Isn't Law Rising from Dogmatic Slumber !", *Banaras Law Journal*, 1979, 56.

59. No. 5 of 1898, Section 488.

60. See *Bhikaji Maneckji* v. *Maneckji Mancherji*, (1907) 5 Cr. L. J. 334. (*Emphasis added*)

This approach was subsequently formalised by the Legislature, which expressely enabled the courts to make an order of maintenance where neglect or refusal was proved, even if the husband was willing to maintain the wife, provided the court found that there was "just ground" for passing such an order. The provision was construed to give a wider discretion to the court; meaning thereby that, "in passing such an order it is legitimate for it to take into account the relations between the husband and the wife, and (especially) the husband's conduct towards her."[61]

Very recently, the highest court of the land "fully" endorsed this "pragmatic" approach,[62] particularly in evolving the concept of "just ground".[63] The Supreme Court even seems to induce all the courts that they should apply the formal legal norms creatively when it ruefully observes : "it is rather unfortunate that subsequent decisions have not noticed this important principle of law (evolved in 1906)," which was both "prophetic and pragmatic."[64]

To put it generally, the question that keeps on coming before the superior courts in this respect is, what constitutes the 'just ground' enabling the wife to claim separate maintenance. Speaking specifically, what is that concept of cruelty which falls within the ambit of 'just ground' ? Still more concretely, whether the physical incapacity of a husband to cohabit with his wife constitutes mental cruelty to her. This marital conflict problem was answered in the negative earlier,[65] because it could not be said that "this inability (to cohabit) amounted *intentionally* to disregarding, slighting, disrespecting or carelessly and heedlessly treating his wife." In that view of the matter, it was opined that, since the element of neglect as envisaged under the relevant provisions of the Code of Criminal Procedure relating to maintenance,[67] the wife could not be held entitled to claim separate maintenance.[68] This view has now been repudiated by the Supreme Court in *Sirajmohmedkhan*.[69]

61. *Ibid.*

62. See *Sirajmohmedkhan* v. *Hafizunnisa Yashinkhan*, A. I. R. 1981 S. C. 1972, paras 24 and 25, at 1978 (*per* S. Murtaza Fazel Ali and A. P. Sen, JJ). (Hereinafter simply cited *Siraj*)

63. *Ibid.*

64. *Ibid.*

65. See *Bundoo* v. *Smt Mohrul Nisa*, 1978 Cr. L. J. 1661 (All.), *per* Bakshi, J.

66. *Id*, at 1963 (*Emphasis added*)

67. See *Supra*, note 59

68. *Supra*, note 65.

69. *Supra*, note 62.

Commenting specifically on this view, the Summit Court said that the learned Judge "seems to have been influenced more by the concept of neglect rather than by the reasonableness of the ground on which the refusal of the wife was based,"[70] To resolve marital conflict problems in to-day's society on the basis of *intentional* neglect is to proceed, the Supreme Court said deprecatingly. "on a totally wrong assumption."[71] Such a judicial processing of the marital conflict problems would be reflective of "a most outmoded and antiquated approach."[72] "....After International Year of Women when all the important countries of the world are trying to give the fair sex their rightful place in society and are breaking the old shackles and bondage in which they were involved it is difficult to accept a contention that the salutary provisons of the Code are merely meant to provide a wife merely with food, clothing and lodging as if she is only a chattel and has to depend on the sweet will and mercy of the husband...."[73]

In this pragmatic approach of the Supreme Court, we discern two important developments. One, the emphasis has rightly shifted from the *acts* of a spouse to the *effects* of those acts on the other spouse.[74] Secondly, the provision of separate maintenance is to be seen, not merely as a maintenance allowance *simpliciter* but,[75] more as an attempt

70. *Id.*, para 7, at 1974-75.
71 *Id* , para 7, at 1974.
72. *Ibid.*
73. *Id.*, para 14, at 1976.
74. *Id.*, para 21, at 1977 : "..The matter deserves serious attention from the point of view of the wife..who is forced or compelled to live a life of celibacy while staying with her husband who is unable to have a sexual relationship with her...."
75. *Cf. Arunchala* v. *Anandaymmal*, A. I. R. 1933 Nag. 688 (1), *per*, Burn, J. : "I cannot see Section 488, Criminal P. C has anything to do with ordinary conjugal rights ; it deals with 'maintenance' only and I see no reason why maintenance should be supposed to include anything more than appropriate food, clothing and lodging." The Madras High Court in *Jaggavarapu Basawamma* v. *Jaggavarapu Seeta Reddi*, A. I. R. 1922 Mad. 209 (*per* Kumaraswami, Sastri, J) also saw the problem of maintenance quite apart from the conjugal relationship It opined that food and clothing were sufficient for the maintenance of the wife, and even if the husband refused to cohabit, that would not provide any cause of action to the wife to claim separate maintenance Likewise, the Kerala High Court in *Velayudhan* v. *Sukmari*, 1971 Ker. L T. 443, seems to hold that failure of the husband to perform marital duties is no ground for the wife to claim separate maintenance so long maintenance is provided by the husband otherwise

(howsoever meagre that attempt may be) to enable the aggrieved wife to vindicate and maintain her dignity. In these developments, we find a high order of judicial creativity, which has enabled the Supreme Court to state that "the fundamental basis of the ground of maintenance under S. 488 is conjugal relationship and once conjugal relationship is divorced from the ambit of this special provision, the very purpose and setting of the statutory provision vanished...."[76] In the totality of the conjugal relationship, as is perceived in the light of the prevailing social, psychological and medical estimates, the Supreme Court held that, if owing to the husband's impotency, the wife is forced or compelled to live a life of celibacy, that would *ipso facto* amount to "mental cruelty."[77] "detrimental to the health of the woman,"[78] "which would undoubtedly be a just ground for the wife's refusal to live with her husband and the wife would be entitled to maintenance from her husband according to his means."[79] "In these circumstances, therefore," the court stated somewhat apologetically, "it would be pusillanimous to ignore such a valuable safeguard which has been provided by the legislature to a neglected wife (now under the second proviso of sub-section (3) of Section 125 of Cr. P. C. 1973)."[80]

Within the confines of the formal adversary procedure, legitimate adaptation of the normative rules to the ever changing context is often made by drawing parallels through comparative approach. In *Sirajmohmedkhan*, for instance, for bringing 'impotency' within the ambit of 'cruelty' by de-emphasizing 'intention' as its essential element,[81] our Supreme Court drew support from the statement of Lord Denning in *Sheldon* v. *Sheldon* :[82]

"I rest my judgment on the ground that he has persistently, without the least excuse, refused her sexual intercourse for six

76. *Sirajmohmedkhan*, para 12, at 1975. For this proposition, Supreme Court derived support from the observations of Mahmood, J. in *In the Matter of the Petition of Din Muhammad* (1833) 1. L. R. 5 All. 225 : "The whole Chapter XLI, Criminal Procedure Code, so far as it relates to the maintenance of wives, contemplates the existence of the conjugal relation as a condition precedent to an order of maintenance...."
77. *Id.*, para 34, at 1980
78. *Id.*, para 21, at 1977.
79. *Id* , para 34, at 1980.
80. *Ibid.*
81. *Id* , para 33, at 1980.
82. (1966) 2 All E. R. 257.

years. It has broken down her health. I do not think that she was called on to endure it any longer.

It has been said that, if abstinence from inter-course causing ill-health can be held to be cruelty, so should desertion simpliciter leading to the same result."

Procedurally, liberal construction of remedial statutes is another mode of matching marital problems. This approach bears the sanction of the Supreme Court[83] in its approval of the categorical statement :[84]

"In advancement of a remedial statute, everything is to be done that can be done consistently with a construction of it, *even though it may be necessary to extend enacting words beyond their natural import and effect.*" (*Emphasis added*)

This is usually done through widening the ambit of the established conceptions by drawing inferences, making presumptions, treating the enumerated grounds not exhaustive, amplifying the object of a statute, but, be it noted, all on the plea of conforming to the realities of life. A few of these may be illustrated through the manipulation of a proviso, added to the maintenance provisions contained in Section 488 of the Cr. P. C. by the Amending Act of 1949,[85] which is extracted as follows :

"If a husband contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him."[86]

In the light of this proviso, whether it would be a *just ground* for the wife's refusal to live with her impotent husband without being deprived of her maintenance was also a question that specifically came up before the Supreme Court in *Sirajmohmedkhan*. It was answered in the affirmative.

On one count the Court observed that, because the very object of introducing this provision was clearly to widen the scope and ambit of 'just ground", therefore, "(t)his provision is not exhaustive but purely illustrative and self-explanatory and takes within its fold not only the two instances mentioned therein but other circumstances of a like or

83. *Sirajmohmedkhan*, para 29, at 1979.
84. *Per* Roy, J., in Sm. Panchi v. *Ram Prasad* A. I. R. 1956 All. 41, at, 42.
85. The Code of Criminal Procedure (Amendment) Act, No. 9 of 1949.
86. Presently, this provision exists as an Explanation to the second proviso to sub-section (3) of S. 125 of Cr. P. C 1973.

similar nature which may be regarded by the Magistrate as a just ground by the wife for refusing to live with her husband under the Code."[87] And, the impotency of the husband is certainly not excluded,[88] even if the marriage would have been contracted before the incorporation of the said proviso.[89] Secondly, the same result is reached *via* the concept of mental cruelty. This has been done by the Supreme Court by emphasizing that the 1949-Amendment clearly intended" to put an end to an unsatisfactory state of law utterly inconsistent with the progressive ideas of the status and emancipation of women, in which women were subjected to a mental cruelty of living with a husband who had taken a second wife or a mistress on the pain of being deprived of any maintenance if they chose to live separately from such a husband."[90] But the concept of mental cruelty bears the same attributes under different laws,[91] whether it is a civil case or whether it is a criminal case.[92] It takes within its sweep "all other (similar) circumstances . not excluding the impotency of the husband."[93] Thirdly, once cruelty of the nature which compels a wife to live separate and apart from her husband is established, then, even quite independently of the added proviso, the husband "must be *deemed* to have deserted her, and she will be entitled to separate maintenance and residence."[94] All these are only a few instances to show how the Indian courts are attempting to resolve marital conflict problems within the confines of formal adversary procedure.

87. *Sirajmohmedkhan*, para 18, at 1977.
88 *Id.*, para 20, at 1977.
89. This is on the analogy of the statement of Dixit, J., in *Gunni* v. *Babu*, A. I. R. 1952 Madh. Bha. 131, at 133 (approved by the Supreme Court in *Sirajmohmedkhan*, para 27, at 1978) : "....In my view to hold that the amendment is intented to afford a just ground for the wife's refusal to live with her husband only in those cases where he has, after the amendment, taken a second wife or a mistress, is to defeat in a large measure the very object of the amendment."
90 *Sirajmohmedkhau*, para 28, at 1979. Before the 1949-Amendment, the fact of the husband's marrying a second wife or keeping a mistress was not, by some High Courts, considered a just ground for the first wife's refusal to live with him, although it was taken into account in considering whether the husband's offer to maintain his first wife was really bonafide or not. See *per* Fazal Ali, J., in *Mst. Biro* v. *Behari Lal*, A. I. R. 1958 J. & K. 47, at 49.
91. *Sirajmohmedkhan*, para 6, at 1974.
92. *Id.*, para 21, at 1977.
93 *Id.*, para 20, at 1977.
94. *Id* , para 26, at 1978, citing with approval *Bai Appibai* v. *Khimji*, A. I. R. 1936 Bom. 138

C. *Formal Adversary Procedure : It Needs to be Reinforced*

In certain important respects, the courts in India have miserably failed to break through the confines of the formal adversary procedure. A telling example of this experience is reflected in the dispensation of the principle of irretrievable breakdown of marriage. Currently, this principle revolves around the remedies of restitution of conjugal rights and judicial separation under Section 13 (1A),[95] read with Section 23 (1) (a) [96] of the Hindu Marriage Act 1955. In this respect, the law is said to be "settled beyond doubt" by the decision of the Supreme Court in *Dharmendra Kumar* v. *Usha Kumar* (1977);[97] the decisions of the various High Courts, particularly the later ones, are purported to be a mere repository of the spirit of the summit court's decision.[98] To cut short the unseemly discussion, the context as well as application of the Supreme Court decision in *Dharmendra* has been objectified by us through a contrived monologus (A matrimonial lawyer is advising a prospective petitioner for divorce).[99]

'In the course of matrimonial collision should you desire to dissolve your marriage, you must ask in the very first instance

95. It provides that *either* party to a marriage may present a petition for the dissolution of the marriage by a decree of divorce on the ground—
(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties "

96. It stipulates that, in any proceeding under this Act, whether defended or not, if the Court is satisfied that, inter alia, "(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief."

97. A. I. R. 1977 S. C. 2218, *per* A. C. Gupta, and S. Murtaza Fazal Ali, JJ. (Hereinafter cited as *Dharmendra*)

98. Of constitutional necessity, it has to be so, because the law declared by the Supreme court is binding on all the courts in India under Article *141* of the Constitution.

99 See author's paper, "The Principle of Irretrivable Breakdown of Marriage: Its Indian Perspective and Dispensation," presented at the All-India Seminar on *Women and the Law*, organized by the Indian Council of Family Welfare in New Delhi on October 17-18, 1981. See A. I. R. 1982 Journal 82-86.

for the relief of restitution of conjugal rights. Don't be alarmed at my mentioning of *restitution*, because, to your delightful dismay, you would discover that the very purpose of this remedial relief has undergone a drastic change ! If you care to know a little bit of matrimonial law, and the law is what the courts say it is, I may tell you that this remedy of *restitution*, to all intents and purposes, is now rarely reared for reconciliation, implying resumption of cohabitation; but for doing just the opposite. Believe me in all sincerity. Never mind the insincerity of your own thoughts and actions, because that is not what really matters in the matrimonial law as it stands to-day. Yes, coming to brass tacks, by obtaining the decree of restitution of conjugal rights, half of the matrimonial battle is already won : you have enlisted the court's support on your side. This support is indeed invaluable. Not merely morally; I mean *financially*. With this support, you may rightfully defeat any maintenance move of your adversary spouse. But here at this point, I must warn you against yielding to the temptations of matrimony, which would indeed be many. In the light of my enormous experience in successfully handling the matrimonial disputes leading to divorce, I forewarn you that there would be many attempts by the other party to comply with the decree of restitution of conjugal rights, either by writing several registered letters to you, or *otherwise* inviting you to cohabitation. You should not be foolish enough to accept any such offer. Bear always in mind that, that was not the purpose for which you have sought the decree. You may receive some of the letters if you so fancy ; but never reply to any one of them, evincing any such stupid desire as to resume cohabitation.

Assumingly, you have reached thus far. But don't think that the divorce decree has become yours. There still remain many a statutory stake, requiring a really competent person (like me) to prove not only that "any of the grounds for granting relief exists," but also that "the petitioner....is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief." Proving this to the court's satisfaction is not an easy task. It is indeed an highly technical one, and—and—and it is for this you have to pay me handsomely. And, by this time you ought to know very well that, everything is handsome about him who does handsome things.....God be with you.'

C. *Formal Adversary Procedure : It Needs to be Reinforced*

In certain important respects, the courts in India have miserably failed to break through the confines of the formal adversary procedure. A telling example of this experience is reflected in the dispensation of the principle of irretrievable breakdown of marriage. Currently, this principle revolves around the remedies of restitution of conjugal rights and judicial separation under Section 13 (1A),[95] read with Section 23 (1) (a) [96] of the Hindu Marriage Act 1955. In this respect, the law is said to be "settled beyond doubt" by the decision of the Supreme Court in *Dharmendra Kumar* v. *Usha Kumar* (1977);[97] the decisions of the various High Courts, particularly the later ones, are purported to be a mere repository of the spirit of the summit court's decision.[98] To cut short the unseemly discussion, the context as well as application of the Supreme Court decision in *Dharmendra* has been objectified by us through a contrived monologus (A matrimonial lawyer is advising a prospective petitioner for divorce).[99]

'In the course of matrimonial collision should you desire to dissolve your marriage, you must ask in the very first instance

95. It provides that *either* party to a marriage may present a petition for the dissolution of the marriage by a decree of divorce on the ground—
(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties "

96. It stipulates that, in any proceeding under this Act, whether defended or not, if the Court is satisfied that, inter alia, "(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief."

97. A. I. R. 1977 S. C. 2218, *per* A. C. Gupta, and S. Murtaza Fazal Ali, JJ. (Hereinafter cited as *Dharmendra*)

98. Of constitutional necessity, it has to be so, because the law declared by the Supreme court is binding on all the courts in India under Article 141 of the Constitution.

99 See author's paper, "The Principle of Irretrivable Breakdown of Marriage: Its Indian Perspective and Dispensation," presented at the All-India Seminar on *Women and the Law*, organized by the Indian Council of Family Welfare in New Delhi on October 17-18, 1981. See A. I. R. 1982 Journal 82-86.

for the relief of restitution of conjugal rights. Don't be alarmed at my mentioning of *restitution*, because, to your delightful dismay, you would discover that the very purpose of this remedial relief has undergone a drastic change ! If you care to know a little bit of matrimonial law, and the law is what the courts say it is, I may tell you that this remedy of *restitution*, to all intents and purposes, is now rarely reared for reconciliation, implying resumption of cohabitation; but for doing just the opposite. Believe me in all sincerity. Never mind the insincerity of your own thoughts and actions, because that is not what really matters in the matrimonial law as it stands to-day. Yes, coming to brass tacks, by obtaining the decree of restitution of conjugal rights, half of the matrimonial battle is already won : you have enlisted the court's support on your side. This support is indeed invaluable. Not merely morally; I mean *financially*. With this support, you may rightfully defeat any maintenance move of your adversary spouse. But here at this point, I must warn you against yielding to the temptations of matrimony, which would indeed be many. In the light of my enormous experience in successfully handling the matrimonial disputes leading to divorce, I forewarn you that there would be many attempts by the other party to comply with the decree of restitution of conjugal rights, either by writing several registered letters to you, or *otherwise* inviting you to cohabitation. You should not be foolish enough to accept any such offer. Bear always in mind that, that was not the purpose for which you have sought the decree. You may receive some of the letters if you so fancy ; but never reply to any one of them, evincing any such stupid desire as to resume cohabitation.

Assumingly, you have reached thus far. But don't think that the divorce decree has become yours. There still remain many a statutory stake, requiring a really competent person (like me) to prove not only that "any of the grounds for granting relief exists," but also that "the petitioner....is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief." Proving this to the court's satisfaction is not an easy task. It is indeed an highly technical one, and—and—and it is for this you have to pay me handsomely. And, by this time you ought to know very well that, everything is handsome about him who does handsome things.....God be with you.'

a Judge, who is called upon to resolve marital conflict problems, should be, by training as well as by inclination, not only well versed in the legislative policy as reflected in the specific provisions of a matrimonial statue but also, a keen observer of human relationship so as to be able to apply those provisions creatively.

IV From Formal to Non-formal Adversary Procedure

In the judicial adaptation of the formal adversary procedure to meet the marital conflict problems through the mechanics of analogies, liberal constructions, engrafting presumptions, drawing inferences, and the like, we are indeed moving, not towards non-adversary procedure but, toward non-formal adversary procedure. Conferment of the wider discretion on the courts by the Legislature, through such means as the introduction of residuary clause,[110] and the leaving of the 'justness' or 'reasorableness' of matrimonial grounds to the cours.[111] Supports our

annulment of such a viodable marriage under Section 12 of the Hindu Marriage Act. This was the solitary question that arose in this case under Cl. 10 of the Letters Patent.

The clear import of the provisions relating to condonation (Section 23 (1) (b) of the Hindu Marriage Act), as has been rightly pointed out by the Division Bench of the High Court, is that, "there has to be a conscious and deliberate condonation and a full ratification of the matrimonial status, which alone would amount to a bar against challenging a marriage which otherwise is vitiated by force or fraud." (*Id.*, para 8, at 393. "In other words, both the physical and the mental requirements must concur to ratify a marriage which intrinsically is not valid." *Ibid.* Against this categorical requirement, the learned single Judge, whose decision became the subject of appeal, held that, "even a single act of cohabitation after the discovery of fraud would be a good ground for dismissal of the petition for nullity of marriage," *per* R. N. Mittal, J., in A. I. R. 1979 P. & H. 248.

110. For instance, in Section 18 (2) of the Hindu Adoptions and Maintenance Act of 1956, after enumerating specifically the grounds on which a wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance, the Legislature has included a residuary clause (g) which provides : "if there is any other cause justifying her living separately."

111. Section 9 of the Hindu Marriage Act 1955 (providing for the remedy of restitution of conjugal rights), for example, after the repeal of its sub-section (2) by the Amending Act No. 68 of 1976, leaves the determination of what is not a "reasonable excuse" for withdrawal of one spouse from the society of the other to the courts. The repealed provision provided : "Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce." This merely meant that "reasonable excuse" in sub-section (1) of Section 9 was to be strictly construed only in terms of its sub-section (2).

surmise. In this respect, the proposed induction of the irretrievable breakdown of marriage as a ground for divorce[112] is a step further in the direction of non-formality. It should facilitate the viewing of marital conflict problems far beyond the confines of formal adversary procedure in the totality of conjugal relationship. In my understanding, the breakdown principle is not as simple as it seems to be. It is a principle which reflects a search for ponderables not in superficially perceived actions, but in complexity. I lay stress again on *complexity* because all that we have discovered about man through ages (and we are discovering anew through the new shafts of light) that the human being is incredibly complex. It is a principle which implies that the problems involving human relations cannot be justly answered either through a simple formal adversary procedure, or by acting on the utterly untenable premise that such an intimate relationship as marriage is merely a "coalation,"[113] or that it is possible to pronounce it dead without even a diagnosis.[114] Certainly, its purpose is not to make divorce easy.[115] lest the remedy of divorce should itself become the cause of divorce. Being preocupied with judging the marriage itself rather than merely apporting the fault of the spouses, the concomitant conditions of the breakdown principle are most conducive to reconciliation. In this respect, we had the occasion to observe elsewhere :[116]

112. *See* the Bill, which is currently pending before the Parliament for incorporating irretrievable breakdown of marriage as a ground of divorce on the basis of Law Commission's 71st Report (hereinafter simply cited as *Report*). For critical appraisal of the *Report*, see author's paper, "Dynamics of Marital Reconciliation in Divorce Litigation under Hindu Law," *Panjab University Law Review*, vol. XXX, 1978, 38, at 47-50.

113. *Cf Report*, para 4.2 : ".... Because of the rising rate of female activity, the family unit is more of a coalition. It is, therefore, necessary that if the coalition cannot be worked, the legal sanction for it must be withdrawn."

114. *Cf. Report*, paras 1.5, 2.5, 2.7, 3.2, particularly the last one, in which it is stated : ".... Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. .... The parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation...."

115. *Cf. Report*, para 1.3 : ".. It is further pointed out that the Muslim, Christian and Parsee marriage laws allow divorce more easily than the Hindu law..... (T)he Hindu law of divorce should be liberalised and brought in conformity with the modern trends in Europe and elsewhere...."

116. See author's paper, *Dynamics*, *supra* note 112, at 46.

> "Attempt in this theory is to find out whether the marriage in question has simply broken down, or whether its break-down is also irretrievable. It would indeed be a seriously mistaken matter if the determination of this forensic examination were to be based on the simple declaration of the spouses caught in marital conflict. That would simply be a dissolution of marriage on *pure* mutual consent—a ground which has been tested, tried, and abandoned in Soviet Russia, obviously for reasons, that it takes little note of public interest, for the protection of which the whole court machinery is interjected. Mind you, the determination of this question is coterminous with the responsibility of the judicial order to reconcile the spouses as far as possible, because the institution of marriage is indisputably worth preserving. If that is so, shouldn't we say that the court's pronouncement, whether the marriage is alive or dead, would be an index of the success or failure not of the parties alone but of the whole legal order ?

The realization of the new responsibility of the legal order has given birth to the modern concept of the Family Court, which functions in a manner "that it may tend to conserve and not to disserve the family life; that it may be constructive and not destructive of marriage; that it may be helpful, not harmful to the individual partners and their children; and that it may be preservative rather than punitive of marriage and family."[117] Our Law Commission in its Fifty-fourth Report on the Civil Procedure Code alludes to this concept when it is stressed that, as far as possible, an integrated broad based service to families in trouble, should become a part of the court system; existing court structure should be so organized that one single court should deal with the problem of preserving families, and the conventional procedure dominated by the adversary litigation system may not be appropriate for disputes concerning the family.[118] In short, from the separate special Family Court we expect a broad based integrated service to spouses in marital conflict. Such a court is manned, not by a Judge who is unconnected, unconcerned, uninformed, formal judicial officer, deciding only on the basis of what is formally presented before him but, by a special committed and concerned Judge who informally goes beyond the confines of formal adversary procedure in order to put the

117. The statement within quotes is from the 1954—Report of the Special Committee of the Association of Bar of the City of New York.

118. *See* Chapter 32 A,

problem in its proper perspective. In our moving from formal to non-formal, it is not suggested to devalue the role of adversary procedure, because still it remains a valuable process of looking at the marital problem from atleast two opposite angles,[119] which sharpens the focus of our value judgment. Its purpose is not to embitter or embolden the conflict; that would simply be a misuse of the adversary process. Nor is it our suggestion to dispense with the *formal* normative rules; they are indeed our signposts revealing the direction to proceed. What we mean to emphasize is that, we have not to stay put at the formal rules but go ahead in the direction beyond them. Considered thus, we may describe the formal rules as the grammar of identification of the societal problems.

Very often, the new grounds that have been explored and developed by the courts through the non-formal adversary procedure are subsequently formalized by the Legislature. At times, the legislative formalisation gives rise to the feeling of liberalisation of grounds. For instance, on this count, it is said, in our submission quite mistakingly, that, the purpose of irretrievable breakdown of marriage as a ground of divorce is to liberalise divorce,[120] as if it were a return to the state of nature where there were no rules regulating the spousal relationship. In my own view, the so-called liberalisation of divorce grounds is, in reality, a silent and steady attempt to *distill* the grounds whereby the quality of human relationship is improved. However, for maintaining the process of distillation, continuing critique of the corpus of family law is a *sine qua non*.

119. It should remain an adversary procedure to the extent that one party, called petitioner, has to come to the court and allege that the marriage with the other spouse has broken down. In support of his contention, he is also obliged to appraise the court of the fact from which breakdown of marriage could be presumed. This presumption can, however, be rebutted by the other spouse. The court is also, on its part, bound by the duty to rule out collusion, connivance, etc. All these are characteristics of the adversary procedure

120. *See supra*, notes 114 and 115, and the accompanying text.

CENTRE STATE RELATIONS : SOME TENSION AREAS IN ADMINISTRATIVE RELATIONS

ALICE JACOB*

India represents a plural society in which a variety of ethnic, linguistic and religious groups coexist in terms of varying cooperation and competition. Consequently, the Founding Fathers of the Indian Constitution, taking the Government of India Act, 1935 as the base, carved out a Constitution which is federal with two levels of Government, the Centre and the State operating on the people. The true nature of federalism in the Constitution has been a matter of debate among scholars. It is not proposed to go into those differing views. On the other hand, it is suggested that there is no absolute federal principle in any of the world's federal constitutions. A cursery examination of the federal constitutions of the world would reveal how much they differ in numerous features and how difficult it is to find in them a common thread which can be characterised as the basic features on federalism. As has been appropriately said, "If there is such a thing as a strict, pure and unqualified federal principle, then the hard fact is that there are no federations and no federal constitutions".[1] The Founding Fathers in fashioning the Constitution were not obsessed with any abstract federal design or dogma but gave to the country an instrument which is workable and meets the diverse needs of the country with different cultures. Undoubtedly, there is a conscious tilt in favour of the Centre. The main purpose was to create a strong Central Government which would unify the country into a homogenous nation out of the various religious and linguistic groups. Partition of the country had left its scars on the process of constitution-making. In the words of Dr. Ambedkar "the aim was to create a Constitution which would be unitary or federal according to the exigencies of the situation".[2]

*B. A., LL. B. (Poona), LL. M. (Delhi), LL. M., J. S. D., (Yale) Research Professor, Indian Law Institute, New Delhi

1. K. H, Bailey, *Summary Report of Proceedings—International Legal Conference*, New Delhi, 1953-54, p. 29 quoted in M. C. Setalwad, *The Indian Constitution*, 1950-1965, 1 67. 5.
2. VII *Constituent Assembly Debates* 33-4. *See* also Austin, *The Indian Constitution; Cornerstone of a Nation*, 1966, 186-16,

However, the operation of oentre-state relation in the decades following the coming into force of the Constitution has vividly brought to light certain tension areas. It is proposed to highlight two such areas : one is the role of Governor-relationship with the Central Government and the other, the use of para-military forces by the Centre in the States.

Role of Governor-Relationship with the Central Government

The initial fifteen years after the Constitution came into force saw hardly any controversy about the status, role and functions of the Governors. It was only since the Fourth General Elections in 1967 that the role of Governor became a matter of public debate and the institution of Governor has been subjected to increasing stresses and strains not anticipated at the time of the framing of the Constitution.

Each state in India has a Governor and as per Article 154 all exclusive powers are vested in him. These powers are to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Article 156 though the Governor holds office during the pleasure of President the period is for a term of five years. Article 108 provides for a Council of Ministers with the Chief Minister at its head to aid and advise the Governor in the exercise of his functions except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion. Under Article 164 the Chief Minister has to be appointed by the Governor and other Ministers have to be appointed by the Governor on the advice of the Chief Minister. The Council of Ministers has to be collectively responsible to the legislative assembly of the State. Article 166 lays down that all executive action of the Government of a State is to be expressed to be taken in the name of the Governor. The Governor under Article 168 forms a part of the legislature. He summons from time to time one or both houses of the Legislature and he has also the power to prorogue the legislature and dissolve it. He may address the legislature. Where a bill has been passed by the legislature, it has to be presented to the Governor and the Governor shall declare either that he assents to the Bill or he withold assent there from or that he reserves the Bill for the consideration of the President.

Under Article 356 which forms part of the emergency provisions of the Constitution, the Governor is required to send a report to the President about the failure of constitutional machinery in the states.

On the report of the Governor the President may assume to himself all or any of the functions of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the legislature of the State.

Our Constitution-makers felt that the Gevernor should be a bridge between the Centre and the States but not at the cost of the representative Government in the State) a task which is enjoined upon his office as much from the discussion in the Constituent Assembly as by the written provisions which are found in Article 355 which expects of him to "ensure that the Government of every State is carried on in accordance with the provisions of this Constitution".

The same sentiments were echoed by the Administrative Reforms Commission (ARC) set up to review centre-state relations in 1960 :

> The Governor functions for most purposes, as a part of the state apparatus, but he is meant, at the same time, to be a link with the Centre. This link and his responsibility to the Centre flows out of the Constitution mainly because of the provisions that he is appointed and dismissed, by the President....The Constitution thus specifically provides for a departure from the strict federal principle and it is relevant to observe that this departure is not fortuitous or casual...It is clear, therefore, that the Constitution-makers did not intend the Governor to be only a component in the apparatus of Governance at the state level. They meant him also to be an important link with Centre.[2a]

This means that the Governor has to act in a dual capacity, as a constitutional head of the state as well as a representative of the Centre. This duality of role is an important and unusual feature of the Constitution which makes the role of the Governor really a very difficult one. The ARC commenting on the dual role said, "The holder of this office is not required to be an inert cypher and that his character, calibre and experience must be of an order that enables him to discharge with skill and detatchment his dual responsibility towards the centre and towards the state executive of which he is the constitutional head .....It would be wrong to emphasise one aspect of the character of his role at the expense of the other and successful discharge of his role depends on correctly interpreting the scope and limits of both."[3]

2a. Vol. I, *Report of the Administrative Reforms Commission*, (1967) 272-273.
3. *Ibid.* at 272.

In *Hargovind* v. *Raghukul*[4] the Supreme Court speaking through Bhagwati J. said that the office of Governor was not an employment under the Government of India and it did not come within the prohibition of Article 319 (d) of the Constitution (Prohibition of re-employment for members of the state public service commission). Rejecting that the Governor is under the control of the Government of India, Justice Bhagwati said :

> [Governor's] office is not subordinate or subservient to the Government of India. He is not amenable to the directions of the Govt. of India, nor is he accountable to them for the manner in which he carries out his functions and duties. He is an independent constitutional office which is not subject to the control of the Government of India. He is constitutionally the head of the State in whom is vested the executive power of the state and without whose assent there can be no legislation in exercise of the legislative power of the State.[5]

In the area of centre-state relationship the Governor has been given specifically two functions by the Constitution where he is to act in his own discretion. One, under Article 200 the Governor can reserve a state Bill passed by the state legislature for the consideration of the President. Here the role of the Governor in centre-state relations is a crucial factor. The Constitution nowhere requires that the Governor in making such a reference act on the advice of his Council of Ministers. As mentioned earlier the Governor has a dual role as the constitutional head of the state as well as a nominee of the central government. In the past it has been the practice that with the few exceptions, all the Governors have been selected from the ranks of the political party in power at the Centre and frequently politicians defeated at the polls were given the safe haven of gubernatorial posts. Though the Governors are supposed to be politically non-aligned, they remain basically partymen watching the political developments in their states. In such a situation they may not heed to the advice of their state Council of Ministers about referring to the President state legislation prejudicial to the party.

The question may arise as to whether a Governor can reserve a Bill for the assent of the President when such reservation is advised

4. A. I. R. 1979 S. C. 1109.
5. *Id.* at 1113.

against by the state cabinet.[6] This issues gains added significance in situations where some states are controlled by parties in opposition to the party in power at the Centre. This issue whether the Governor can reserve a Bill for Presidential assent when advised against by the State Government has to be examined from dual role of the Governor. The Governor as the nominee of the Centre has to fulfil certain obligations. Consequently it may be reasonable to presume that he can exercise his personal discretion, irrespective of the advice of the state government, in referring a Bill to the President. No norms have been laid down by the Constitution for the exercise of discretion by the Governor in this matter. However, in the interest of amicable centre-state relations, the Governor should exercise his discretion only in exceptional cases when in his independent judgement he feels that the Bill will be against the larger interests of the relevant state or the country as a whole or if in his opinion an important federal or political question is involved.

Secondly, under article 356 the Governor can make a report to the President recommending presidential rule due to the failure of constitutional machinery in the state. In this matter the Governor acts in his own discretion without the Council of Ministers. He acts as the representative of the Centre. Since the coming into force of the Constitution, President's rule has been imposed on the states over seventy times and this has been normally on the reports of the Governor. A survey of the manner in which the Presidential rule has been imposed in the states on the reports of the Governor leads to the impression that the Governors have not often acted in a neutral and non-partisan manner but have acted to serve the political ends of the party to which they owed their allegiance.[7] In situations where Governors sought to

6. It is not very sure whether the Kerala Education Bill initiated by the Marxist Government in Kerala in 1959 was reserved to the President on the advice of the state government or of the central government. The Bill was a controversial measure and attracted much public debate in that it empowered the state to interfere with the control and management of educational institutions administered by the Christian Churches in the State. The President, however, referred the Bill to the Supreme Court for its advisory opinion under article 143 of the Indian Constitution. Subsequently the Bill was modified in the light of the Court's opinion.

   One author was of the view that the Bill was reserved presumably on the advice of the law minister of the state government. K. Santhanam, *Union-State Relations in India*, 1960, 24.

7. *See* an incisive study by Rajeev Dhavan, *President's Rule in the States*, 1977.

take an objective view of the political situation in a state. their tenure had been shortened by the Centre for political reasons. Thus, in Punjab in 1966, Governor Ujjal Singh was replaced by Dharam Vira who recommended the imposition of President's rule there three days after he was sworn in. Further, Governor Dhawan of West Bengal proceeded on leave and later resigned as Governor in 1971 well before his tenure ended. This development might have been due to the fact that he invited the Communists (the single largest minority party) to prove that they had a majority in the legislature with a view to forming a government. The functioning of the office of the Governor in independent India shows that his holding office at the pleasure of the President determines the limits of his objectivity in assessing the political and non-political developments in the state.

Should the Governor have security of tenure ? It is necessary that he should have security of tenure so that the centre cannot transfer, or induce him to resign when he acts in a non-partisan and objective manner.

The "pleasure" of the President cannot be exercised arbitrarily and capriciously. We may suggest changes in the procedure for the appointment and removal of Governors. As regards appointment, a collegium consisting of the Vice-President, the Speaker of the *Lok Sabha* and the Chief Justice of India may be asked to recommend a name out of the panel prepared by it, to the President. A recommendation so made would be subject to rejection only on specified grounds to be recorded in writing and to be replaced by another recommendation by the collegium. As regards removal of the Governor either the procedure of impeachment under article 124 or the procedure for removal of Union Public Service Commission member laid down in article 317 be followed.

The unceremonious dismissals of Patwari, Governor of Tamil Nadu and Ragukul Tilak, Governor of Rajasthan[8] and sending feelers to T. N. Singh, Governor of West Bengal and G. D. Tapase, Governor of Haryana to resign etc. do not redound to the credit of the Centre. The doctrine of pleasure vis-a-vis the Governor does not mean a licence to deal with him arbitrarily. A conscientious Governor cannot be expected to send reports pleasing to the Centre about the functioning of

8. Raghukul Titak, the former Governor of Rajasthan has referred to the feelers sent to him by the then Union Home Minister to resign and to his dismissal in an article "*On Her Majesty's Service*" in *Indian Express Magazine* May 1, 1983, p. 6.

the state government. The role of the Governors is particularly unenviable in states ruled by a party different from the ruling party at the Centre. For healthy centre-state relations in this regard, there is a need to evolve democratic norms regardless of political differences.

III

The use of Para-Military Forces by the Centre in the States

Under the constitutional division of powers between the Centre and States, maintenance of public order is the primary responsibility of the states and they have their own institutions and agencies. The states have their own police departments and they utilise their own ordinary police for the maintenance of law and order as laid down in the various state Police Acts. Besides, the ordinary police, there are the reserve police forces which are maintained on para-military lines and which are ordinarily held in reserve for use in emergent situations, in order to limit the use of the military in aid of the civil power to the greatest possible extent.

In addition to the existing police organizations of the states, the Centre has also raised certain para-military organisations such as CRPF, BSF and CISF for ensuring law and order in the states. The use of "such parallel" forces by the Centre in the states is a typical feature of the Indian federalism. The Administrative Reforms Commission had supported such use. In its report on "Centre-State Relations" it observed :

> The Central Reserve Police and the Border Security Force are armed forces raised by the Union to meet the needs of the security of the country, both external and internal. In the circumstances, the use of the armed police forces of the Union in aid of the civil power of a state is perfectly constitutional. It is also clear that such aid can be provided at the request of the state government or *suo moto*. The question whether such aid is needed must obviously be a matter of judgment by the centre.[9]

In this context it may be worthwhile to examine the role and functions of para-military forces like the CRPF, BSF and CISF.

C. R. P. F.

The Central legislature enacted the Central Reserve Police Force Act in 1949. In accordance with the rules promulgated, in particular

9. *The Report of the Administrative Reforms Commission*, 1969. p. 36.

rule 25 (a), members of the force may be employed in any part of the Indian Union for the restoration and maintenance of law and order, and for any other purpose as directed by the Central Government. Consequently the Central Government may send the CRPF to any part of the country to supplement the local police forces. Any state government may request the Centre to supplement its own police forces in the event of large-scale civil disturbances. In 1982 the strength of the CRPF was 66 battalions including 3 special peace keeping battalions now being raised.[10]

B. S. F.

The BSF was set up by the Parliamentary legislation of the Border Security Force Act, 1963. The primary functions of this force is to police and patrol the Indo-Bangla borders and to provide protection to persons and property of people against depredations from across the border, to deal with incidents of intrusions, illegal infiltrations and trans-border smuggling and to coordinate the activities of the various law and order agencies involved in the detection and prevention of crime in the border areas.

The BSF is a light infantry force well equipped with arms. Though it is primarily meant to police the borders. It has also been increasingly used in all parts of the country in aid of civil power. The present strength of the force is 79 battalions. In addition to its primary duties, it also provided assistance to civil administration in *Law and Order* duties in Assam, Andhra Pradesh, Bihar, Delhi, Kerala, Maharashtra, Punjab, Rajasthan, West Bengal and Madhya Pradesh.[11] This tendency of the Centre to use BSF has prompted a commentator to remark "It (BSF) has become an agency to suppress civil disturbances—there is hardly a major riot today that does not see the BSF induced to quell it."[12]

C. I. S. F.

The Central Industrial Security Force Act, 1968, a central statute set up the CISF to ensure the security and protection of central industrial undertakings in the states. It is under the Union Ministry of Home Affairs. It has expanded over the years from 2000 to 49,000 men, and officers currently deployed in industrial and allied complexes.

10 *The Annual Report of the Ministry of Home Affairs*, 1981-82, p 12.

11. *The Annual Report of the Ministry of Home Affairs*, 1981-82.

12. Ravi Rikhye, "*Towards a Border Range Command : New Operation for the BSF*," Vol. 4, No. 6 March, 1974, p. 34.

The members of this force are posted at important central public sector undertakings. During the year 1981, 2554 persons involved in theft of property of these undertakings were apprehended by the CISF personnel and property to the tune of Rs. 44.5 lakhs were recovered.[13]

Recently the Parliament passed a Bill for amending the Act seeking to convert the CISF into an "armed force" and vesting it with power to arrest without warrants. These extended powers of arrest aroused opposition because it would usurp the powers and functions of the normal police forces and to that extent erode the role and authority of the states in such matters.[14]

The use of these para-military organisations by the Centre in the states has in the past evoked protest and antagonism on the part of states. For instance, in 1968 the Central Government issued an ordinance to meet the threat of strike by its own employees. It also issued directions to all the states to take action under it to arrest and prosecute those central employees who had threatened to go on strike and also deployed CRPF units to meet the situation. However, the Kerala Government (Marxist government) infuriated by the Centre's despatch of CRPF to Kerala without consultation, informed the Central Government that it would maintain law and order, protect central property, but not arrest those who were instigating other employees to go on strike. The state government felt it was within its discretion to decide what action should be taken and how. The central government said that it had sent the CRPF to protect only its properties, offices and installations at the time of the proposed strike.

Subsequently a similar situation arose in West Bengal where a United Front Government organised *bandh* (strike) for a day in April 1969 to protest against the action of the CRPF which fired on a group of workers at a defence factory near Calcutta and killed a few of them. The Central Minister of Home Affairs defended the Centre's action in using CRPF for dealing with the workers' agitation.

Such use of the para-military forces by the Centre to protect law and order, an exclusive responsibility of the states, has been considered to be a serious inroad on states' autonomy. The Central Ministry of Home Affairs has assumed to itself the policing functions of the whole country. In its annual report this role comes out very clearly :

13. *See* The *Annual Report of the Ministry of Home Affairs*, 1981 82, p. 13
14. *See Statesman*, 4.5.83 also *see Indian Express*, Editorial "Arming the C. I. S F." 5.5.83.

> Though the responsibility for the maintenance of law and order rests primarily with state governments, the Ministry of Home Affairs have also a vital role to perform in the sphere. They give guidance and advice in important matters and provide assistance by arranging for deputation of extra forces either from the central reserves or from other states. The Home Ministry also help in securing arms, ammunition, wireless equipment and vehicles for the states' police forces.[15]

This is also evident from the 131st Report of the Public Accounts Committee (1973-1974) which commented on the phenomenal rise in the police budget of the Union Home Ministry.

The report reads :

> "The Committee was very much concerned over large scale and continuous increase in unproductive expenditure from Rs. 3 crores in 1950-51 to Rs. 48.27 crores in 1966-67....Rs. 130.91 crores in 1972-73 and Rs. 156.42 crores in 1974-75. This means a 52 times increase in 24 years. This is by any standard an alarming increase...
>
> The Committee are surprised that police force of such large strength should be necessary over and above the substantially large forces of the state governments who are required to do precisely the same job and are responsible for maintaining law and order. The Committee feel that the expenditure on police organizations of different kinds has been increasing at such a rapid rate that it calls for an urgent review by an independent high powered commission.

The trend of centralization in this sphere reached its apogee during the Emergency when the Constitution (Forty-Second Amendment) Act, 1976 incorporated article 257A to the Constitution empowering the Central Government to deploy any armed force of the Union or any other force subject to the control of the Union for dealing with grave situations of law and order in the states. These forces were to act in accordance with the directions of the Central Government and were not to be under the superintendence or control of the state governments. The states resented this provision vehemently which, *interalia*, found expression in the Memorandum put forth by the West Bengal Govern-

15. The *Annual Report of the Ministry of Home Affairs*, Govt. of India, 1966-67 p 38.

ment in 1977 during the Janata party Rule at the Centre. The Memorandum advocated the scrapping of article 257A. Consequently the Constitution (Fourtyfourth Amendment) Act, 1978 enacted during the Janata Rule deleted this provision with effect from June 20, 1979.

With the deletion of article 257A the *status quo ante* has been restored as regards the use of para-military forces. The Centre may have the right to send the CRPF without consultation much less concurrence of the State Government. However, it is essential to remember that for purposes of centre-state amity and coordination for the success of Centre's efforts, voluntary consultation and cooperation are to be preferred over unilateral action. Despite the recent changes in the law relating to CISF it would be both necessary and desirable that the CISF units maintain close liasion with the state police as the protection of vital installations is neither the concern of central nor state governments alone but of both.

SOME ASPECTS OF TAX HOLIDAY UNDER THE INDIAN INCOME TAX ACT*

DINESH CHANDRA UPADHYAY**

Tax holiday is a tax incentive given under Section 80I of Indian Income tax Act. This section has been enacted with a view to encourage the establishment of new industrial undertaking and the object has been sought to be achieved by granting exemption or concession from tax on a certain portion of the profits earned for the first few years of such establishment. The legislature intends to provide an incentive for expansion of trade by setting up of a new industries etc. apparently to vitalise industrial process. The tax holiday mitigates risk by permitting an earlier recovery of capital than would be possible with normal taxation and permits a higher rate of return than could be realised with full taxation. Since this scheme operates by reducing income tax liabilities that would otherwise accrue, it is more significant in a country like India, where the income tax rates are higher than in many countries. It would thus appear that to the extent business taxation is a factor influencing investment decisions, tax holiday represents a fiscal device of great economic value to the investors.

These provisions of Section 80I, like provisions in so many other sections of the Income tax Act, 1961, are replete with ambiguous words and phrases, the interpretation of which has led to constant litigation. In this article we will take up some of these "gems" and endeavour to clear a way through the cobweb of deliberate statutory ambiguity and judicial pronouncements. The tax incentive under this section is given only if the "Industrial undertaking" is not formed by the "splitting up" or the "reconstruction" of a business already in existence and it is not formed by the "transfer" to a new business of machinery or plant previously used for any purpose; moreover, it "manufactures" or "produces" articles in any part of India. These are the words and phrases which we will take up for discussion.

* This is a part of the LL. M. dissertation written under the supervision of Prof M. C. Bijawat, Law School, Banaras Hindu University, and submitted for the LL. M. degree.

** LL. M. (B. H. U.), Research Scholar, Law School, B. H. U.

Industrial Undertaking

(*a*) *Meaning* :

The Indian Income tax Act has not defined what is an undertaking or what is an industrial undertaking. The word undertaking has different shades of meaning. Anything undertaken to be done is an undertaking. An industrial undertaking therefore, would normally be in its ordinary acceptance, some industrial concern or enterprise or adventure which is undertaken to be done by the person, concern or enterprise.

The words "industrial undertaking" cover a complex of ideas. Though it is not desirable to interpret the expression in one statute in the light of that expression appearing in a different statute, yet it would give us some guidance. The words "industrial undertaking" was defined under Section 3 (d) of the Industries (Development and Regulation) Act, 1951, where it was said :

"Industrial undertaking" means an undertaking pertaining to a scheduled industry carried on in one or more factories by the person or authority including government."

According to the Webster's Dictionary undertaking means "anything undertaken, any business work or project which one engages in or attempts an enterprise."

Viscount Duredin of the Privy Council observed in *In re Radio Communication in Canada*[1] :

> "Undertaking" is not a physical thing, but is an arrangement under which, of course physical things are used".

In *State of Bombay* v *Hospital Mazdoor Sabha*[2] which dealt with the Industrial Disputes Act and the interpretation of the word "undertaking" in Section 2 (j) of the Industrial Disputes Act, it was said that it was the character of the activity which decided the question and it was indicated that such an activity which came within the meaning of the word "undertaking" involved a cooperation of the employer and the employees and satisfaction of material human needs and must be organised or arranged in a manner in which trade or business was generally organised or arranged.

1. (1932) AC 304 (P. C.)
2. (1960) AIR 610 (S C.).

(*b*) *New Industrial Undertaking under Section* 80 I :

The words "industrial undertaking" in the Indian Income Tax Act, 1922, should be interpreted to mean any venture or enterpries which a person undertakes to do and which has relation to some industry or has some industrial consequences. The notion of an undertaking basically means that it has got to be concrete and tangible venture in the path of industry to make it an industrial undertaking. On an interpretation of Section 15C of the old Act,[3] the industrial undertaking must be such where some capital is employed and which is separate to the extent as to show how much a 6% return on it would be in order to merit or qualify for the exemption from tax under Section 15C. In other words, this industrial undertaking should not be such where it would be difficult to find the capital employed or where it is a part and parcel of the general capital employed otherwise by the assessee. This employment of the capital need not be formal in the sense of actually raising the capital and putting it into the new industrial undertaking, but nevertheless, there must be employment of capital in that undertaking and that is one of the requirements of the section. The idea of this factor of capital being employed in that undertaking to qualify for exemption under Section 15C is to introduce a kind of separate existence of that undertaking which can be taken by itself, apart from the general context of the business or the industry of the assessee.

In *C. I. T.* v *Rohtas Industries Ltd.*[4] the Rohtas Industries Ltd., Dalmianagar, the assessee, was a public limited company. It carried on the manufacture of paper, cement, sugar, chemicals etc. In its assessment for income tax it claimed relief under Section 15C of the Income tax Act, 1922, by way of rebate in respect of two new undertakings, namely, paper machine No, 2 and a cement factory. The Calcutta High Court laid down the tests for new industrial undertaking to get relief under Section 15C.

The Court said that the concept of expansion was not decisive test in construing Section 15C. The new undertaking must not be substantially the same old business. Even if a new business was carried on, but by piercing the veil of the new business it was found that there was employment of the assets of the old business the exemption will not be available. From this it followed that substantial investment of new capital was imperative. The words "the capital employed" in the

3. Sec. 801 of the 1861 Act.
4 (1979) 120 ITR, 110 (Cal.)

principal clause of Section 15C was significant, for fresh capital must be employed in the new undertaking claiming exemption. Manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit was essential to earn the benefit under Section 15C. For the new industrial undertaking, there must be an emergence of a new physically separate industrial unit which could exist on its own as a viable unit. The new undertaking must be an integrated unit by itself wherein articles were produced and at least a minimum of ten persons with the aid of power have been employed. In the present case it had been found that the new paper machinery, chemical factory, the power house and the cement factory were engaged in manufacture of production of articles yielding additional profit and these undertakings had been set up by fresh outlay of capital in separate and distinct units. The units were physically separate from the old units, they were using separate buildings and were fed with power from a new power house, therefore assessee was entitled to the exemption under Section 15C. The following tests were laid down in order to be entitled to the benefit under Section 15C :

(1) investment of substantial fresh capital in the industrial undertaking set up,

(2) employment of requisite labour therein,

(3) manufacture or production of articles in the said undertaking,

(4) earning of profit clearly attributable to the said new undertaking, and

(5) above all a separate and distinct identity of the industrial unit set up.

Moreover in the case of *C. I. T.* v *M. R. Gopal*[5] the Madras High Court pointed out that for being called an industrial undertaking manufacturing process was an essential element to get relief under Section 15C of Indian Income Tax Act, 1922, along with the other conditions.

Splitting up or the reconstruction :

The tax holiday relief is given to a newly established industrial undertaking, but the industrial undertaking in order to qualify for the relief must fulfil the conditions laid down in Section 80I[6]. The first condition laid down in Section 80I for exemption is that, "it is not

5. (1965) 58 ITR 598 (Mad.)
6. (1962) 46 ITR 818 (Mad.).

formed by splitting up or the reconstruction of a business already in existence."

The words 'splitting up' and 'reconstruction' have led to a lot of controversy.

Splitting up :

The word 'splitting' came up for consideration before the Kerala High Court in *Chambra Peak Estate* v *C. I. T.*[7], where the assessee a public limited company owning tea and coffee plantations, had a factory for the manufacture of tea. The assessee established a new factory by employing new process for manufacture of tea. The entire tea leaves which were being manufactured in a single factory were now manufactured in both the factories and the assessee claimed exemption under Section 84 in respect of its profits from the new factory.

On the facts and in the circumstances of the case, the Tribunal held that the assessee was not entitled to relief under Section 84 of the Income tax Act, 1961. The case came before the Kerala High Court and the Court held that the new factory was formed by the splitting up of a business already in existence. Hence the assessee was not entitled to the exemption. The Court held that it was enough for the purpose of this case to hold that in view of the facts admitted the new factory was formed by the splitting up of the business which was already in existence.

In another case of Patna High Court *C. I. T. Bihar* v *Ridhkeran Somoni*[8] where the assessee was a partner of a firm, the business of which was carried on in the name of North Bihar Saw Mill certain machineries were purchased in February, 1961. Oa April 15, 1961, on the dissolution of the firm, the Saw Mill was under installation, came to the share of the assessee. During the assessment year 1962-63 the assesses claimed exemption under Section 84 (later 80I) of the Income Tax Act, 1961, as a new industrial undertaking in respect of the Saw Mill the installation of which was completed after the dissolution of the partnership. The ITO rejected the claim of the assessee on the

7. (1972) 85 ITR 401 (Ker). *See* also *T. Satis U. Pai* v *C. I. T.* (1979) 119 ITR 877 (Ker), here the partner of a firm carrying on the business of printing and book binding set up a separate business of book binding. It was held on the facts, that the assessee's business was not formed by the splitting up of an existing business and he was entitled to the relief provided under Section 80I.
8. (1980) 121 ITR 668 (Patna).

ground that the new industrial undertaking came into existence on the splitting up of the business of the firm. On appeal the Appellate Assistant Commissioner and, on further appeal, the Tribunal held that the assessee was entitled to the exemption in respect of the new industrial undertaking. On a referenoe the High Court held, on the facts and circumstances of the case that the new industrial undertaking of the assessee was not formed by the splitting up or reconstruction of the business already in existence, because it could not be said that the same persons were carrying on substantially the same business. Therefore, it was a new business unconnected with the earlier business which was carried on by the assessee in the relevant accounting year and the assessee was entitled to exemption under Section 34 of the Act. So far as this decision is concerned, it is obvious from the fact that new industrial undertaking was not formed by splitting up of the business of the firm.

Reconstruction :

The word 'reconstruction' has been interpreted in two important Supreme Court cases. The first decision was given in the case of *Textile Machinery Corporation Ltd.* v *C. I. T.*[9] in which the appellant, a heavy engineering concern manufacturing boiler machinery parts wagons etc. set up two new units, a steel foundry division and a jute mill division. The steel foundry division started manufacturing some castings which the appellant was previously buying from the market but the castings were mostly used by the other existing divisions of the appellant itself. Raw materials were supplied to the jute mill division by the boiler division of the appellant and other machinery and forging parts were given back by the jute mill division to the boiler division. The appellant claimed exemption under Section 15 C of the Indian Income Tax Act, 1922, in respect of the profits from the steel foundry division for the assessment year 1958-59 and 1959-60, and in respect of the profits from the jute mill division for the assessment year 1959-60.

The income tax authorities held that the two units were formed by reconstruction of the business already existing within the meaning of Section 15 C but the Appellate Tribunal, on appeal, held that the appellant was entitled to relief under Section 15 C. The Tribunal found that the machinery in the two divisions was new, it were housed in separate buildings and that industrial licences had to be obtained for manufacturing the parts. The existing business of the appellant consisted of manufacturing boilers, wagons etc. and for that purpose the

9. (1977) 107 ITR 195 (SC).
See also, *C. I. T.* v *Hindustan Motors Ltd.* (1977) 107 ITR 164 (Cal).

appellant was purchasing the parts forging and castings from outside, and that therefore, it could not be said that the new undertaking were formed out of the existing business to come within the mischief of Section 15 C (2) (i). On reference the Calcutta High Court, it took the view that the change of producing ones own goods systematically used in the existing business instead of buying them from outside would only be a reconstruction of a business already in existence. The Court said that the business of the machinery of the steel foundry dlvision and the jute mill division could not by itself make them new industrial undertaking. Separate housing of and separate accounts for the steel foundry division and jute mlll division may be only parts of reconstruction of the same business and did not necessarily indicate a new industrial undertaking to qualify for exemption from tax under Section 15 C[10] because the licence was for expansion of the existing industrial undertaking and the licence did not cover the jute mill division.

In appeal, the Supreme Court reversed the decision of the High Court and held that the steel foundry division and the jute mill division were not formed by reconstruction. The Court held that for the reconstruction of an existing business there must be transfer of assets of the existing business to the new industrial undertaking. The Court laid down certain tests for reconstruction. A new activity launched by the assessee by establishing new plant and machinery by investing substantial funds may produce the same commodities of the old business or it may produce some other distinct marketable products, even commodities which may feed the old business. Thus products may be consumed by the assessee in his old business or may be sold in the open market. One thing was certain that, the new undertaking must be an integral unit by itself wherein articles were produced at least a minimum of ten persons with the aid of power and a minimum of twenty persons without the aid of power have been employed. Such a new industrially recogisable unit of an assessee could be said to be reconstruction from his old business. Since there was no transfer of any assets of the old business to the new undertaking which took place when there was reconstruction of the old business. For the purpose of Section 15 C the industrial units set up must be new in the sense that new plants and machinery were erected for producing either the same commodities or some distinct commodities. In order to deny the benefit of Section 15 C the new undertaking must be formed by reconstruction of the old business.

10. Section 15 C (1922 Act) corresponds to Section 801 1961 Income Tax Act,

Moreover it was held that if an undertaking was not formed by the reconstruction of the old business, that undertaking would not be denied the benefit of Section 15C merely because it went to expand the general business of the assessee in some directions. The use by the assessee of the articles produced in its existing business or the concept of expansion were not decisive tests in construing Section 15C.

By giving the above decision the Supreme Court reversed the decision of Delhi High Court given in *C. I. T.* v *Naya Sahitya.*[11] In this case the assessee firm which carried on the business of publishing books. Prior to the assessment year 1961-62 the assessee was getting its books printed in some other printing press. The assessee installed a new printing press for the first time in the accounting period relevant to the assessment year 1961-62 and printed its book in that new press. The question was whether the assessee's business of printing and publishing books was a newly established industrial undertaking entitled to the exemption from tax under Section 15C(2).

The Court held that only change that took place was that instead of getting its books printed outside, it got them printed in its own press and therefore, the printing was not a new business but the old business of publishing books remained the same. The view of Delhi High Court was based on the ground that printing and publishing were an integral part of the same business.

If we analyse this decision we find that this was against the objectives of the provision. The main objective is only to give relief to the new industrial undertaking, it is immaterial whether it helps the old business or not That was a strict interpretation of statutory provisions by the Court creating hurdle in the industrial development.

In the *South African Supply and Cold Storage Co.* case[12] Mr. Justice Buckley, while considering the question of reconstruction of an undertaking, observed :

11. (1972) 84 ITR 567 (Delhi).

12. In *re* (1904) 2 Ch 268.
The word "Reconstruction" was also considered in *C. I. T.* v *Gaekwar Foam and Rubber Co. Ltd.* (1959) 35 ITR 662 (Bom.) and *C. I. T.* v *Devson Ltd.* (1975) 98 ITR 311 (J & K). The term "reconstruction" implies that the identity of the business should not be lost, and substantially the same business should be carried on by more or less the same persons. If the business is old and if its very nature is changed, it is not a case of reconstruction.

> "What does 'reconstruction' mean ? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on—that would be a mere sale—but in some altered form to continue the undertaking in such manner as that the persons now carrying it on will substantially continue to carry it on...."

In another case of *Ganga Sugar Corp. Case*[13], where the assessee was a manufacturer of sugar and had installed a plant for the same which was operated by steam engine. Afterwards, it purchased a new plant for crushing sugar which was operated by electricity. In constructing the new factory the assessee utilised some scrap and old material out of the old factory and this amounted to only a small fraction (say about 1%) of the cost of the new unit. The Delhi High Court held that having regard to the fact that the value of the transferred materials constituted only a small fraction, it could not be held to have been formed by reconstruction of the old business or, by the transfer to a new business of building, machinery or plant previously used in another business, and the assessee was entitled to exemption from tax under Section 15C.

In this case the Court has given a correct decision on the given facts. The materials which had transferred were not so much as to make it a reconstruction of business, already in existence.

The Calcutta High Court has taken a liberal approach in the case of Orient Paper Mills Ltd.[14] The setting up of a new factory for manufacture of caustic soda which was essential for the manufacture of paper and which the assessee was previously purchasing from outside, for its old paper mill was held entitled to exemption under Section 15C. The fact that the assessee was using the product of its new unit as raw material for its existing business, was not a material consideration. Moreover the Court held that the expression 'new industrial undertaking' and 'splitting up or reconstruction of business already in existence' must be understood in a broad commercial sense from a common sense point of view bearing in mind that purpose of Section 15 C was to encourage the setting up of new industries.

13. (1973) 92 ITR 173 (Delhi).

14. (1973) 94 ITR 73 (Cal.).

The second important Supreme Court case is *Commissioner of Income Tax, West Bengal* v *Indian Alluminium Co. Ltd.*[15] Here the respondent was a manufacturer of alluminium ingots from ore. In the years prior four manufcturing centres at Belur, Kalwa, Alupuram and Hirakund In the accounting year relevant to the assessment year in question one more centre was established at Muri and there was also extensions to the existing factories at Belur and Alupuram. In the assessment year 1960-61 the respondent claimed relief under Section 15C of the Indian Income tax Act 1922, in respect of the fresh capital outlay at Muri as well as of the additional investments in the form of extensions to the existing factory premises, installation of new plant and machinery etc. at Belur and Alupuram.

The Income Tax Officer refused to allow the relief and the Appellate Assistant Commissioner dismissed the respondent appeal. The Appellate Tribunal held that during previous year, the production of Alluminium ingots had doubled and that the additional units set up by the respondent cost over Rs. 50 lakhs at Belur and about the same figure or a little more at Alupuram and in view of this nature of the substantial investment it could not be said that the units were not new industrial units by themselves. It held that these units had been set up side by side with the old ones and had added to the respondent total output of alluminium ingots. It held that the respondent was entitled to the relief under Section 15C.

When this case came before the High Court it was held that the "sine qua non" was that the assessee had established or commenced a new undertaking which may either take the shape of reconstruction, reformation, reincorporation on the one hand or a new production unit or separate business on the other. Moreover, the Court said that subsequent industrial undertaking did not necessarily exclude all cases of expansion or extension of the original business. Some time the substantial expansion amount to the establishment of new industrial undertaking. It depends upon the facts of the each case. However, the Court held that if the assessee's original business remained intact and retained its original character and the assessee invested some amount of money and established separate independent undertaking, whether of the same or different nature or in respect of the same or different commodity, the subsequent undertaking could not be called reconstruction.

15. (1977) 108 ITR 367 (S C.). The above Supreme Court's decision has been followed in the following cases also—
(1) *CIT* v *Hind Lamps Ltd* (1980) 122 ITR 451 (Alld.).
(2) *CIT* v *Associated Cement Companies Ltd.* (1979) 11[illegible] ITR 406 (Bom.).
(3) *CIT* u *Saywer's Asia Ltd.* (1980) 122 ITR 259 (Bom.).
(4) *Add. CIT* v *Dalmia Mognesite Crop* (1979) 117 ITR 930 (Mad.)
(5) *CIT* v *N Guru Investment Pvt. Ltd.* (1979) 117 ITR 922 (Cal.).
(6) *CIT* v *Dunlop Rubber Co Ltd.* (1977) 107 ITR 182 (Cal.).
(7) *CIT* v *Rohatas Indstries Ltd.* (1979) 120 ITR 110 (Cal.).
(8) *CIT* v *Batala Engg. Co Ltd.* (1979) 120 ITR 683 (Punj).

This decision was affirmed by the Supreme Court. The Supreme Court more or less settled the meaning of the expression 'reconstruction' in the above two cases after reviewing the different High Court cases. The Court has laid down certain tests regarding reconstruction but based on ambiguous phrases. The Supreme Court has given the test of substantial investment but the Court is not at all clear on the point as to when can an investment be treated as substantial. The Court is also not clear on the relationship between total money invested in business already existing and money invested in the setting up a new industrial undertaking not amounting to reconstruction. What should be the ratio of money invested in new industrial undertaking and money invested in business existing ? How much investment would be necessary to call an undertaking independent ? What is the meaning of the word 'independent' regarding an undertaking and what is its area of operation or when a normal expansion will be treated substantial expansion ? The Court was not elaborate when a substantial expansion will be treated really a fresh formation, resuscitation, reorganisation, revival or resumption of the assets in earlier business. The only answer of all the above questions was given by the Court by pointing out that the final answer in every case would depend upon the particular facts and conditions of new industrial undertaking on account of which the assessee claimed exemption under Section 15C. In this way everything will depend on the whims of the Court. So far as the view taken by the Calcutta High Court in *Textile case* is concerned it is evidently based on considerations irrelevant to the objectives and has frustrated the intended purpose. The emphasis on the newness of the industrial undertaking would not only hamper the promotion of industrial growth but diversify the development of new lines of activites. Therefore, the view taken by Supreme Court in both the above cases were in favour of the spirit of the act. But the Supreme Court has not clearly interpreted the tests laid down by itself. Some guidelines must be given to distinguish a normal expansion from the substantial expansion. Therefore our

submission is that some inclusive definition of the term 'reconstruction' may be provided under the Act.

The second condition for getting the relief under Section 80I by the undertaking is that it is not formed by the transfer of a new business of machinery or plant previously used for any purpose. This clause (ii) of sub-section 4 of Section 80 is heralded with the phrase "transfer to the new business of building machinery or plants previously used for any purpose". There is a lot of controversy relating to the meaning of this phrase. The main question relating to transfer is, transfer by whom, the assessee or any other person? Another question is, should it be previously used by assessee only or by any other person also? In absence of any express indication in the Act this provision has come up for judicial determination in catena of cases.

In *Phagoo Mal Sant Ram* v *C. I. T.*[16], the assessee was a firm which had been carrying on business in its name. On October 22, 1951 it established a new industrial undertaking. For this, it constructed a factory building investing Rs. 47,221 and installed in it machinery worth Rs. 1,47,353. Out of the total value of the machinery a sum of Rs. 1,05,376 represented purchase of old machinery from several parties, and the remaining sum of Rs. 41,982 was the price of the new machinery. In the assessment year 1959-60 and 1961-62, the assessee claimed exemption under Section 15C of the 1922 Act. The Income tax Officer denied this claim. On appeal the Appellate Assistant Commissioner of Income tax allowed this claim. On further appeal to the Income tax Appellate Tribunal, the order of the Appellate Assistant Commissioner of Income tax was reversed, restoring the order of the Income tax Officer.

On a reference the case came before the Punjab and Haryana High Court. The question before the Court was whether the exemption given by Section 15C of the 1922 Act in respect of new industrial undertaking would be available or not, there the undertaking was formed by transfer to the new business of machinery previously used in any other business of the assessee himself or another from whom the assessee had acquired the machinery. The Court held that there was nothing in clause (i) of sub-section (ii) of the Section 15C of 1922 Act which limited the transfer only to the act of the transferor alone to his own business, the expression was used in its ordinary meaning and covers the case of such a person, as also another person, purchasing

16. (1969) 74 ITR 734 (Pun.).

building, machinery or plant for setting up his own new business in the shape of an industrial undertaking. The Court said that there was no justification for confining this part to the owner as transferring to a new business any building, plant or machinery previously used by him in his or any other business. But the same result may come out by another person making a purchase of the previously used building, machinery or plant when that person sets up his own industrial undertaking with such previously used building, machinery or plant. The Court said that in the present case a substantial part of the machinery of the undertaking was an old machinery purchased from other persons and it was previously used for their business by those other persons. The Court did not accept that it was an industrial undertaking not formed by transfer to it of machiney (substantial part of it were old) previously used in the business of those from whom the same was purchased. The case come within clause (i) of the sub-section 2 of Section 15C of 1922 and exemption as claimed by the assessee under subsection 1 of the section was not available to it.

In this case the view taken by the Court was sound enough when it said that the word transfer was used in its ordinary meaning and covered the case of such a person as also another person purchasing, building machinery or plant for setting up his own new business in the shape of an industrial undertaking. Our submission is that if it was not so, things would have been clearly given in the Act itself.

On the other hand, the Calcutta High Court in the case of *C. I. T.* v *Sainthia Rice and Oil Mills*[17] has taken another view. Here the assessee was a registered firm owning rice and oil mills of Sainthia in the district Birbhum in the State of West Bengal. In the course of assessment proceeding, the assesse had claimed exemption from tax under Section 15C of the Indian Income Tax Act, 1922, which was allowable to a newly established industrial undertaking in respect of the assessment of the immediately preceding year 1959-60, and such claim had been refused originally. An appeal against the said order to the Appellate Assistant Commissioner in respect of the said assessment

17. (1971) 82 ITR 778 (Cak.).
See also, *CIT* v *Ganga Sugar Corpn Ltd* (1972) 92 ITR 173 (Delhi) Held, unless the second hand machinery or plant is sufficiently important and essential to justify the inference that the new undertaking is formed by its acquisition, the condition in sub-section 4 (ii) should be regarded as fulfilled. *See* also, *CIT* v *Asbestas, Magnesia and Friction Materials Ltd.* (1977) 106 ITR 286 (Bom.); *CIT* v *Kopran Chemical Co. Ltd.* (1978) 112 ITR 893 (Bom.).

for 1959-60, in the revised assessment was made under the directions of the Appellate Assistant Commissioner's order passed under Section 31 for the year 1959-60. the Income Tax Officer agains disallowed the claim under Section 15C of the said Act, on the ground that some of the machinery utillsed for the newly started mill was old and second-hand. There was an appeal before the Appellate Assistant Commissioner, who upheld the order of the Income Tax Officer. The assessee preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal interpreted the word 'transfer' to be a transfer of a going concern by one to the other and not the purchase in the open market. The Tribunal was, therefore, of the opinion that the assessee was entitled to the benefit under Section 15C of the Income Tax Act 1922. On an application being made, the Tribunal referred the matter to the Calcutta High Court. The only question that required consideration was whether the said purchase of one second-hand steam engine by this industrial undertaking disentitled it to exemption under clause (i) of sub-section 2 of the Section 15C of the said Act ? The Court said that the scheme of this section was to encourage new industrial undertakings provided they fulfilled the conditions mentioned in the various clauses of the sub-section. The expression 'transfer' was used in different sense in different statutes depending on the context. In a broad sense, it would certainly include an acquisition of an asset by one person from whatever source. But the scheme of the section indicated that what was being aimed at was to prevent exemtption to those industrial undertakings which were formed by the splitting up or by reconstruction or by the transfer to a new business, plant or machinery of the old business.

The Court said :

> "The transfer, in our opinion, in this context must mean a transfer of plant which is essential for the formation of new industrial undertaking and that must again mean a transfer to the new business of the transferee of any machinery used by the said transferee in his old business. Merely because *some machinery* in the new industrial undertaking has been purchased from the second hand market cannot in our opinion, disentitle the assessee to the relief of the exemption contemplated under Section 15C of the Indian Income tax Act, 1922."

Firstly, the Court in the above decision has taken a broad and liberal view, when it said that the transfer should be of the type which

is essential for the formation of new industrial undertaking, whether by the same assessee or by purchase from open market. The Court did not clearly laid down when second hand machinery would be considered essential for the formation of new industrial undertaking. Secondly, the Court wrongly tried to limit the transfer to the new business of the transferee of any machinery used by the said transferee in his old business. It was not warranted by the Act.

In another case of *Capsulation Services Pvt. Ltd.* v *Commissioner of Income tax, Bombay*[18], the assessee company was incorporated in October 1952, with the object of carrying on the business of sale and manufacture of gelatin capsules etc. It took on a monthly lease a huge compound (godown). The factory of the assessee company was located in the godown which belonged to Messers Pure Products & Madhu Canning Ltd. and it was used by the latter company as its godown for business purposes. Production was commenced by the assessee company some time after August 1, 1954. For both the assessment years, the assessee company claimed relief under Section 15C of the Act. The relief asked for by the assessee company was not granted by the Income Tax Officer. This view was also confirmed by the Appellate Assistant Commissioner. The Tribunal also took the view that there was clear case of transfer of possession of some of the property from one business to another. In a reference the Bombay High Court rejected the contention of assessee that the word 'transfer' used in Section 15C(2) (i) must mean a transfer by the assessee from one of his business to a new business started by him, that the word transfer was not used in the sense in which that word was used under the Transfer of Property Act and held that this construction required addition of certain words and there was nothing in clause (i) to indicate that the building-machinery or plant, which was previously used in another business must be that of the assessee. It could equally be attracted when the old business was carried on by the persons other than the assessee and the building, machinery or plant previously used in such a business were transferred to a new business carried on by an assessee while forming an industrial undertaking. Therefore, it was not possible to restrict the operation of Section 15C (2) (i) to a case of an assessee conferring to the new business of his own, his building, plant or machinery which was previously used by him in his other business. Moreover the Court also rejected the contention of the assessee and held that the words 'transfer to a new business of building...'' could not be

18. (1973) 91 ITR 566 (Bom)

restricted to a case where full rights of ownership were transferred. The word 'transfer' should be accorded to its normal meaning. The ordinary modes of transfer as referred to in the Transfer of Property Act were sale, mortgage, lease, gift and exchange. In case of sale, gift or exchange there may be complete transfer of ownership. But in the other two cases of transfers, i. e. mortgage or lease, the entire bundle of rights that go to constitute ownership were not transferred but some limited rights or interests in or to the property were transferred. Section 15C(2)(i) includes a case where a transfer was effected by creation of a lease in a building in favour of the new business or the person carrying on the new business.

The facts of present case show that the assessee company started its industrial undertaking in a factory located in a godown which was previously used by Pure Products and Madhu Canning Ltd. for the purposes of its business. There was nothing in the wording of clause (i) to indicate that the normal meaning of the word 'transfer' was intended to be excluded from its operation.

Another case is *Commissioner of Income Tax, Bombay* v *Suessin Textiles, Ball Bearing & Product (P) Ltd.*[19]. There the assessee who had taken on lease a portion of a building and a portion of an estate for purposes of his business, which were used earlier by other persons for purpose of business, claimed exemption from tax under Section 15C of the Income Tax Act, 1922. The Income Tax Officer disallowed the claim. The Tribunal also taktooken the view that the transfer of the building must be of the building used by the assessee and that the lease was not covered by the word 'transfer'.

The Bombay High Court held that the words 'transfer' of a new business of building was not restricted to case where the full right of ownership was transferred and the word transfer should be accorded to its normal meaning. Therefore the view taken was that Section 15 C (i) of 1922 Act included a case where the lease of a building was created in favour of new business or of the person carrying on new business.

Our submission is that full right of ownership is not necessary because transfer itself is not restricted to any particular mode. If we go through the above cases we obviously find that views taken by Punjab and Bombay High Courts are more correct than that of the Calcutta High

19. (1979) 118 ITR 45 (Bom.)
See also, *CIT Bombay City* v *Fordham Pressing (India) P. Ltd*, (1980) 121 ITR 463 (Bom.); *CIT* v *Teritex Knitting Indusries Pvt. Ltd* (1978) 114 ITR 634 (Bom.).

Court. The Calcutta High Court in *C. I. T.* v *Sainthia Rice and Oil Mills case*[20] unnecessarily restricted the meaning of word 'transfer' only relating it to the assessee by considering extraneous considerations. On the other hand the Bombay High Court in *Capsulation's case*[21] rightly interpreted the scope of word 'transfer' which is already evident from the language of the Act.

A distinction was drawn by the Bombay High Court in *C. I. T.* v *Asbestoc Magnesite & Friction Materials Ltd.*[22] In this case the assessee company manufacturing asbestos textile products closed its factory in Sewri in 1955, and thereafter ceased to manufacture asbestos textiles called "Fysax". In 1954, the assessee company had acquired certain land at Ghatkopar and there it created new factories for the manufacture of asbestos yarn and other asbestosp roducts called "Firefly". The assessee company transferred some items of machinery and equipment formerly used in the Sewri factory to the factory at Ghatkopar. The original cost of such transferred items was Rs. 73,778, but their written down value on the date of transfer was about Rs. 26,000. The assessee company claimed exemption under Section 15C of the Indian Income Tax Act 1922, for all units set up at Ghatkopar. The Income Tax Officer and the Appellate Assistant Commissioner held that the textile department unit was not entitled to the benefit of exemption under Section 15 C on the ground that some items of machinery belonging to the old Sewri factory had been tranferred to and used in the new factory. On appeal by the assessee, the Tribunal held that it could never be suggested that the new units was formed with the old reconditioned machinery. The Tribunal, therefore, directed the Income Tax Officer to give exemption under Section 15 C to the assessee company.

The High Gourt held that the value of the transferred machinery formed a small fraction of the assets employed in the textile department at Ghatkopar. Some minor equipment of the old Sewri factory with written down value of Rs. 26,000 was reconditioned and utilized in the new unit, but it would never be suggested that the new factory was 'formed' with this old reconditioned machinery. Therefore the word 'formed' to be found in the clause which is under consideration must be given its due significance. One of the very important aspect to be considered must be the monetary value of the old assets transferred to

20 *Supra* note 17
21 *Supra* note 18.
22 (1977) 106 ITR 286 (Bom).

be utilized in the new undertaking. Where the old machinery utilised could not be regarded as important or essential to the new undertaking and where its value was comparatively very small (and in the actual case before us it only comes to hardly one or two per cent of the capital assets employed in the new undertaking), the assessee on the ground of such utilisation should not be denied relief under section 15 C if it was otherwise entitled to the same.

Here the Court further interpreted and widened the scope of transfer relating to the relief given under Section 15C of Indian Income Tax Act. According to the Court the transfer of building, machinery and plants of negligible value in comparison to the total value of new industrial undertaking would not disentitle the assessee to the relief. The transferred assets must be essential or in other words they should play crucial role in the formation of new industrial undertaking without which the new industrial undertaking could not materialise. But sometimes it so happens that the transferred assets may be negligible in monetary value but play an important role in the formation of new industrial undertaking without which the new industrial undertaking cannot come into existence.

In a later case of *Commissioner of Income Tax, Bombay* v *Indian Card Clothing Co. Pvt. Ltd.*[23], the Court has given a new 'nucleus theory', Here the assessee was a private limited company. It started an industrial undertaking by purchasing new machinery. It also imported reconditioned machinery. At the end of the accounting period relevant to the assessment year 1961-62, the machinery which was not used previously was valued at Rs. 17,23,682 while the reconditioned machinery was valued at Rs. 14,25,715. The assessee company claimed exemption under Section 15C of the Indian Income Tax Act 1922. The question was 'whether on the facts and in the circumstances of the case, the industrial undertaking of the assessee company satisfied the requirement of Section 15C (2) (i), namely it was not formed by the transfer, to a new business, of building, machinery or plant, previously used in any other business ?" The Income Tax Officer accepted the claim of the assessee company and allowed the exemption. The Tribunal found that the reconditioned machinery formed an important block but was not the nucleus around which the new undertaking was formed and that

23. (1977) 110 ITR pp 103-114 (Bom).
See also, *C. I. T* v *Hindustan Milk Food Manufacturers Ltd.* (1974) 96 ITR 278 (Punj).

there was no material or record to show that the reconditioned machinery had been used in any business in U. K. from where it was imported in India.

The High Court held that the words 'machinery or plant used in any business' occuring in Section 15C mean 'machinery or plant used in a business in India' and not 'machinery or plant used in a business any where else in the world. Secondly the object of the provision appears only to be that the benefit of Section 15C should not be made available twice. The Court further said that the reconditioned machinery formed an important block *but was not the nncleus around which the new undertaking was formed and that there was no material on record to show* that the reconditioned machinery had been used in any business in U.K. from where it was imported in India. Therefore, the Court held that the industrial undertaking satisfied the requirement of Section 15C (2) (i), namely that it was not formed by the transfer to a new business of building, machinery or plant previously used in any other business. The assessee was entltled to the exemption under Section 15C.

Here the Court further diluted the scope of transfer in terms of restriction given in the Act for granting the relief holding that the reconditioned machinery formed an important block but was not the nucleus around which the new undertaking was formed. It means that the reconditioned machinery should be only important, if it has a decisive role in the formation of new industrial undertaking; its monetory value is not a valuable consideration. If we deeply consider it, all types of transfer will come out of the sphere of restriction imposed for granting the relief because in each and every case, the transferred assets play like nucleus this or that way and in this way the very purpose of the Act would be frustrated. This decision also invites greater judicial intervention regarding this phase. Our submission is that the monetory consideration may help to solve this problem if it is considerably related to word 'formed'.

Explanation 2 to sub-section (4) may be invoked and condition may still be regarded as fulfilled if the total value of the second hand machinery or plant does not exceed twenty per cent of the total value of the second hand machinery or plant used in the new undertaking cannot be regarded as having been formed by their acquisition. the condition of deduction must be regarded as fulfilled, even if the value of the second hand assets exceeds twenty per cent of the total value of the machinery or plant used in the new business. In other words, the

Explanation deems the condition to be fulfilled when in reality it is not ; but if in reality the condition is fulfilled the Explanation does not operate to deem it to be unfilled.[24]

Therefore, it is submitted that this 20 per cent must be incteased to 40 per cent and if the total value of the second hand machinery or plant exceed 40 per cent of the total value of the machinery or plant used in the new business, it should be covered within the perview of the expression 'formed'.

The Court rightly interpreted the meaning of machinery or plant previously used in any business referring to user in India with the help of word building used in the Act. But now when the word building is taken out of the phrase the situation is again not clear because the whole reasoning of the Court was based on it.

Manufacture or Produce

The expression 'manufacture' or produce' has not been defined in the Act or in any section ; which means that the legislature has not chosen to give to this expression any technical or artificial meaning and has intended to give it the meaning as understood in ordinary parlance. Before going into details of the cases it would be better to look at the meaning of these terms by different authorities.

Manufacture is a compound word from Latin "manu" meaning "hand" and "facere" which means "made". In origin, therefore, the word implied the making of any thing by hand but with the passing of time and in the context of industrial development the word has acquired many meanings. According Webster to manufacture means :

> "to work, as raw or partly wrought materials, into suitable forms for use, as to manufacture wool, iron, etc., to make (wares or other products) by hand, by machinery or other agency."

In Blacks Law Dictionary, the meaning given to the word "manufacture" is the process or operation of making wares or any material produced by hand, by machinery or by other agency, anything made from raw material by the hand, by the machinery or by Art. It also states that production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations whether by hand labour or machine would be manufacture.

24. Kanga and Palkhivala's *The Law and Practice of Income Tax*, Seventh Edition, 1976, volume 1, page 679.

Generally the dictionary meaning attributed to the word "manufacture" would be to work up materials into forms for use, making of articles or materials by physical labour or mechanical power and making of goods by hand or by machinery often on large scale by division of labour.

One has to see the legislative intent, the context in which these particular expressions have been used. For this, it would be worthwhile to go through the judicial pronouncements which throw light on the meaning of these terms as accepted by the Courts.

In *North Bengal Stores Ltd.* v. *Board of Revenue*[25], the Calcutta High Court, while dealing with a case under the Sales Tax Law, held that a chemist who made specific medicines in considerable quantities for sale to the members of the public was a manufacturer and the process of dispensing carried on by him constituted manufacture. Das J. in a separate judgment considered the scope and meaning of the term "manufacture". Explaining the meaning and the scope of the term "manufacture" the learned judge observed that the term must be given its meaning as used in common parlance in a wider sense. According to him the expression to manufacture goods meant to bring goods into being and to manufacture or produce goods for the sale meant to bring into being or to produce something in a form in which it would be capable of being sold or supplied in the course of business. The learned judge said, thus—

> "The essence of manufacture, I apprehend, is that something is produced or brought into existence which is different from that out of which it is made in the sense that the things produced is by itself commercial commodity which is capable as such of being sold or supplied. It does not mean that the materials with which the thing is manufactured must necessarily lose their identity or become transformed in their basic or essential properties."

The broad principle laid down in the above case was restricted in another case of *Dr. Sukh Deo* v *C. S. T.*[26] by the Allahabad High Court. Here the Court held that the preparation of mixture in accordance with prescription of a doctor to be used solely by the patients, couldnot be termed manufacture. The Court said in *North Bengal's case*[27], situa-

25. (1938-50) 1 STC 157 (Cal.).
26. (1963) 14 STC 581 (All.).

tions was quite different and that was of no help to the present case. There the chemist was a dealer and he also produced goods Therefore, in the present case Chief Justice Desai said that preparing medicines according to the prescription could not come within the word 'manufacture'. Therefore, it was clear that meaning given to the word 'manufacture' by the Calcutta High Court was not preferred by the Allahabad High Court, inasmuch as the wider meaning came to be restricted, and the word 'manufacture' meant producing an article commercially different from that of its components or ingredients. The Court further said that the expression 'manufacture' had in ordinary acceptance a wide cannotation, it meant making of articles, or materials commercially different from the basic components, by physical labour or mechanical process, and a manufacturer was a person by whom or under whose direction or control the articles or materials were made.

The Supreme Conrt also agreed with this view with slight modification in *Union of India* v *Delhi Cloth and General Mills Co. Ltd.*[28] when it observed :

> "The word manufacture used as a verb is generally understood to mean as bringing into existence a new substance and does not mean merely to produce some change in a substance; however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent edition of words and phrases, vol. 20 from an American judgment.
>
> 'Manufacture' implies change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But some thing more is necessary and there must be transformation, a new and different article must emerge having a distinct name character or use (*Charles/Merchand Co.* v *Higging*)"[29].

This view was also accepted by Punjab High Court in the case of *Raghubir Chand Som Chand* v *Excise Taxation Officer*[30]. Here the Court held that a new and different article must emerge having a distinct name, character, or use.

27. *Supra* note 25.
28. AIR (1963) 791 (SC).
29. 36 Fed Supp 792 (795).
30. (1960) 11 STC 147 (Punj.).

The Bombay High Court observed in the case of *C. I. T.* v *Tata Locomotive and Engg. Co. Ltd.*[31] that the word 'manufacture' has a wider and also a narrower cannotation. In the wider sense it simply meant to make, fabricate or bring into existence an article or a product either by physical labour or by power; and the word manufacturer in ordinary sense would mean a person, who makes, fabricates or brings into existence a product or an article by physical labour or power. The other shade of meaning, which was the narrower meaning, implied transforming raw materials into a commercial commodity or a finished product which is an entity by itself, but this did not necessarily mean that the materials with which the commodity was so manufactured must lose its identity. Thus both the words 'manufacture and produce' apply to the bringing into existence or something which was different from its components.

In this case the Court again widened the meaning of the term 'manufacture and produce' with a particular case to come within the purview of the said terms. The Court held that the assembling of automotive bus or truck chasis from imported parts in a 'knocked down' condition constituted manufactured, since the resultant product was an article totally different from the parts and this was so even though the component parts from which the automotive chasis was made, retained their individual identity in the whole article which was thus manufactured.

The matter also came for consideration before the Supreme Court in *C. I. T.* v *Harbilas Rai and Sons.*[32] While dealing with the scope of the term 'manufacture', Sikri J. observed :

> "In our view, the word 'manufacture' has various shades of meaning, and in the context of Sales Tax Legislations, if the goods to which some labour is applied remain essentially the same commercial article, it cannot be said that the final product is the result of manufacture".

In *C. I. T.* v *M. R. Gopal*[33], the Madras High Court held that the process employed in converting boulders into chips of various sizes with the machinery was held to be a machinery.

31. (1968) 68 ITR 325 (Bom.).
See also, *CIT* v *Ajay Printers Pvt Ltd.* (1965) 58 ITR 811 (Guj.).
32 (1968) 21 STC 17 (SC).
33. *Supra* note 24.
See also, *East India Cotton Mfg. Co. P. Ltd.* v *Assessing Authority* (1972) 30 STC 489 (Punj).

But when a log, either by manual labour or mechanical process is converted into rafter, plank and firewaod, etc., a new thing does not come into being and this process cannot be termed as 'manufacture'. This view was expressed in *Pyarelal Khashwani Rai* v *State of Punjab*.[34]

The principle that emerged out of the various decisions of the Court is that manfacture is a process which results in alteration or change in the goods which are subjected to such manufacture and a commercially new article is produced. The test, therefore, is to see whether a new commodity, which in a commercial sense is different from the raw materials used therein, has been produced. For this purpose, it is immaterial whether the manufacture is carried on by utilising manual labour or mechanical force or even by nature's own process.

In *C. I. T.* v *Casino Pvt. Ltd.*[35], an interesting question came before the Kerala High Court. The question was whether the business carried on by a company as a hotel, constituted a business of manufacturing or processing of goods. The Court held that a hotel was mainly a trading concern and a company running the business of a hotel was not an industrial company within the meaning of the definition given for the tax purposes. According to this decision in would not be appropriate to refer to the production of food materials in a hotel as amounting to manufacture in the ordinary or commercial sense of the term. Since the activity carried on in preparing articles of food from raw materials in a hotel did not constitute manufacture or processing of goods, the fact that the raw materials used for preparing the various items of food articles lost their indentity in their preparation, would not automatically make the preparation a process of manufacture, since the loss of identity of the raw material was not the sole consideration or test to determine whether there was manufacture or not. Since a hotel is essentially a trading concern, and incidental to the business or trading is the preparation of food materials, it cannot be said that food articles are either manufactured or proposed for being sold in the hotel. This is also because of the fact that a concern which is essentially a manufacturing one, does not become a trading company merely because the goods manufactured by it are ultimately sold, leading thereby to trading activities. This line of distinction between a trading company and a manufacturing company has been specifically drawn by the Court in this case.

34. (1974) 34 STC 341 (Punj).
35. (1973) 71 ITR 289 (Ker).

On review of so many cases, it is obvious that the words "manufacture and produce" have been given very wide meaning, thus entitling large number of industrial undertakings for the tax holiday relief. However, it is doubtful whether such was the intention of legislature to include such a wide range of industrial activities, or had they in their mind only some specific industries the growth and development of which was important for our economy. Therefore, it is submitted that a definite guidelines should be provided regarding the industries which would be entitled for the relief rather than to leave it to the courts to give the meaning. The Taxation Enquiry Commission (1953-54) while giving the reasons for the ineffectiveness of Section 15C remarked—

"...moreover as the concession applies to all industrial concerns, it loses some of its effectiveness as stimulus to capital formation...."

The government should specify selected industries and produce for providing the relief for stimulating the industrial expansion particularly, in the modern context of planned economic development in the country.

In the end it may be submitted that despite the best efforts of the courts to give a somewhat precise meaning of these words and phrases, the ambiguity remains and if the suggestions which have been given are implemented the position will inprove.

THE REGIONAL RURAL BANKS: THE LAW, ITS WORKING AND SUGGESTED REFORMS*

J. K. MITTAL**

That poverty in India is primarily a rural phenomenon is evident from the fact that 240 million population of villages live below poverty line.[1] In recent time a number of laws have been enacted to provide various reliefs to the rural population. The Regional Rural Banks Act 1976 (replacing the Central Ordinance of 1975) is one of the measures to promote the economic interests of these people.

I

THE LEGISLATION

The genesis and rationale of the Regional Rural Banks Act (RRB Act) may be attributed to the fact that due to their urban, culture and elitist approach, the rural branches of the public and private sector commercial banks failed to reach the rural poor; so also the co-operatives, commonly known as mini-banks, dominated by the rural rich and the influential, showed lack of concern for them. As a result, the traditional non-institutional agencies continued as the chief source of credit to the weaker sector.[2] In view of the requirements and interests of the rural indigent, it was imperative to establish new institutions on the basis of attitudinal and operational ethos entirely different from that obtaining in commercial banks.[3]

Consequently, the RRB Act devised a new type of institution—the institution of Regional Rural Banks (RRBs), which is meant to combine the local feel and familiarity with rural problems possessed by co-operatives and the degree of business organisation, ability to mobilise deposits, access to central money market and a modernised outlook

* Presented at the All India Summer Institute on Law Relating to Rural Development and Planning organised by the Law School of Banaras Hindu University, Varanasi, in February-March 1983

** Research Professor, Indian Law Institute, New Delhi.

1 See the *Draft Five Year Plan*—1978-83, 1978, 50. The Statement of the Prime Minister on the rural poor. *The Economic Times* (13 March 1980).

2. See *the Report of the Review Committee on Regional Rural Banks* (*R. C. Report*), 1978

3. *Id.* at 4 citing the view of the Government of India.

enjoyed by commercial banks.[4] Its role is to supplement and not supplant other institutional agencies in the area.[5]

Some main provisions of the RRB Act and, in the absence of rules, principal guidelines issued by the Central Steering Committee[6] may be summarised as under :

Object

The law is intended to provide for the incorporation, regulation and winding up of the RRBs with a view to developing rural economy by providing credit and other facilities particularly to the backward sector for development of agriculture, trade, commerce, industry and other productive activities in rural areas.[7]

Incorporation

It is at the initiative of sponsor banks which are normally the public sector scheduled commercial banks that the Central Government may establish in the states and Union territories RRBs and specify their names and territorial jurisdictions.[8] It is, however, understood that in many cases commercial banks sponsored RRBs as a result of the directives of the Central Government. Normally, each RRB may be assigned a compact area of one or more districts with, as far as possible, homogeneity in agro-climatic conditions and rural clientele and its each branch a cluster of villages where the credit need is imminent. Sometimes, a branch may be assigned one or more blocks in rural areas.[9]

The sponsor bank is obliged to aid and assist the RRB by subscribing to its share capital, recruitment and training of its personnel during the first five years of its functioning and providing to it managerial and financial assistance.[10]

4. *Id* at 5 quoting from *the Report of the Working Group on Rural Banks*, 1975.

5. *Ibid*

6. So far the Government of India did not frame any rules under this Act. Instead, it appointed at the national level a committee known as the Steering Committee to work out details of the new scheme, lay down suitable guidelines for, and monitor the progress of the RRBs *See R. C Report, supra* note 5 at 7.

7. Preamble.

8. S 3 (1).

9. See *R. C Report, supra* note 5 at 6. Also information supplied by the Chairman of the Haryana Kshetriya Gramin Bank (Haryana RRB at Bhiwani) (hereinafter cited as *Co. HKGB Inf.*).

10. S.3 (3).

Capital

The authorised capital of each RRB is placed at 10 million rupees and the issued capital at 2.5 million rupees. The authorised capital is divided into 100 thousand fully paid-up shares of Rs. 100 each. Of the issued capital, 50 per cent is subscribed by the Central Government, 15 per cent by the concerned state government and 35 per cent by the sponsor bank.[11] In case of need and to the extent of the amount of loans given, however, the sponsor banks and the National Bank for Agriculture and Rural Development (NABARD) constantly refinance the RRBs charging 9 per cent and 7 per cent perannum rates of interest respectively with a view to ensuring free flow of credit. The NABARD provides by way of refinance loans and advances for various agricultural and rural development purposes.[12]

Management

The Management of each RRB is vested in a board of directors which, in discharging its functions, has to act on business principles and pay due regard to public interest. The board consists of a chairman appointed by the Central Government, three directors nominated by the Central Government, two directors nominated by the concerned state government and three directors nominated by the sponsor bank. To begin with, the chairman is normally an official deputed by the sponsor bank.[13] Later, besides their selection through advertisement, the chairman may be chosen from state departments like departments of co-operation, agriculture and revenue provided they have aptitude for dealing with the problems of rural credit and development. These officers are often exposed to orientation and re-orientation courses at the College of Agricultural Banking, Pune.[14]

Each RRB may appoint a number of officers and other employees necessary for the efficient performance of its functions and determine the terms and conditions of their appointment and service. On a request from the RRB the sponsor bank may send on deputation these persons during the first five years. The Central Government has to determine the remuneration of officers and other employees appointed by the RRB keeping in view the salary structure of the employees of the state gover n-

11. Ss. 5 and 6.
12. *Ch. HKGB Inf.*
13. Ss. 8 and 9.
14. Steering Committee Guidelines *(S. C. Guidelines)*.

ment and local authorities concerned of comparable level and status in the operational area of the RRB.[15] In pursuance of this principle, pay scales, allowances and retirement and other benefits have been prescribed for officers, field supervisors and clerks-cum-cashiers. Employment of peons is ruled out. Part-time sweepers and other workers may, however, be appointed on hourly wages.[16]

After due advertisement the board of directors of each RRB select officers from among the candidates residing within the state concerned preferably from within the area of operation of the RRB. Generally, they should be graduates in agriculture. The recruitment of other employees has to be made through a selection committee of the RRB. They have to be selected from within the area of operation. Preference has to be given to those who have previous experience, aptitude, rural orientation and the like. A field supervisor should be a graduate. Preference has to be given to graduates in agriculture, commerce or economics. A clerk-cum-cashier should normally be a graduate; a matriculate or a holder of higher secondary certificate may also be employed. While the officers are trained at the College of Agriultural Banking, Pune, other employees get training at the regional training centres of the respective sponsor banks under the overall supervision of this college.[17]

Business

Every RRB may transact the business of banking which means, among others, acceptance of deposits and may also engage in other forms of business in which usually the banking companies may engage.[18] Besides, each RRB has to undertake, in particular, the following types of business : First, the granting of loans and advances especially to small and marginal farmers and agricultural labourers, whether individually or in groups, and to co-operative societies including agricultural marketing societies, agricultural processing societies, primary agricultural credit societies or farmery service societies, for agricultural and connected purposes. Second, the granting of loans and advances particularly to artisans, small entrepreneurs and persons of small means engaged in trade, commerce, industry or other productive activities.[19]

15. S. 17.
16. *S. C. Guidelines.*
17. *Ibid.*
18. S. 18 (1) read with ss. 5 (b) and 6 (1) of the Banking Regulation Act 1949.
19. S. 18 (2).

Although the RRBs are primarily obliged to serve the rural poor, they may open their branches at district headquarters and in urban and semiurban areas within their jurisdiction with a view to attracting deposits. Such branches may extend banking services other than loaning the affluent sections also. It is, however, understood that now the RRBs may be permitted to advance loans to big farmers also on the recommendation of the NABARD in regard to schemes approved by it.[20]

Beneficiaries of the law are small and marginal farmers, agricultural labourers, artisans, small entrepreneurs and persons of small means engaged in productive activities. A small farmer has been defined as one whose pre-investment net annual income at 1972 prices does not exceed Rs. 2,000. While calculating the net income, the cost of computed value of the family labour used by a farmer in agricultural operations should also be taken into account. The RRBs are to translate this income concept into acreage taking into consideration the local conditions at current prices. Generally speaking, a small farmer is one who has an unirrigated land holding of 2.5 to 5 acres and a marginal farmer below 2.5 acres. In the case of irrigated land, the limits of land holding are generally 50 per cent of these figures. This test is being liberalised by various states. A landless agricultural labourer is one who does not have any land holding but a permanent homestead and derives more than half of his earnings from agricultural pursuits. Beneficiaries in non-agricultural sector such as artisans and small traders are indentified on the basis of their annual income which, at present, should not be more than Rs. 6,000. The small and marginal farmers and landless agricultural labourers are identified, among others, by small farmers development agencies, and marginal and agricultural labourers development agencies. Under the integrated rural development (IRD) plan, the district rural development agencies (DRDAs) are required to identify the poorest whose per capita income is not more than Rs 65 per month. This category is in addition to other categories of beneficiaries selected by the DRDAs for loans. In regard to these and other categories, village *patwaries* (revenue functionaries) and *pradhans* (chiefs of rural local self-governments) are also approached for their identification. The RRBs may otherwise satisfy themselves about their status.[21]

In order to mobilise deposits and inculcate banking habit among

20. *Ch. HKGB Inf.*
21. *S C Guidelines*; *Ch. HKGB Inf.*; *India 1981, supra* note 2 at 236 and 237.

the beneficiaries, the RRBs have to pay a rate of interest which is higher 1/2 per cent to the rate of interest paid by other commercial banks.[22]

The RRBs have to sanction short term, medium term and loans to eligible borrowers for appropriate productive purposes. Individual loans should not be given to small and marginal farmers who have other off-farm incomes placing them in the category of the well-to-do. While sanctioning crop loans, the RRBs may also give maintenance loans enabling the farmers to subsist till production starts. In deserving cases the borrowers may also be granted consumption loans for medical and educational purposes. The lending rate for individual borrowers should not be higher than the prevailing rate in cooperatives operating in the region. The RRBs are prohibited from advancing loans at differential rate of interest (4 per cent) which is much lower than the prescribed rate. The sponsor bank may, of course, advance loan at this lower rate through the RRB to the borrowers who are covered under the plan of this rate of interest.[23]

In case small and marginal farmers and agricultural labourers are identified by, and given loans through, their development agencies, the small and marginal farmers may get subsidies from their project funds up to 25 per cent and agricultural labourers up to 33⅓ per cent of the capital cost of investment for various purposes such as minor irrigation, land development, soil conservation and animal husbandry.[24]

The RRBs may also finance Farmers Service Societies (FSSs) which are supposed to disburse loans to eligible persons. Prior to that, however, it must be ensured that these societies have a preponderance of small and marginal farmers, agricultural labourers and others, and that they are potentially viable. The lending rate for co-operatives should be lower than the rate for individuals so as to allow a reasonable margin for their operation.[25] As the FSSs are expected to play a significant role in the rural credit structure, a number of them should be organised in the operational area of each RRB to facilitate a large coverage of borrowers. They should be attached to the RRBs for short, medium and long term credit for multipurpose operation. The sponsor bank concerned should reimburse the salary and allowances for the managing directors of the FSSs ceded to the RRB sponsored by it.[26]

22. *Ch HKGB Inf.*
23. *Ibid.*; *S. C. Guidelines.*
24. *India 1981, supra* note 2 at 237.
25. *S. C, Guidelines.*
26. *Ibid.*

Reasonable facilities for free remittance of funds between the head office of the RRB and its different branches should be extended by the offices of the public sector commercial banks operating in the area covered by the RRB.[27]

The loans should generally be secured through hypothecation of crops, implements and other goods, guarantees from suitable persons and/or joint guarantees from the borrowers themselves. Recoveries should be ensured through persuasion and constant touch with the borrowers and only ultimately through legal methods.[28]

Althongh the local staffing which breeds more familiarity with the rural population is imperative for the success of the RRB plan, there are a few more things which the RRBs should do. They should carry out their day-to-day business in the language of their operational areas and adjust their working hours to suit the farmers and other beneficiaries. They should also maintain a completely unostentatious character conducive to a homely atmosphere where the rural inhabitants can move without inferiority complex. Further, the RRBs should carefully survey and plan the credit requirements of the given area and its potential for development. In addition, they should so devise the loan appraisal system that applications are expeditiously disposed of and that the recoveries become a by-product of the appraising process.[29]

Miscellaneous aspects

Every RRB is a body corporate with perpetual succession and a common seal with power to acquire, hold and dispose of property and to enter into contracts. It may sue and be sued in its name. Its shares are deemed to be approved securities. Its accounts have to be properly maintained and audited. It has to submit its annual report to its shareholders and declare dividends out of its net profits. The RRB is deemed to be a co-operative society for the purpose of the Income-tax Act 1961 or any other law relating to any tax on income, profits or gains. It is, therefore, exempt from such tax. It is also exempt from interest-tax under the Interest-tax Act 1974. The RRB is not subject to any law relating to the winding up of companies. It cannot be liquidated except by an order of the Central Government. The RRB Act is extended to the whole of India and it has over-riding effect.[30]

27. *Ibid.*
28. *Ch. HKGB Inf.*
29. *S C. Guidelines.*
30 Ss 3 (2), 7, 19, 20, 22, 23, 26 and 32,

As the RRBs are included in the second schedule of the Reserve Bank of India Act 1934. they enjoy the same ptivileges and facilities as the scheduled banks, which include access to the central money market. Like other scheduled banks, they are required to maintain a cash reserve ratio of 3 per cent (6 per cent for other banks) with the Reserve Bank under the aforesaid Act[31] and a statutory liquidity ratio of 25 per cent (34 per cent for other banks) under the Banking Regulation Act 1949.[32] Consequently, their credibility is increased.[33]

II

THE REGIONAL BANKS

Establishment and Expension

It was on 2 October 1975 (especially chosen as being the birthday of Mahatma Gandhi) that 5 RRBs sponsored by 5 commercial banks were established in 4 states covering 5 districts with the solemn pledge to serve the rural poor. Thereafter. the bank and branch expansion and coverage are indicated in the following table.

Table I : Exponsion and coverage

Year	*Number of sponsor banks*	*Number of RRBs*	*Number of branches*	*Number of states*	*Number of districts*
December 1976	14	40	495	15	72
June 1981	18	102	3,784	18	167

As compared with October 1975-December 1976, January 1977-June 1981 was evidently a period of slow growth, except in the case of branch expansion. It is understood that one of the reasons (other reasons listed *infra*) was political. The Janata Party was voted to power in early 1977 and it went slow with the institution of RRBs. It perhaps thought that the institution was an unwarranted burden on the state exchequer and doubted its viability. At the instance of the Central

31. S. 42 (1).
32. S. 24.
33. See also P. N. Joshi, "Regional Rural Banks" 47 *Journal of the Indian Institute of Bankers* 72 1976 72.

Government, the Reserve Bank of India, therefore, appointed a committee to review the working of these banks. The Committee submitted its report in early 1978 and gave the finding that the institution of RRBs was a very useful component in the totality of rural credit structure and suggested that it must be retained.[34] Even after this favourable report not much could done till 1980.

In any case, the RRBs with a larger number of branches did well in mobilising deposits and disbursing loans. This is obvious from the following tables.

Table II : Deposit mobilisation

Year	*Number of accounts*	*Amount Rs. '000*
December 1976	1,96,137	78,280
June 1981	44, 30, 827	25,28,518

Table III : Disbursement

Year	*Number of accounts*	*Amount Rs. '000*
December 1976	1,01,415	70,714
June 1981	23,62,997	28,63,739 (outstanding)

Note : The amounts in this table include money given by way of consumption and maintenance loans to a sizeable number of borrowers as also money advanced through PACSs and FSSs.

While the figures of amount in both the tables are important from the point of view of deposit mobilisation and credit flow, what is more socially relevant is the number of depositors and that of borrowers—the beneficiaries under the law. Depositors are more than 4.43 million and borrowers more than 2.36 million. These are, no doubt, small but their performance cannot be said to be poor. However one has to look to the constrains under which they were working. Many a time there were problems of refinance; the state governments did not take much interest in the functioning of this new institution the co-operatives and the rural branches of the commercial banks offered resistance to the march of the RRBs.[35]

34 *R. C. Report, supra* note 5 at 69.

35. See also *supra* note 38.

Workings

The working of the all-India RRBs may be summarised as follows. The overall performance of the RRBs has been satisfactory both from quantitative and qualitative points of view such as branch expansion, deposit mobilisation and lending operations. They have potential to become financially viable institutions. In the matter of deployment of local resources their performance has been superior to that of rural branches of commercial banks. The location of the RRBs is justified in most of the areas keeping in view the wide credit gap, weak co-operative structure and agricultural potential. This institution has greatly succeeded in taking banking facilities to hitherto unbanked and under-banked places in remote rural areas. They have simplicity of loan application forms, assistance to borrowers in filling them and flexibility of approach. Their credit administration has been admirably responsive to rural need. The RRBs have saved a large number of small men from the clutches of village money-lenders who charge usurious rates of interest. A large number of educated persons having rural background have got employment with the RRBs. In 60 to 70 per cent cases the borrowers have been rehabilitated with means to satisfy their daily needs. But inspite of the bright side of the picture, there are instances of non-availability of funds for meeting credit requirements of eligible borrowers. Sometimes the efficient functioning of a number of RRBs was adversely affected by political and other vested interests. Moreover, most of the RRBs have not made serious efforts to generate among beneficiaries the awareness about the new credit institution.[36]

RRBs in Haryana

Haryana is divided into 12 districts having a population of more than 10 million. Of this, 8.26 million, that is 82 per cent live in her 6,731 villages. The 1971 census report shows that 1.9 million are members of the scheduled castes ; 2.18 million are rural workers; 0.43 million agricultural labourers; 0.04 million are engaged in livestock, forestry, fishing, hunting and plantations; 0.005 in mining and quarrying; 0.09 in household industry, 0.18 in occupations other than household industry (such as servicing and repairs), 0.05 in constructions, 0.18 in trade and commerce; 0.065 in transport; storage and communication and 0.32 in other services.

Presently, there are two RRBs in Haryana. Haryana Ksherriya

36. See also *R. C. Report, supra* note 5 at 34-68.

Gramin Bank the (HKGB) established at Bhiwani for the district of Bhiwani on 5 October 1975 and the Gurgaon Gramin Bank sponsored by the Syndicate Bank was established at Gurgaon for the district of Gurgaon on 28 March 1976 and also the district of Mahendragarh which was also ceded to it. Until the end of June 1981 the two RRBs established 116 branches in five districts and had on their record 1,36,283 deposit accounts and 42, 359 loan accounts having a coverage of Rs. 68.22 million and Rs. 92.19 million (outstanding) respectively. Out of 12 districts in Haryana, only 5 have been covered.

A brief case study of the Haryana Kshetriya Gramin Bank HKGB[37] which is the Haryana RRB for the districts of Bhiwani and Rohtak may be presented.

Jurisdiction

In December 1972 the backward area of the district of Hissar (Haryana) was carved out as a district entity designated as the district of Bhiwani. It comprises just 2 sub-divisions and 4 tehsils. There are only 6 towns and 7 blocks covering 468 inhabited villages with 417 panchayats. Topography of the district is of varied nature.

The population of the district is 7,61,953 of which 6,58,765, that is 84 per cent, is rural. The district of Rohtak was assigned to Bhiwani RRB in June 1981 where not much is done in the next six month and therefore, not much importance is given to it in the study. The clientels include the agricultural labourers, the labourers in mining, forestry, fishing, those involved in trade and commerce, transport, construction and other unemployed persons.

Establishment and branch expansion

Sponsored by the Punjab National Bank. the HKGB was established at Bhiwani on 2 October 1975. In 1975 the HKGB opened 1 urban and 1 rural branch. Until the end of 1981, the HKGB had 53 branches in all (13 in Rohtak district).

Management and staff

As provided, the 9-member board of directors meets regularly to take policy decisions and supervise the HKGB. The members hail from

37. The sources of data and other informations were the published r.ports, documents and other materials available with the HKGB; interviews with the Chairman and employees of the HKGB, Bhiwani; consultation with two Professors of Commerce and Economics of Panjab University respectively and interviews with 25 beneficiaries.

the Central and Haryana Governments, Reserve Bank of India and the sponsor-bank. The Additional Deputy Commissioner, who is the chief executive officer of the District Rural Development Agency (DRDA) of Bhiwani, and the Secretary, Institutional Finance, Government of Haryana, are invariably the directors of the HKGB—the latter ex-officio. The chief executive—the chairman-cum-managing director—has been on deputation from the sponsor-bank right from the very beginning. Till 31 December 1981, The HKGB had in all 46 managers 7 officers, 45 upper division clerks and 27 lower division clerks and other staffs.

The entire staff (except those on deputation) has been recruited by the HKGB. The policy is to recruit officers from anywhere in the State of Haryana and other employees from the districts covered by the HKGB except scheduled castes employees who may belong to uncovered adjoining districts. Nobody can be recruited from outside the state. Most of the employees belong to the district of Bhiwani. By and large they have rural background and most of the managers are graduates in agriculture. The chairman and almost all the managers have had their training at the College of Agricultural Banking, Pune. Other employees have been trained at the Staff Training Colleges of the Punjab National Bank at Delhi and Chandigarh.

Offices

The head offices and branch offices have very simple office where the beneficiary is received with dignity. There are no counters, no armed men. Villagers can easily walk into these offices and discuss informally their problems with the staff. As most of the villagers are illiterate, almost all formalities relating to deposit and loan accounts are completed by the bank staff themselves. These villagers thus feel at home with the staff. Their work is also done in Hindi which is the local language.

Publicity

Whenever a branch is opened, wide publicity is given through handbills, signboards and placards that attract villagers, beat of drum, plays and music at significant places especially on the days of festivity and personal contact. The HKGB has, however, not yet entered the field of publicity through mass media like radio (very rarely), television and newspapers. The Central Government may use these media on behalf of all the RRBs in the country.

Schemes for Finances

The HKGB has formulated four general schemes for financing the rural poor.

(*A*) *Short term loan to small and marginal farmers.* The crop loan is a short term loan granted to small and marginal farmers and also to a few categories of bigger farmers who are covered by the Drought-Prone Areas Programme. Amount of loan is need-based but cannot ordinarily exceed Rs. 5,000 to any single borrower. The loan is granted to meet the cost of inputs such as seeds, fertilisers and pesticides. Part of the loan can be given to meet subsistence and consumption needs which should not exceed Rs. 250. Except for subsistence and consumption needs, the amount of loan is made in kind through government agencies and/or suppliers of the inputs on verification of the invoices and delivery notes. The quantum of loan depends upon the agro-climatic conditions, different types of crops to be grown, method of cultivation, cropping pattern of the area and also package of practices recommended for different crops in a particular area. The rate of interest is 00.25 per cent per annum. The loan is repayable within one year in suitable instalments within due dates coninciding with probable harvest period after giving an allowance for marketing period of about 6 weeks. While processing loan proposals the field officers examine eligibility, credit worthiness and repaying capacity of the applicants and they recommend need based loan. They ensure that the farmer generates sufficient income from investment of loan enabling him to repay it within the stipulated period. Loan is secured through hypothecation of crops and a guarantee from a suitable person and/or a joint guarantee.

(*B*) *Medium term loan to small and marginal farmers* : The medium term loan is advanced to small and marginal farmers to meet the cost of agricultural implements like improved ploughs and tools, agricultural machinery like seed/fertiliser drills, threshers, insecticides/pesticides spraying machines, installation of pump sets/tube-wells, sinking or drilling and repairing of wells, construction of water storage tanks and/or field channels for irrigation, *jhallars* to raise water, levelling/bunding/fencing of farm land, construction of cattle-sheds and silos and other ancillary activities. The loan is need-based but its amount can not exceed Rs. 10,000 to a single borrower. The rate of interest is the same as in the previous scheme. While processing proposals for loans the field officers ensure eligibility and credit worthiness of the applicants. They take into account the actual need of the farmer for purposes of

agricultural production, his capacity, ability to increase the marketable surplus. In case of minor irrigation schemes the field officers consider the irrigation potentiality of each type of well/tube-well, the existing availability of water and the availability of power for commissioning the pumpset etc. Besides, loan for the purchase of agricultural implements and machinery is paid directly to the suppliers. The labour cost for laying or construction of the irrigation channels/pumphouse/digging of wells or boring is disbursed in cash as the work progresses after proper verification. The loan is to be repaid within 5 to 7 years in half-yearly instalments, however, the due dates are so fixed that they are not far from the harvesting seasons. The loan is secured through hypothecation of agricultural implements and machinery and guarantee of one person acceptable to the Bank. In case the loan does not exceed Rs. 5,000, it is collaterally secured by mortgage of land of at least 150 per cent of the amount or a guarantee from two suitable persons.

(C) *Working capital and term loan to agricultural labourers and artisans* : The working capital loan upto Rs. 1,500 and the term loan upto Rs. 5,000 (to be disbursed in kind) are advanced to landless agricultural labourers and artisans who are not migratory. The loans can be given for any rural industry, trade or small business taken up by the intending borrowers on their own or under any scheme sponsored by the government or for any ancillary agricultural activity such as dairying, poultry-farming, piggery, sheep-rearing; village transport. In order to ensure their proper utilisation, loan is disbursed in instalments. The rate of interest is 00.25 per cent per annum. The loan is secured through hypothecation of goods/animals and the like acquired with the amount of loan together with a guarantee from some suitable person acceptable to the Bank or hypothecation of the same together with a group-guarantee of 5 or more borrowers of the same socio-economic strata of the society. The loan is repayable within 3 to 5 years in monthly or half-yearly instalment. The field staff has to resort to post-inspection of loans to ensure that they are properly utilised.

(D) *Loan to handloom and carpet-weavers* : The need based loan, maximum being Rs. 7,500 per borrower, is advanced to handloom and carpet-weavers for purchasing improved types of equipment such as looms, constructing workshed and purchasing raw material to last for two months. Weavers must not have more than two handlooms and must have a fixed place of business and be qualified/experienced in the

operation of looms. However, they should not be indebted to any other financial institution or state agency. Money for purchase of equipment is paid directly to the supplier. As far as possible advance for purchase of yarn is also made directly to the supplier. The rate of interest is 00.25 per cent per annum. The loan is secured through hypothecation of immovable and movable assets of the borrower and guarantee from a suitable person. It is repayble within 3 to 5 years in monthly instalments.

Apart from these four schemes, two more schemes were implemented in 1981.

(I) *Scheme for financing mini dairy units to provide self-employment to educated rural youth and ex-servicemen*: The scheme is implemented by a special cadre of the Department of Animal Husbandry—Assistant Director, Animal Production, under the control of the Milk Commissioner, Haryana, to ensure effective supervision of utilisation of loan amount, and provision of technical guidance. Educated unemployed persons up to the age of 40 years possessing matriculation or equivalent qualification and small/marginal farmers and landless educated youths are eligible for this loan. The candidates must be prepared to arrange regular supply of green fodder throughout the year and to undergo training in dairy farming for 21 days, sponsored by the concerned government department. The maximum limit of the loan is Rs. 25,000. The money for construction of shed and purchase of cattle has to be released through the same account. The bank charges interest at the uniform rate of 10.15 per cent per annum. The entire interest burden has to be subsidised by the Government of Haryana.

The advance is given under the following conditions. The villages selected for the mini-dairy units must be on the milk van-route and within 5 kms. of milk collection centres, veterinary hospitals/dispensaries and artificial insemination centres. The cattle of good breed must be purchased and suitable identification marks must be made on the cattle. The cattle should be suitably vaccinated against diseases such as rinderpest, haemorrhagic and sopticimia, and foot and mouth diseases. In no case the cattle can be disposed of without prior written permission of the Bank. Adequate insurance is taken of the cattle and the relevant policy is assigned in favour of the Bank.

(II) *Scheme for financing small scale units of industries and rural artisans*: Under this scheme a composite term loan up to the limit of Rs. 25,000 may be advanced. This includes working capital. For the purposes

of such loans the Industrial Development Bank of India has sanctioned a refinance of one million rupees. At present other details are not available.

Deposit mobilisation

Deposit mobilisation is an important part of the RRB-activity. The extent to which the HKGB has gone in this direction is indicated in the table given below :

TABLE IV

Deposit mobilisation

Year	*Number of accounts*	*Amount Rs.* '000
December 1975	260	141
December 1976	7,119	2,444
December 1977	15,169	7,599
December 1978	20,617	12,417
December 1979	30,604	19,427
December 1980	38,691	27,219
December 1981	48,071	42,856

These figures relate to savings funds, current accounts (very few), fixed deposits including mini and recurring deposits. Among these, savings funds have special significance because these are the accounts which generally belong to poor persons, the real beneficiaries who have no money for current, fixed or recurring deposits. The position of savings funds is given in the following table :

TABLE V

Savings funds

Year	*Number of accounts*	*Amount Rs.* '000
December 1975	256	133
December 1976	6,453	1,810
December 1977	12,451	5,366
December 1978	16,724	8,329
December 1979	22,866	12,756
December 1980	28,485	16,380
December 1981	35,214	26,616

These figures are much over the figures relating to fixed and recurring deposits (not given) and show a constant increase in the involvement of the weaker segments in deposit mobilisation. They may not be impressive but certainly not insignificant in the context of various constraints under which the HKGB functions. Towards the end of 1981, 35, 214 persons had put money to the extent of 26.62 million rupees. The total mobilisation touched a height of 42.86 million rupees.

Disbursement of loans

The HKGB disburses the loan out of its own capital and deposits and also from borrowings from the sponsor banks and the Reserve Bank of India. Advancement of different loans is displayed in the following tables. The break-up of October-December 1975 is not available. However, during this period only direct loans under 161 accounts were advanced to the extent of Rs. 2,98,000.

TABLE VI

Loans for agricultural and allied purposes

Year	*Small/marginal farmers*		*Agricultural labourers*	
	Number of accounts	*Amount Rs.*'000	*Number of accounts*	*Amount Rs.* '000
December 1976	1,274	1,741	1,172	1,863
December 1977	2,258	3,619	2,825	5,023
December 1978	3,084	5,703	3,954	7,811
December 1979	4,515	9,559	5,277	11,150
December 1980	8,214	19,895	4,501	9,526
December 1981	7,540	21,137	8,181	17,661

Although these figures may not be impressive, the table shows a steady progress except some ups and downs during 1980 and 1981. The record at the end of 1981 reveals that 15,621 persons were advanced 38.80 million rupees for agricultural and allied purposes. The figures

of 6 years would have certainly gone up had the demand for crop loans not been limited. In fact, about 80 per cent farmers were covered by PACSs and got loans from them. The HKGB was, therefore, left with 20 per cent farmers for crop loans.

TABLE VII

Loans for rural artisans and self-employed and consumption loans

Year	*Rural artisans and self-employed*		*Consumption loads*	
	Number of accounts	*Amount Rs.* '000	*Nmmber of aecounts*	*Amount Rs.*'000
December 1976	546	489	82	9
December 1977	995	1,291	80	11
December 1978	1,428	1,997	141	31
December 1979	1,836	2,611	196	49
December 1980	2,795	4,185	202	45
December 1981	3,831	6,525	278	86

These figures also indicate a steady progress. The number of rural artisans and the self-employed towards the end of 1981 is 3,831 having by way of loans a sum of 6.53 million rupees. The number of consumption loans is always limited. Surprisingly not many villagers opt for consumption loans which are non-productive. This shows their intention to utilise money for productive purposes and to repay it also. As it is evident, only 278 of them took Rs. 86,000 for consumption purposes. These figures relate to the end of 1981. (Table VIII)

Again there is a steady progress in the disbursal of indirect loans which are processed through the FSS at Bhiwani. As a matter of strategy (reasons not known), there was no fresh disbursal in 1981.

Demand loans are given from various deposits which are the moneys of the borrowers themselves. These loans are not, therefore,

covered here. The total disbursement since 1975 is given in table IX.

TABLE VIII

Indirect loans through Farmers Service Society (FSS at Bhiwani)

Year	*Number of accounts*	*Amount Rs. '000*
December 1976	nil	nil
December 1977	1,073	1,263
December 1978	1,426	2,223
December 1979	1,967	3,714
December 1980	2,285	4,630
December 1981	No fresh disbursal 1,135 (outstanding)	2,164 (outstandding)

TABLE IX

Total Disbursement

Year	*Number of accounts*	*Amount Rs. '000*
December 1975	161	298
December 1976	3,074	4,102
December 1977	6,158	9,944
December 1978	8,607	15,542
December 1979	12,242	24,327
December 1980	16,411	35,172
December 1981	20,991	48,624

Evidently the progress is steady. The end-December 1981 record shows that 20,991 weaker persons were helped to the extent of 48.62 million rupees for productive purposes (consumption amount is negligible). This performance of the nascent HKGB is an indicator of its success.

Recovery

The issues of recovery is perhaps the most sensitive. There is a presumption that poverty breeds dishonesty. This is belied in the case of the rural folk which is covered by the RRB Act. This, it seems, gets support from the following data :

TABLE X

Recovery position

Year	*Percentage*
1977	65.70
1978	65.00
1979	75.00
1980	60.00
1981	56.00

A fall in recovery percentage in 1980 and 1981 has been attributed to natural calamities like drought, unexpected rains during harvesting season, inflation and shortage of field staff. It is, however, understood that necessary measures including legal have been taken to improve the recovery position. For instance, the staff has been activated to establish personal contact with the defaulters and suits have been filed before the courts. About one-half of the suits have been decreed (mostly *ex parte*). However, the amount outstanding is meagre—just 0.62 million rupees. Is it not commendable that in 1979 the recovery from the poor rural folk went to the extent of 75 per cent ? Though some effective non-coercive methods have to be devised to ensure a much better recovery position, the above figures (the comparatively low ones) do not pose any threat to the exchequer.

The Reactions of Beneficiaries

A brief account of interviews held with 35 beneficiaries (25 borrowers and 10 non-borrowers) throws some light with respect to their reactions with the working of the HKGB. They belong to three villages under the jurisdiction of the Charkhi Dadri branch of the HKGB. The 25 borrowers represented those who had taken loans for crops, buffaloes, sheep, camel carts and *chakkis* (hand-operated grinders made of stone). Eight out of 10 non-borrowers intended to take loans for buffaloes, sheep, camel carts and *chakkis*. The remaining two had

double mind about the loans. They were perhaps already under debt from a money-lender and did not want to add to their burden. But this was the fate of many others also.

Almost all the respondents welcomed the coming up of the new institution as an aid to the poor in the countryside They, however, pleaded for much more publicity than what was given to it so that greater awareness might be generated among the rural poor. A sizable number of these persons still depended on village money-lenders. They wanted that with the rising cost, the amount of loans should also be increased. A need for periodic counselling was also felt. The RRB branch should continue its contact with them even after repayment of loans so that in case of need and further progress they might fall back upon it, not the village money-lender.

The case history of one of the borrower-respondents who belonged to the village Kalyana born in a backward class an illiterate labourer with no land having a family of 8 showed that after the assistance from the HKGB his economic condition had improved a lot.

To sum up, the performance of the HKGB, as a whole, was satisfactory. However, some improvements may be suggested so that the regional rural banks may play an important role in building up a strong rural economy.

III

Suggested Reforms

The Regional Rural Banks Act has given a new philosophy and approach to the rural banking system but it requires amendments. Firstly, the Preamble and section 18 (2) of the Act should be amended in such a way that credit flow is ensured exclusively to the specified categories of beneficiaries only. Secondly, an amendment to increase the authorised and issued capital of the regional rural bank to 50 million rupees and 10 million rupees respectively be effected. This will solve the problem of frequent approaches for refinance, which causes inconvenience both to the bank and the prospective loanee and will strengthen financially the RRBs. Moreover, it is time that the Central Goverment should now wind up the steering Committee and frame rules under the Act.

Now coming to the functioning of the RRBs the following suggestions may be made. Normally the bank should have jurisdiction over

one district, and one branch should cater to the needs of around 15,000 persons. Initially the chairman may be deputed by the sponsor bank for 5 years but in order to avoid half-hearted dealings by the deputees, a person selected by the board of directors and approved by the Reserve Bank of India may be appointed as chairman. The rates of interest should be curtailed and in exceptional cases the differential rate of interest of 4 per cent be charged so as to attract more borrowers. In view of the rising costs the loan amounts should be increased. Posts of area manager and general manager may be created so that chairmen are left to the task of building up the banks. Field officers should be attached to all the branches so that constant operation in the area is ensured. They may take care of publicity, identification of eligible borrowers, counselling, processing of loan proposals, recovery and the like. The last but not the least but the wide publicity and education of the rural population are some of the suggestions that the government must take into consideration.

SOCIAL IMPERATIVES AND RELIGIOUS DOCTRINES : SOME DILEMMAS FOR A UNIVERSAL DECLARATION OF RELIGIOUS FREEDOM.*

PARMANAND SINGH**

Introduction : National Ideologies and the Global Concern

We are in the midst of debate on the feasibility of a Universal Declaration of Freedom of Religion. The task is difficult and complicated. It involves the identification of minimum core content of a universally acceptable notion of religious freedom. One's own notion of religion or the relation of religion with the state or inter-relationship of various religious groups of contrasting cultures will be of little avail because whatever proposals are made here, they will have to receive general acceptance by various nation states with varying political and national ideologies. In working out a Universal Declaration of freedom of religion one would also have to face a new cultural crisis facing the modern nation-states in homogenizing the culture of the West on the one hand, and the indigenous concern for maintaining ethnicity, on the other. At any rate, the global concern for a meaningful assurance would involve the protection of the interest of the religious, ethnic and cultural minorities against exploitation by the political majorities. The notion that in a democracy, state should not interfere with the religious beliefs of individuals and groups has, with varying degree, found acceptance and expression in the constitutions of many progressive nations but still there is no common denominator to evolve a universal declaration of religious guarantee.

The reason is that in each society the nature and extent of religious freedom has been the outcome of its own past social experience and present ideology. In the Christian countries the relationship of State with Church has been dictated by an assumed tension between the temporal power and the spritual power. The horrors of history of religious persecutions in England and Europe gave rise to fear that if

* This is an expanded and updated version of a paper contributed to the "Colloquium On Religious Freedom" organised by Banaras Hindu Univrsity on 21-23 November, 1980.

** LL. M. (Luck) Ph. D. (Delhi) Reader, Law School, BHU, Varanasi.

the State was allowed to favour or establish any particular religion, all other religions will be suppressed. This gave rise to the doctrine of wall of separation between the church and the state which tried to eliminate religion from life public and exhorted the state to keep its hands off religion. A notable example is the constitution of the United States where the guarantee of religious freedom formed part of the general scheme of individual liberty and the state was completely forbidden to establish a state religion or pass laws to aid one religion or all religions or prefer one over another.[1] The belief was that the association of the state with religion tended to degrade religion and destroy government.[2] But even in the United States today, there is no complete separation of church and state and it has now been realized that in a rigid wall of separation, state may even turn hostile towards religion and those who do not believe in any religion may be more benefited than those who believe in religion.[3] Ultimately with the judicial help, the state has been permitted to grant limited aid or facilities to denominational groups for secular purposes. The model that the United States presents today is this : State can excercise its legitimate activities uninterrupted and unhindered by the intrusions of the church. There is freedom of individual religious belief but the state can regulate the practice of religion for the overall social good.

In countries with communist ideologies the position is altogether different. These countries favour and encourage anti-religious propaganda and although the state does not favour or patronize any particular religion, it excercises considerable control over the free excercise of freedom of religion. In communist societies the state can even think of abolishing religion altogether. Their professed ideology is to release the human mind from the tyranny of religion. And this ideology is a protest against the intolerant claims of spritual power.

1 The first amendment to the U. S. Constitution says that "Congress shall not make any law regarding the establishment of a religion or restricting the free excercise thereof." By judicial interpretation the prohibitions contained in the amendment have also been extended to the states. *Cantwell* v. *Connecticut* 310 U. S. 296 (1940)

2. *Engel* v. *Vitale*, 370 U. S. 421 (1962); *Eversion* v. *Board of Education*, 330 U. S. 1 (1947).

3. *Zorach* v. *Clausan*, 333 U. S. 203 (1948). Justice Douglas said that the first amendment did not say that "government should be hostile to religion" and "throw its weight against efforts to widen the effective scope of religious influence" *Id* at 314 Also *see* the dissenting opinion of Justice Stewart in *Abington School District* v *Schemp*, 374 U. S. 203 (1963) at 312-13.

Then there is an ideology of theocratic societies where there is no wall of separation between the church and the state and in fact there is sovereignty of religion and spritual power over secular activities of the state. In these societies, social cuttoms, religious beliefs and behavioural patterns are more likely to be under the influence of religion or spiritual prescriptions rather than under the influence of modern liberalism. Thus we find Islam as state religion in Afghanistan, Iran, Iraq Pakistan and Arab countries (and the revival of Islamic fundamentalism), Hinduism in Nepal and Buddhism in Burma, Combodia and Laos.

In Quebec, Scotland and Basque ethnicity is challenging the established modern nationalism, racism, is on the rise in the liberal first world (the West) and the church is ascendant in the super-secular second world (the Soviet block). Even in societies not torn by ethnic passion, a new cultural pride as well as exclusivism are visible (American blacks and Hispanies are examples).[4] The point is that it is the national ideology or the political culture or the consensus that shapes the meaning of religious liberty in a given society. And each society has evolved its own value-system to resolve the conflict between religion and modernism.

II

The Indian Ideology : Tension between Constitutional Imperatives and Religious Doctrines

The Indian ideology is also a product of its own genius and past social experience. The guarantee of freedom of religion in India is not based upon any supposed conflict between the temporal power and the spritual power but upon the spirit of tolerance and equal respect for all religions. The framers of the constitution knew that "left to itself religion could permit castemen to burn widows alive on the piers of their deceased husbands, it will encourage and in its own subtle way even coerce social evils like child marriage or even crimes like human sacrifice or could relegate large sections of humanity to the sub-human status of untouchability and inexorable inferiority."[5] Since in India almost every aspect of social life is regulated by religious prescriptions, the constitutional guarantee of religious freedom is qualified by the power

4. Ashish Nanda, "Relearning Secularism", *The Times of India*, January 20, 1981, P. 8. Ashish Nanda thinks that there exists today a dilemma faced by global concern for homogenizing the culture of the West and the indigenous concern of the nations to maintain ethnicity.
5. P. K Tripathi, *Spotlights on Constitutional Interpretation*, 1972, 104-5.

of the state to so order the excercise of religious freedom by groups and individuals as not to jeopardize public order, morality and health. The Indian ideology directs a firm commitment for the relief of human suffering, social injustice, exploitation and cruelty in the name of religion. The validity of religion in life is recognized but an attempt is made to strike a balance between the legitimate claims of religion and the legitimate interests of the secular state.[6] The religious doctrines must yield before the social and constitutional imperatives and cannot be permitted to encourage bigotory, superstition, exploitation and preservation of vested interest. The state is supreme over religion and can even take the initiative for social reconstruction.

It may perhaps, be interesting, to note that the framers did not like the word 'secular' or 'secularism' to be used in the constitution because they apprehended that such usage may unnecessarily introduce anti-religious overtones associated with the doctrine of secularism as developed in Christian countries.[7] Only in 1976 that the word 'Secular' has been added to the preamble to the Indian Constitution to describe the nature of Indian polity and such addition has also been approved by the Supreme Court[8] as consistent with the basic structure doctrine enunciated in *Kesavanada* v. *State of Kerala*.[9]

In a multi-religious society, a guarantee of religious freedom inevitably poses a dilemma between the constitutional imperatives and the religious doctrines. Sometimes the religious freedom and autonomy claimed by a religious denomination conflicts with the freedom of conscience of the individual believer. Then there are situations where the religious practices claimed by one religious group collides with the religious tenets of the other religious groups. These situations disturb inter-communal harmony in a pluralistic society. Attempt made by the state to erode dogmatic practices of individuals and religious groups with a view to harmonize freedom of religion with secular ideals also poses intricate problems of policy-making. At times the

6. P. B. Gajendragadkar, *Secularism and the Constitution of India*, 1971, 52.
7. In the Constituent Assembly two unsuccessful attempts had been made by Professor K. T. Shah to introduce the word 'secular' to describe the nature of Indian Republic and according to Justice, P. B. Gajendragadkar the omission was deliberate. *See Supra* note 6 at 47. K. M. Munshi had also described the Indian secularism as having a distinctive meaning different from what it had in other countries. *See All India Colloquium on Ethical and Spiritual Values as the Basis of National Integration*, 1967, 132.
8. *Minerva Mills Limited* v. *Union of India* AIR 1980 SC 1789.
9. AIR 1973 SC 1461.

reformist measures to achieve national and cultural integration is seen with increasing suspicion by the religious and linguistic minorities. It is alleged that under the guise of evolving a composite national culture the state is patronizing "the religion of the dominant majority in the region" and there may thus be the state patronage of "Islam in Kashmir, Sikhism in Punjab, Christianity in Nagaland and Hinduism in all other states" which is plainly inconsistent with the idea of secularism.[10] Then the method of proselytizing is claimed as part of christian religion and thus falling beyond the pale of state's regulatory power.

Atleast in one area even the Indian judiciary has shown special solicitude in favour of minorities. This is in respect of the constitutional right of the religious and linguistic minorities to establish and administer educational institutions of their choice.[11] The courts have generally been taking the view that since the minorities may not be able to find protection in political process, the courts must show special judicial solicitude in protecting their interests.[12] This approach has been characterized by one jurist as "preferred freedom" approach otherwise impermissible in the Indian scheme of fundamental rights.[13]

It will, however, be interesting to ponder whether the values underlying the Indian scheme of religious freedom can serve as a model for the formulation of a Universal Declaration of Religious Freedom. Let us, therefore, turn to the Indian constitutional provisions as operationalised by the judiciary and then to evaluate whether similar notions can form the core-content for a universal guarantee of religious liberty.

III

Individual versus Denominational Rights

Sometimes the rights claimed by a religious denomination may

10. M. Ghouse XI *Annual Survey of Indian Law*, 1975, 280-281.
11. See Articles 29 (1) and 30 (1) of the Constitution of India.
12. For a recent articulation of this view see *Ahmedabad st. Xavier College* v. *State of Gujarat* AIR 1974 SC 1731 (The minority institutions have a right to affiliation and recognition as an integral part of their article 30 (1) right on terms different from those imposed upon non minority institutions) For a comment see Parmanand Singh, "The Constitutional Estate of Minority Educational Institutions: Myth and Reality" *Delhi Law Review* 1975-76, 14-37. Parmananad Singh, "Academic and Administrative Freedom of Minority Institutions in India" 12 *JILI* 1977 296.
13. U. Baxi, Introduction to K. K. Mathew's *Democracy, Equality and Freedom*, (1978) LVIII-LXI.

conflict with the civil rights of the individual members of that denomination. How to resolve this conflict ?. In a case[14] the head of the Dawoodi Bohra community challenged the validity of a Bombay law which declared all kinds of ex-communication invalid. This law was declared unconstitutional as it was found that the power of the head of this community to ex-communicate its members was a 'matter of religion' protected by Article 26(b) of the constitution of India.[15] Obviously, the Bombay law conflicted with the freedom of conscience guaranteed to all persons by Article 25 but the Supreme Court gave primacy to denominational right over the right of the individual believer and thus denied the state a power to protect the individual against disabilities stemming from ex-communication.[16].

It must not be forgotten that in democracy it is the individual liberty and dignity which is the prime concern of the state. That is why the rights guaranteed to denominations are also intended for the ultimate benefit of the individual believer. What is guaranteed is not only freedom of religion of the individual but also *freedom from religion* when it becomes a menace to his liberty and dignity.[17]

It is submitted that the conflict between individual and denominational rights can be resolved by upholding a claim which promotes a paramount social value and rejecting it if it betrays the overall constitutional objective.[18] Viewed thus the personal laws of Hindus and Muslims should be considered as a social and secular matter subject to reform unhindered by scriptural prescriptions.

14. *Saifuddin Saheb* v. *State of Bombay* AIR 1962 SC 853.
15. Article 26 (b) guarantees a right to religious denomination to manage its own affairs in matters of religion.
16. The conclusion reached by Prof. R. K. Misra in his 'Social Perception of the Role of the State in relation to religion' (mimeo : 1980) presented in his Tables 12 and 13 confirms the view that the majority community favour a legal ban on excommunication although the minority community has shown some reluctance to permit the state interference in their religious matters.
17. P. K. Tripathi, supra note 5, at 105. Also *see* M. Ghouse, *Secularism Society and Law in India*, (1973) 200-208 ; M. C. Jain Kagzi, *The Constitution of India*, 1979, 577-78.
18. Thus in *Venkatarammana* v. *State of Mysore* AIR 1958 SC 225 the individual freedom was balanced against denominational freedom. There it was held that Gowda Saraswat Brahmins could exclude other classes of Hindus on special occasions when religious ceremonies were performed in the temple but on other occasions the excluded classes could have access to the temple. For balancing technique see generally M. Ghouse, *supra* note 17, at 138.

IV

Essential versus Non-essential Religious Practices

The legal doctrine developed by the courts is that only essential practices connected with religion can receive constitutional protection and non-essential practices cannot claim such protection. Essential part of the religion is ascertained with reference to the doctrine of that religion it self but the question whether a particular practice is an essential part of religion or not will ultimately be determined by the court, of course, on the basis of the evidence adduced as regards the conscience of the community and tenets of its religion.[19] The non-essential accretions to religion which might have appeared essential in earlier times can now be discarded as non-religious and as such will be tested by secular considerations.[20] Thus the courts have taken upon themselves the difficult task of separating superstitious matters from truly religious matters and are thus playing the role of social reformer.[21]

But even the reformist role played by the judiciary is not free from criticism in a multireligious society like ours where a vast majority of the population comprises of superstitious people. After all what is superstition to one may be an article of faith to another.[22]

V

Conversion and Religious Liberty

Right to propagate religion was included as a part of the freedom of religion only at the insistence of Christian missioneries who desired a constitutional protection to their proselytizing activities.[23] But even at

19. *Commissioner of H. R. E.* v. *Laximindra* AIR 1954 SC 287; *Durgah Committee* v *Syed Hussain* AIR 1961 SC 1042; *Ratilal* v. *State of Bombay*, AIR 1954 SC 388; *Govindlalji* v. *State of Rajasthan* AIR 1963 SC 1638.

20. For instance, untouchability might have been sanctioned by religious texts at one time but now they are regarded as non-religious.

21. For Example, the Supreme Court's logic in *M. H. Quareshi* v. *State of Bihar* AIR 1958 SC 731 in holding that cow-slaughter is not an essential part of Islam has been subjected to withering criticism with the assertion that the banning of cow-slaughter by some Muslim rulers need not necessarily affect the Islamic precept. See U. Baxi, "The Little Done the Vast Undone....." 9 *J. I L. I.*, 1967, 323, 348, 334.

22 Latham C. J. in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The Commonhealth*, (1943) 67 CLR 116.

23. *C A. D*, 1947, vol. 3 489-94. For details *see* V. P. Bharatiya "Pronagation of Religion : Stainislaus v. State of M. P.", 19 *J. I. L. I.* 1977 321.

the time of making of the constitution it was universally believed that deliberate attempts at conversion was incompatible with the idea of secularism. When the Christian missioneries began to use oppressive methods in the propagation of religion and began to employ objectionable methods of conversion, many states reacted by passing laws forbidding conversion by use of force, fraud or inducement. These laws came to be challenged before the courts as interfering with the freedom of religion which included the right to convert a person to ones own religion.[24] Scriptures were cited for the proposition that Christ commanded every Christian "to carry his *message* throughout the world." The Supreme Court took the view that the word 'propagate' did not include a right to convert another person to one's own religion; it only included a right to transmit or spread one's religion by an exposition of its tenets. It opined that the constitution guaranteed freedom of conscience to every citizen and forcible conversion always impinged upon the "freedom of conscience" of other. The guarantee was not only to one religion but to all religions alike and a person should excercise his religious liberty in a manner commensurate with the like freedom of others,[25]

Equal respect for all religions is an essential ingredient of the Indian secular ideal. It is indisputable that "propagation of one's faith with the idea of converting a person belonging to another faith to one's own necessarily assumes the belief that the religion propagated is superior to the religion of the person sought to be converted."[26]

The Indian ideology towards religion is often referable to the traditional Hindu philosophy in which religion claimed no monopoly of spiritual wisdom and always agreed that there were more than one valid approaches to truth, salvation and virtuous conduct and that these different approaches were compatible with each other. Hinduism had always a strong tradition of freedom of conscience and tolerance of religious diversity.[27]

24. *Yulitha Hyde* v. *State of Orissa* AIR 1973 Orissa 116; *Rev.Stainislaus* v. *State of M. P.* AIR 1975 M P. 163; *Rev. Stainislaus* v. *State of M P* AIR 1977 S. C 938.

25. *Rev. Stainislaus* v. *State of M P. supra* note 24 at 911. Outraging the religious feelings of others is also punishable under section 295 of the Indian Penal Code.

26. P B. Gajendragadkar *supra* note 6 at 97

27. Recently the reports of mass conversion of the *Harijans* to Islam in various parts of the country have come into light. For instance, the reports of mass conversion of *Harijans* to Islam in Meenakshipuri in Tamil Nadu is said to be

VI

Equal Respect for all Religions

The constitution prohibits the levying of any tax whose proceeds are to be used for the maintenance or promotion of a particular religion.[28] This means that state cannot give preference to one religion over another religion. It can encourage or aid all religions on the principle of equality. Thus the state grant for renovation of water tanks belonging to religious bodies or for education of students professing a particular religion would conform with the concept of religious freedom.[29] If some Hindu and Muslim places of worship are destroyed as a result of a communal riot, state can grant financial assistance to meet the cost of restoring these places to the pre-riot condition.[30] Thus the maintenance of religions places used by the general public by the state is consistent with the guarantee of religious liberty. The Government of India supported a programme of celebration of the 2500th anniversary of attainment of salvation by the founder of the Jain religion, Mahavira. The programme included erection of stone pillars with inscriptions from his teachings, establishment of Centre for imparting knowledge about the life and teaching of Mahavira, erection of a memorial at his birth place, releasing of a postal stamp etc. The celebrations were held to be consistent with the constitutional guarantee of religious freedom and not amounting to promotion and maintenance of Jainism.[31] Similarly, the Indian concept of secularism permits the government to honour the memory of great sons of India and commemorate the distinguished persons who had contributed to the cultural heritage of India. The underlying policy is to focus attention on the liberal, humanitarian and notable traditions from all religions and to

a reflection of the agony of the untouchables over the Hindu orthodoxy which preaches u touchability Conversion by untouchables to Islam, Buddhism or Christianity is an attempt to reject the low ritual standing ascribed by the Hindu society to this class and to achieve a new status in the social order. But even conversion does not answer the problems of illiteracy, poverty and discrimination of the untouchables. See Parmananad Singh 'Social Justice For Harijans: Some Socio-legal problems of identification Conversion and Judicial Review" 20, *J. I. L. I.* 1978, 355.

28. Article 28 of the Constitution of India.
29. *Bira kishore* v. *State of Orissa* AIR 1975 Orissa 8. *Bashir Ahmed* v. *West Bengal* AI 1976 Cal. 142.
30. *R. Raghunath* v. *State of Kerala* AIR 1974 ker 48.
31. *Suresh chandra* v. *Union of India* AIR 1975 Del. 168, *Gulam Abbas* v. *State of U. P.* AIR 1983 SC 1268

kindle in our generation an awareness of our cultural heritage and promotion of international understanding.[32]

VII

Conclusion

The Indian ideology towards religious freedom has not been highlighted here to present a model for proposed draft declaration on the Universal Declaration of Religious Freedom. Rather it is an endeavour to show that the concept of religious freedom based upon the principle of tolerance, liberty and equality contains universalistic norms and is able to achieve a rational accommodation of diverse religious cultures and tradition. This is not to say that there is complete communal harmony and peace in India. There are difficult problems of conflict between religious groups. There are claims of minority tradition and cultural identity to resist reformist state measures. There are allegations that no state can patronize religion in the name of promoting Indian cultural heritage on the principle of equality and that ultimately the religion of the dominant majority gets favoured treatment at the expense of minorities. Some of these controvers ies are rooted not in the claims of religious belief but in the politics for power and the relative economic, social and political position of the religious or ethnic groups of contrasting cultures.

Whatever may be the problems with religious guarantee at the operational level, it cannot be denied that on a purely conceptual level, religion has to be a source of morality, ethics and free spirit of enquiry and has to be conducive to man's quest for the Unseen and the Unknown.

Religion which becomes a source of fanaticism, superstition, obscurantism and religious war and which claims monopoly over the spritual wisdom cannot form part of a Universal Declaration of Freedom of Religion. Only that part of religion which consists of morality, ethics and philosophy and which is helpful for materials progress and scientific inquiry should form part of universal religious order.

32. In *D. A. V. College Jullunder* v. *State of Punjab* AIR 1971 S. C. 1737 the Supreme Court upheld a provision for study and research on the life and teaching of Guru Nanak and its religious and cultural impact in the context of Indian and world civilization. See also *S. P. Mittal* v. *Union of* India AIR 1983 SC 1 where the Sapreme Courl held that the teachings of Aurobindo was philosophy rather than religion

RESERVATION IN EDUCATIONAL INSTITUTIONS: SOME DISTURBING TRENDS

Today the policy of reservation in the educational institutions, especially in the advanced courses, is in crisis. The position is that in many cases the overall reservation leaves few seats for open competition. This has in turn driven the student community to try their luck in the reserved quota through either genuine or unfair means or money or muscle power. If this is the environment in the temple of learning we can very well imagine the fate of merit in the institute of higher learning. It is one of the reasons for causing frustration among the students and fall in the educational standard as well. The following are some of the disturbing features of the reservation policy.

The constitution of India through article 15 (4) takes care of the interests of the weaker sections of the Indian community by authorising the State to make special provision for the advancemen of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes. The State politics has played an important role in this group of reservation. Some States are going steady but some are over-active in the matter. These activist States have totally relaxed the minimum qualification for admission for this group. This was turned down by the high courts of Madhya Pradesh,[1] and Patna[2] but the Supreme Court in *Nividata* case[3] endorsed the said reservation politics. Whatever may be the fall out of the judicial activism but the result is that this branch of reservation is experiencing great pressure. There are cases of false certificates of scheduled castes, scheduled tribe, backward class and their income.[4] Some convert to these castes to get the benefits of the reservation policy even though they live in the high caste palaces but fortunately the judiciary did not

1. *Nivedita* v *state*, AIR 1981 M. P.129.
2. *Amalendu Kumar* v. *state*, AIR 1980 Pat 1.
3. *State of M. P.* v. *Nivedita Jain*, AIR 1981 S. C. 2045. See for a detailed discussion, C. M. Jariwala, Nivedita Jain : A Case of Distributive Justice, [1983] *C. U. L.* R., 422.
4. *R. K. Saha* v. *Medical College*, A. I. R. 1976 cal. 347; *Kajari Saha* v. *State*, A. I. R. 1967 Mys 221; *C. P. Sagar*, v. *Chairman, Selection Committee, Govt. Medical College*, AIR 1983 Kant. 199,

allow such manoeuvrings.[5] Candidates, who belong to affluent section of the above castes or who are so called members of the above castes, are entering the tough competitive fields in education in the name of weaker section of society. This raises the question : are we helping those who really deserve a preferential treatment ? It has become a big racket to push in the institute of higher learning those who cannot compete on merit. In this regard the educational institution also plays a mechanical role and simply goes by the certificate submitted by the candidates.

The second class of reservation is of the local candidate. A candidate who lives in the State or is of the same institution is preferred to outside states or other University's meritorious candidates. The reason given in such reservation are that the state is funding the institutes of higher learning and it has the right to decide to whom admission be given; and secondly, the local candidates after their education will stay in the state and render services to that state which incurred expenditure for their education. The court also showed its inability to deliver integrated justice when the activist Justice Krishna Iyer in *Jagdish Saran* case[6] observed that until "no admission for outsider" signboard is removed from other Universities, no order can be issued to the Delhi Medical College to remove its own signboard. The category of local or home students is further enlarged by making reservation for the wards of university employee. This time the support in favour of such reservation was that the university had to look after the welfare of its employees and provide such scheme. The University of Nagpur was forced to introduce such scheme because of agitation by its employee but it was rightly set aside by the Bombay High Court.[7] Another extent of the reservation which was not allowed by the Full Bench of the Patna High Court, was in favour of wards of those employees who rendered meritorious services to the University.[8] The bonus, concessions and other benefits operative in the industrial world cannot be a criteria for an entry in the educational institution. The local students are also benefitted through 'on spot' admission. In this scheme a merit

5. *Guntur Medical College* v. *Mohan Rao*, A I R. 1976 S. C. 1904; *J Das* v. *State*, AIR 1981 Kar. 164. *Principle*, *Guntur Medical College* v *Y. P. ao*, A. I. R. 1983 A. P. 339.
6. *Jagdish Saran* v. *Union of India*, AIR 1980 S. c. 820
7. *Prasanna* v. *Dir-in charge*, *L. I. T. Nagpur*, AIR 1982 Bom. 176. *See* also *Umesh Chandra* v. *V. N. Singh*, AIR 1968 Pat. 3 (F. B.)
8. *Umesh Chandra* v. *V. N. Singh*, AIR 1968 Pat. 3 (F. B.)

list of these candidates who are present on a particular day in the office is prepared and on that basis 'on spot' admission is completed. Can it be called an admission through open competition ? Fortunately the Supreme Court declared on spot admission illegal.[9] The monopoly of home students is bring slowly disintegration in the country and on slaught on the merit. The doors of temple of learning cannot and should not be shut to those who are meritorious simply because they belong to other university or state.

The reservation for the wards of military and defence personnel is very common and looking to their working conditions there may not be much difficulty in accepting such reservation. But the problem comes when such reservation is opend to all categories of public services. It is no doubt true that the government gives finance to the institution of higher learning but the government, it was rightly pointed out by the Gujarat High Court,[10] "cannot arrogate to itself the power of a capitalist handling his own fund." The meritorions services rendered by the government servants may be considered for their promotion but the Himachal Pradesh High court held that such basis had no rational relation with admission of their wards in the University.[11] The government is also given power to nominate its candidates for admission. The politicking in nomination is evident from *Savita's* case[12]. In this case the Government of Haryana nominated four candidates even before the publication of prospectus which required certain procedure to be followed in nominating a candidate for admission to the medical college. The Punjab and Haryana High Court rightly held that such candidates were nominated "arbitrarily and capriciously by mere picking upon a candidate who took their fancy for whatever reasons."

Those who took part in political agitation or freedom movement were also given special seats in the institutes of higher learning. The Supreme Court[13] with majority upheld such reservation on the ground that, "their participation in the emancipation struggle (they) became

9. *Punjab Eng. College, Chandigarh*, v. *Sanjay Gandhi*, A 83 S. c 580 *Ajay Kumar* v. *Chandigarh, Ajmi Union Jentry*, A'83 ALH. 8
10. *Patel Rajesh Motibhai* v. *State*, AIR 1981 Guj. 30.
11. *Rahul Verma* v. *H P. Unvi. Simla*, AIR 1933 H. P. 53
12. *Savita* v. *State of Har.*, AIR 1983 PIH. 262. See for Contrary approach— *Rahul Verma* v. *H. P Univ. Simla*, AIR 1983 H. P. 53 where the court upheld the nomination in view of the fact that the nomination was left" to a very high dignitary i. e. Hon'ble Chief Minister".
13. *D. M Chanchala* v, *State of Mys* , AIR 1971 S. C. 1762

unsettled in life; in some cases economically ruined, and were not in a position to make available to their children that class of education which would place them in fair competition with children of those who did not suffer from that disadvantage". However Dua J., dissenting, rightly opined that these persons had taken part in the national movement "23 years ago" which according to the learned judge "is far too remote in point of time in serving as a rational basis".[14] In Bihar five seats were reserved in the four medical colleges of the state for such candidates who had suffered in the agitation from 1974-1977. As this question was not challenged in the writ petition before the Full Bench of the Patna High Court,[15] the court did not give any ruling but two judges out of three judges Bench were of the opinion that such reservation might be vulnerable to serious attack. It may be submitted that these are some of the cases where politics enters in the educational institution at the very stage of admission. The political agitators have different awards at the state and central levels. A sacrifice is a selfless devotion and not a matter for claiming any reward. If the political party in power wants to reward its followers, the educational institution cannot be a platform for such occasion. They may be given financial help, free tutoring and other facilities for their academic growth.

There was another dimension of reservation politics in *P. Sagar's* case.[16] In this case one per cent reservation of the seats in the medical college was made in favour of the displaced gold smith of the Andhra Pradesh. The court took the stand that as "they were in bad economic plight and as such this reservation can be sustained". Looking to the rise in the cost of living and the limited income can we not say that at least seventy per cent of the Indian population live in bad economic plight. If the answer is in positive then we will have to take into consideration the cases of those candidates whose parents have become unemployed, live in draught, flood or riot affected area, etc. Will it be rational to allow such basis to supersede merit ?

Apart from the reservation politics there is another problem of quantum of reservation. There were cases where sixty to seventy and in some even cent per cent seats were reserved. The *Balaji* case clearly[17]

14. *Id* at 1976.
15. *Amalendu Kumar* v. *State*, AIR 198 Part 1 (F. B.)
16. *P. Sagar* v. *State*, AIR 1968 A. P. 165.
17. *M. B. Balaji* v. *State of Mys.*, AIR 1963 S. C. 6480 See also *Charles K. Sharia* v *C. Mathew*, AIR 1980 S C. 1230

laid down the outer limit of "50 per cent" but in many cases this limit is exceeded and even the judicairy supported it.[18] Can meritocracy survive in this environment ? The educational institutions, which are and should be open to the general public, will in the above atmosphere become a closed door affiars for the vested interes only.

The above are some of many cases which could see the light of the day through the decisions of the court. Can we not say from the above experiences that the reservation politics wither meritocracy ? Now the time has come when we the people of India have to seriously evolve a system of education wherein the institutes of higher learning give merit the main consideration; however, in exceptional cases reservati on may be made for a well defined and deserving class and that too for a limited period. Secondly, in the limited reservation, the centre should lay down an uniform policy so as to avoid politicking at the different levels. When in future the Government plans for a new policy of education, it may evolve a system where at least meritorious and deserving candidates are not deprived of getting entry into the temple of learning.

C. M. Jariwala*

18. *Jugdish Saran* v *Union of India*, AIR 1930 S. C. 820—where reservation to the extent of seventy per cent of the total seats was up held.

* LL M., Ph D. (London), Reader in Law, Banaras Hindu University, Varanasi.

BOOK REVIEW

I. H. Ph. Diedericks-Verschoor : *An Introduction to Air Law*. Deventer, the Netherlands : Kluwer (1983), 185+xxii pp.

The specialized field of air law is steadily increasing in stature, owing to the fact that air transport of passangers has emerged in the second half of the twentieth century as the primary means of international travel. The great steamships that dominated international transport during the inter-war period, and immediately after the Second World War, no longer ply the oceans. Conversely, commercial airlines now reach every continent : only "closed societies" have placed their major cities "off limits" to the intrusion of foreign aircraft. To a lesser degree, air freight has become an accepted means of shipment for perishable and fragile goods, although it will not have an impact on gross or bulk cargoes which must necessarily be carried by ship. Yet, air carriage continues to exercise a highly significant role in the transport of goods. As such, activity has increased, legal problems have accelerated, which has resulted in the creation of distinct rubrics of international law. These "newer rubrics" cut across, and incorporate, public international law, private international law (or conflict of laws), municipal law, and administrative procedures. Traditionally a more restricted and specialized field, air law grew with the aviation industry, especially as legal problems confronted passangers, shippers, and airlines. Indeed, legal controversy seems to emerge as rapidly as technology, which can be appreciated from a survey of the romantic history of air law.[1] Numerous legal subjects, e. g. the state, owners of aircraft, operators, shipers of goods, mortgage holders, insurance companies, manufacturers of aircraft, and above all, passengers—especially injured passengers—are now included within the scope of air law, "which is determined by the special characteristics and demands of aviation...."[2] In short, the legal rights of all these interested parties must be protected. At once, the overlaping and conflicting claims become apparent. If left unresolved, the aviation industry would have been unable to develop, and injured passengers would have been denied an adequate recovery.

Against this background of increased commercial activity, a need arose for a concise book devoted to international air law. Though

1. I. Diederiks-Verschoor, An Introduction to Air Law (1983) [hereinafter cited as *Air Law*].
2. *Id.* at 3.

designed primarily for graduate students, who require an introduction to this fascinating and challenging area, the book is sufficiently broad to enable the lawyer or legislator to grasp the content and underlying jurisprudence. The author achieves her purpose by providing the required insight for the benefit of the increasing number of lawyers, desiring a substantial knowledge of this body of law.

It is fortunate that the task of preparing a concise volume devoted to an examination of air law was undertaken by a distinguished legal scholar, who has taught this subject, during its formative stages. Professor Diederiks-Verschoor approaches this newer rubric from the perspectives of both public and private international law (along with a comparative study of applicable domestic law). Beginning in the 1940s, she projected this comparative approach to the relationship between maritime law and the embryo aviation law.[3] Subsequently, a dutch language textbook was written ; in fact the present volume under review can trace its roots to this earlier publication.[4] Of interest to the reader is the fact that Professor Diederiks-Verschoor is equally well known for her outstanding contributions to the law of outer space, as the President of the International Institute of Space Law. In this context, her many publications also represent a major contribution to air law.[5] In particular, attention is now being focused toward comparative aspects between air and space law, as for example in those areas where differing legal norms govern.[6]

3 *E g* , Het Verdag van Brussel van 1938 betreffende hulp en berging van of door luchtvaartuigen op zee (Thesis, University of Utrecht 1943).

4. 1 Diederiks Verschoor, Inleiding tot het Luchterecht (2d ed. 1978).

5. E. g., Diederiks-Verschoor, Le systeme du code italien de la navigation et l' autonomie du droit aerien, 11 Il Diritto '0 (1972); and Diederiks-Verschoor, Air Law, in Introduction to *Dutch Law for Foreign Lawyers* 223-30 (1978). *See* also *infra* note 32.

6. 1 Diederiks-Verschoor, Similarities With and Differences Between Air and Space Law Primarily in the Field of Private International Law, 172 *Recueil des Cours* 317-423 (1981 III). The author concludes :

> Science is bringing aviation and space activities ever closer to each other, and increasingly within the range of each other's sphere of action and regulatory powers. Without proper consultation at various levels between experts and/or the appropriate authorities, also in the legal sector, conflicts of law, gaps in the legislation and other inconsistencies are bound to occur with increasing frequency and variety. To remove anomalies and to avoid legal entanglements it would be most desirable, for a starts if, international organizations like ICAO and UNCOPUOS could begin working together in closer collaboration.

Concluding Remarks, *id*. at 409.

To safeguard the rights of users, a series of international conventions have been adopted. They now regulate air traffic and the legal interests of the numerous parties, who possess *locus standi*. As a result of these major treaty texts, customary international law and domestic legal norms have assumed a secondary role. Although the sovereign state remains supreme (through its ability to withhold ratification or to attach reservations to multilateral conventions, or even to denounce treaty obligations), an additional phenomenon is affecting air law, which will have an increasingly significant impact. The growth of international and regional organizations[7] is facilitating a higher level of international co-operation, as for example in safeguarding aircraft in flight. With a steady increase in air traffic, it is impractical for only national agencies to attempt the regulation of aircraft. Although such multinational institutions have yet to assume a dominent role, future implications are evident. Yet, this is not to say that national, preferential treatment—frequently assured through bilateral arrangements—has been eliminated.[8] The numerous competing interests, as for example protecting injured passengers and, at the same time, safeguarding the continued existence of airlines, requires solutions at both the international and municipal levels. Unfortunately, not every subject of the law enjoys an equally strong status within the legal process. On the other hand, the series of international conventions has brought a degree of uniformity and predictability into the law, if not always to justice.

7. § 14, Regional Organizations and Agreements, in *Air Law*, *supra* note 1, at 35-40. *See* also § 6, Airline Cooperation, *id* at 17-18, in conjunction with § 13, International Organizations, *id* at 30-35. Accord generally, W. Wagner, *International Transportation as Affected By State Sovereignty* 1970; Gormley, Book Review, 15 *St. Louis U. L.* J. 1970, 337.

8. *See*, e g., Agreement between The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States Concerning Air Services, 28 U. S. T. 5367, T I. A. S. No. 8611, July 23, 1977 [commonly referred to as the Bermuda II Agreement]. See *Air Law*, *supra* note 1, at 42; in conjunction with I. Diederiks-Verschoor, Observations Relating to the Bermuda Treaties on Aviation between Great Britain and the United States, in : *New Directions In International Law*, 1982, 343-50. The author concludes :

> [P]resent aviation policy cannot be considered independent of other trends in the operating environment as for instance the problems of the energy cirsis, the congestion at airports, noise pollution, etc. The trends place emphasis on energy conservation and environmental awareness.. [C]ompetition as the sole guideline may prove to be unsatisfactory for international aviation, (*Id* at-349)

Indeed, the author brings out very clearly the obstacles facing the injured party (s). Under contemporary practice, the airlines have become the favoured parties, largely through their application of contract law.[9]

The main problem-area confronting lawyers is liability and the amount of damages that may be recovered, primarily for injury to passnegers, baggage, or cargo. Thus, Chapter III, *The Liability of the Carrier under the "Warsaw System"*[10] examines "the nature and the development of the legal grounds on which the air carrier's liability rests, and their impact on everyday practice."[11] Beyond question, the entire aviation industry is drastically affected by the spector of huge damage awards, whether to compensate for deceased passengers or for the manufacture of defective products that affect the airworthyness of planes.[12] Although issues involving the exercise of national sovereignty have been resolved, the unresolved questions of liability remain. Accordingly, the most difficult protions of the corpus of air law facing a non-specialist are the intricacies of the *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air*,[13] as modified by subsequent instruments. This chapter, then, proceeds in a consise and orderly fashion to explain the main provisions of the convention's articles and the relevant protocols. But rather than merely present an annotated collection of treaty texts (as is all too frequently the practice in academic writing), the author adopts a topical approach, which will be especially helpful. For instance, such topics as passenger tickets, baggage checks, airway bills, and delay are examined.[14] At this point in the book, one message becomes all too clear :

9. Accord generally, F Pocar, The Protection of the Weaker Party In Private International Law, to be published in *Recueil des Cours*, 1983.
10. *Air Law*, *supra* note 1, at 45-82.
11. *Id*. at 45.
12. Discussed *infra* note 22fr.
13. Convention for the Unification of Certain Rules Relating to International Carriage by Air, 49 Stat. 3000; T. S. 876, 137 L. N. T. S. 11, October 12, 1929 (entered into force, February 13, 1933) [commonly referred to as the Warsaw Convention]. The shortcomings in the Warsaw Convention are all too evident. See, e. g., N. M. Matte, Preface, 8 *Annals Air & Space* L. ix 1983).
14. *Air Law*, *supra* note 1, at 49-66.

See the protocols and supplementary agreements to the Warsaw Convention [*supra* note 13], as follows.

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 478 U. N. T. S, 371, September 28, 1955

injured passengers, largely because of their weaker position within the bargaining process, are in a weaker position to, first, protect their rights (including even the basic human right to life) and, finally, to obtain just compensation, for the reason that airline companies draw up the standard form contracts (and also perpetuate adhension contracts). Also the Warsaw Convention, and supplementary instruments,[15] limit their liability to fixed maximums. Each of these sections is well done and footnoted to additional sources and applicable case law, with illustrations drawn from common and civil law jurisdictions. But may this reviewer (in reality a frustrated, sometime air traveller, who is no longer able to sail by ship) offer one suggestion ? The practice of overbooking[16] should have been discussed in a bit more detail, since it has become such a common occurrence, at least in the United States.

Obviously, many such interesting topics are raised throughout the book, such as the tranportation of radioactive material, even though they cannot be discussed in any detail. Equally obvious is the fact that the precise treaty provisions, comprising the Warsaw system, cannot be dealt with in the confines of this brief review. But the gravamen of the problem is that the numerous protocols have weakened the force of the main convention.[17] As a result, a lack of certainty exists as to the precise legal obligations that apply to passengers, who may be travelling on the same aircraft but are bound to different destinations, as for

(entered into force August 1, 1963) [commonly referred to as the Hague Protocol]. *See Air Law*. *supra* note 1, at 68-73.

Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, 500 U. N. T. S. 31, September 18, 1966 [commonly referred to as the Guadalajara Convention]. *See Air Law*, *supra* note 1, at 73-75.

Montreal Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, 17 U. S. T. 1521, T. I. A. S. No. 6108, May 19, 1965 [commonly referred to as the Montreal Interim Agreement]. *See Air Law*, *supra* note 1, at 75-77,

Protocol to Amend the Warsaw Convention, I. C. A. O, Doc. 8932/2; 10 I. L. M. 613 (1971), March 8, 1971 [commonly referred to as the Guatemala Protocol] *See Air Law*, *supra* note 1, at 77-79

Montreal Additional Protocol I, I. C. A. O. Doc. 9145; Protocol II, I. C. A. O. Doc. 9146; Protocol III, I. C. A. O Doc. 9147; and Protocol IV, I. C. A. O. Doc. 9148, September 25, 1975 [commonly referred to as the 1975 Montreal Protocols]. *See Air Law*, *supra* note 1, at 79-81.

See also the Chart of The Warsaw System, *Air Law*, *supra* note 1, at 82.

16. *Id*. at 62.
17. *Id*. at 81.

example when traveling to or from a state that is not a party to the Warsaw Convention or the Hague Protocol. In these situations, prolonged and costly litigation become inevitable. Moreover, different standards of evidence apply, e.g. as to whether the passenger or the carrier must assume the burden of proof. As Professor Diederiks-Verschoor concludes : "Most of these problems relate to the fact that the unification of rules provided by the Warsaw Convention for the carriage of passangers, baggage and goods has been adversely affected by the multitude of amendments."[18] Despite differing interpretations by municipal fora, "....the old Convention is still functioning on a world-wide basis; its rules operate for the benefit of passengers and carriers alike".[19] Anticipating longer range solutions, the author reiterates one of the book's underlying themes, namely, carriers can insure against potential losses; furthermore, "the passangers know what to expect in cases of injury or damage. If they are not satisfied with the limits for compensation they can take out their own additional insurance policy".[20] Thus, a basic decision has been adopted : a considerable portion of responsibility has been placed on the passanger and the shiper, in order to protect the airline—a position the reviewer finds to be somewhat troublesome, simply because the carrier, in all instances, is in a more favourable bargaining position. As a result, the traveller is compelled to accept the standard form contract. In the reviewer's submsssion, the balance should swing back in favour of the injured (or deceased) passenger; it is the carrier who should assume the cost of additional insurance, premiums and financial obligations. Regardless of the policy-oriented solution favoured, efforts should continue to perfect uniform legal standards and at least reduce the number of discrepancies, in order to assume an adequate level of predictability in contract law.

Having dealt with the main treaty provisions, the remainder of the book, namely the second half, consists of six short chapters that introduce the reader to such additional subject matter areas as *Products Liability In Aviation, Surface Damage and Collisions, Insurance, Rights In Aircraft, Assistance and Salvage, and Penal Law and Aviation.*[21] Such areas as products liability and penal law constitute more recent additions to the corpus of air law, whereas collisions, assistance and salvage, along with insurance, are more traditional rubrics. As originally

18. *Id.*
19. *Id.*
20. *Id.*
21. Chs IV-IX, *id.* at 83-165,

mentioned in the Preface, these chapters are not intended to delve deeply into all related areas. Only a basic insight is sought, i. e. a first step toward a fuller understanding of the main legal issues. Accordingly, Chapter IV, *Products Liability in Aviation*, is devoted to "its place in air law and its influence on aircraft manufacturers, airlines and passangers".[22]

In considering surface damage to third parties and aerial collisions, the issue of liability must again be reexamined. The basic difficulty confronting the policy-maker and treaty drafter is that states resist the imposition of limited liability. Yet, the Montreal Protocol of September 1978[23] seeks to widen the scope of the Rome Convention.[24] Aside from the merits of imposing full liability upon those aircraft causing damage on the earth's surface, the reality of present day political climates is that these conventions will not be widely accepted. In brief, the Rome Convention, in articles 2 and 3, permits narrowly defined exceptions to the rule of absolute liability of the carrier.[25] Hence, the degree of certainty desired by the author (and indeed by the legal community) remains elusive. Conflicting interests cannot be resolved, with the effect that a considerable degree of uncertainty remains.

The review of these subjects, including treaty interpretation and resulting case law, cannot be dealt with in the scope of this limited review, but it may be helpful to note the section on *Damage caused by noise and sonic boom.*[26] Here, then, is a legal controversy that has arisen with the growth of the jet age; moreover, the problem continues to acceletate because of its direct impact on the quality of life in major cities and urban areas. Specifically, there is no single "wrongdoer",

22. *Id.* at 83.
23. Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, I. C. A. O Doc. 9275, September 23, 1978 [commonly referred to as the Montreal Protocol]. *See Air Law, supra* note 1, at 96ff.
24. Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface, 310 U. N, T. S. 181, October 7, 1952 [commonly referred to as the Rome Convention]. *See Air Law, snpra* note 1, at 97ff.
25. The three exceptions to absolute liability are contained in arts 5-6 of the Rome Convention, *supra* note 24, i. e., 1) damage caused solely by the negligence or wrongful act or omission of the injured party, 2) damage that is a direct consequence of armed conflict or civil disturbance, and 3) situations in which the operator was deprived of the use of his aircraft by a public authority. *See Air Law, supra* note 1, at 99-100.
26. *Id.* at 108-13.

since the advantages to society arising from the use of jet aircraft are clear. Nonetheless, these benefits to the world commnnity must be weighed against the discomfort and the damage caused by some of their side-effects. Indeed, a similar observation can be advanced as concerns most disputes between aviation and the general population, especially as environmental factors, e. g. noise abatement, become relevant. On the other hand, the private individual remains in a disadvantaged position *vis-ô-vis* the airlines. "[I]t will be extremely difficult for a private action of an individual against aircraft operators, causing him abnormal discomfort, to be upheld in court. Here again, the law varies from country to country".[27]

A short chapter on *Insurance*[28] can only introduce the reader to this complicated subject; in fact, aviation insurance has emerged as a specialty in its own right. In addition to raising a number of the main considerations (e. g.) pooling by insurance companies), newer problems as for example the risk to be assumed when aircraft have been hijacked and subsequently destroyed, are evaluated. Hence, the insight provided is that multinational solutions will be required, as advancements in technology increase the risk of catastrophic damage awards. The solution favored by the author is the enactment of an international convention dealing with aviation insurance, notwithstanding the fact that prior attempts to codify international standards of insurance coverage have proved to be unsuccessful. At this point in the book, the special competence of the author in the field of space law and of international law becomes evident, for the reason that public law solutions are sought as a means of resolving private law disputes. This approach can be detected as constituting one of the fundamental solutions advanced by the author.

The ever present topics of *Rights in Aircraft*[29] and *Assistance and Salvage*[30] are fundamental to any competence in air law. They are included in brief chapters. By way of conclusion, moreover, Professor Diederiks-Verschoor draws upon her experience in maritime and space law to propose changes, as for instance by imposing a legal obligation on the aircraft commander to commence search and rescue operations just as soon as he becomes aware that an accident has occurred.[31] Also

27. *Id.* at 111.
28. *Id.* at 117-25.
29. The topic of ch. VII, *id.* at 127-44.
30. The topic of ch. VIII, *id* at 145-50.
31. *Id.* at 149-50.

he would be under a legal duty to render assistance to every person, whose life was in danger. Furthermore, the author proposes that there be "closer co-operation between air law, maritime law and space law in matters involving search and rescue."[32]

Continuing with the concept of international co-operation, Chapter IX, *Penal Law and Aviation*, deals with the ever present danger of the seizure of aircraft (including its personnel and passangers) by terrorists. While the number of successful hijackings has been drastically reduced, owing to improved surveilance and precautionary measures, repeated attempts are made to seize aircraft—even as this review is in progress. Sad to say, American planes continue to be targeted by dissident elements. To meet this threat, three major international conventions have been adopted, the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*,[33] the *Convention for the Suppression of Unlawful Seizure of Aircraft*,[34] and the *Convention for the Supression of Unlawful Acts against the Safety of Civil Aviaton*,[35] to deal with aspects of the illegal seizure, damage or destruction of aircraft. That is to say, each convention has a precisely defined scope, and as new deficiencies arose, additional treaty provisions were required to supplement the original Tokyo Convention of 1963.[36] Nevertheless, as the author indicates, some inadequacies remained. Still the Tokyo Convention "....may be regarded as a significant step towards establishing some moderate degree of legal order. It cannot be denied, however, that the

32. *Id.* at 150. Reference is made to the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 19 U. S. T. 7570, T. I. A. S. No. 6599, 672 U N T. S. 121, April 22, 1968 See also I. Diederiks—Verschoor, Assistance et sauvetage en droit maritime, aerial et spatial : Nécessité d'une coopération, 3 *Annuaire de Droit Maritime et Aérien* (1976) 93.
33. 20 U. S. T. 2941, T. I. A. S. No. 6768, 704 U. N T S. 219, September 14, 1963 (entered into force December 4, 1969) [commonly referred to as the Tokyo Convention] *See Air Law, supra* note 1, at 1 1-58
34. Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U. S. T. 1641, T. I. A. S- No. 7192, December 16, 1970 [commonly referred to as the Hague Hijacking Convention]. *See Air Law, supra* note 1, at 159-63.
35. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U. S. T. 46. T. I. A. S No. 7570, September 23, 1971 [commonly referred to as the Montreal Convention or the sabotage convention]. *See Air Law, supra* note 1, at 163-65.
36. Regional solutions can fill some of the gaps in these into national conventions. *See*, e g., *The European Convention on the Suppression of Terrorism*, E. T. S. (1977) 90

final result shows a number of weak points such as : the absence of a definition of the word 'offence'; and the restrictive approach to extradition."[37]

In an attempt to remedy some of these shortcomings, the Hague Convention refined the definition of hijacking, i. e. to offenses committed on board an aircraft in flight and also provisions that permit the extradition of offenders. But, notwithstanding attempts to improve upon the regime of the Tokyo Convention, there still remains a serious gap : there is no duty to extradite. Accordingly, a conflict of jurisdiction may result. Also there is an absence of specific provisions that could establish a basis for liability. It remains unclear which party is responsible for damages and has the corresponding duty to compensate injured parties. It is, therefore, necessary to fall back on the Warsaw Convention or customary international law—a highly unsatisfactory result.

International criminal law continued to evolve, as new situations arose that could not be adequately dealt with by existing conventions, customary law, or municipal legislation. Since the Hague and Tokyo conventions dealt with offenses committed on board aircraft, another instrument was required that would deal with other unlawful acts directed against the safety of civil aviation, such as the damage or destruction of aircraft on the ground. Accordingly, the Montreal Convention, in article 1, specifies a number of unlawful and intentional acts that constitute an offense, e. g. placing a device or substance on board an aircraft.

These three conventions, admittedly in need of further strengthing and amendment, have increased the safety of aircraft and passengers. However, the major shortcoming is that they have yet to receive universal adherence. A number of states refuse to participate, whereas attempts to force compliance have proved unsuccessful. "However, it is interesting to note that the United States authorities insist on an undertaking being given by their partners in bilateral agreements to the effect that the provisions of the three penal Conventions will be applied."[38] The future success of international criminal law will depend on a universal acceptance of implementing measures and closer co-operation between states parties.[39] Air law must, therefore, be perfected to reflect the advances in technology—and its potential abuse by terrorists.

37. *Air Law*, supra note 1, at 158.
38 *Id* at 165.
39. Accord generally, W. Gormley, *Human Rights and Environment* : The Need For International Co-operation, 1976.

In considering the book as a total entiry, this reviewer submits that Professor Diederiks-Verschoor has achieved her objective. Indeed, her text goes beyond a mere "introduction," because insight is provided into the underlying political and legal controversy; further, recommendations are offered, as for example the enactment of additional international conventions. In this regard, it again needs to be stressed that attention has been devoted to the future role of regional and international organizations, as they implement multinational air law. The author demonstrates the ability to quickly reach the essence of legal disputes and not dwell on detail. This is not to say that factual situations, are minimized; the book represents far more than a mere summary of treaty texts and conventions, or a review of case law. There is an effective use of illustrations and examples in the text and footnotes, thereby bringing to life treaty provisions.

The book is easy to read; the writing is concise; and the author has shown a fine sense of organization. Mention should also be made of the excellent bibliography. In sum, the author has more than achieved her purpose; a contribution has been made to untold future readers.

W. Paul Gormley**

**. A. B. San Joes State University; M. A. University of Southern California; Ph. D. University of Denver; J. D. (hons), LL, M. George Washington University; M. Int.-Comp. L., D. Jur. Free University of Brussels; LL. D. Victoria University of Manchester. Member of the District of Columbia and United States Supreme Court bars. Formerly, Leverhulme and Simon Fellows, University of Manchester, England. Attended the Hague Academy of International Law.

Constitutional Law of India by T. K. Tope, Eastern Book Company, Lucknow, 1982 ed., pp. XXXV+781; Rs. 75.00.

THE Constitution of India being the basic law forms an important subject of legal studies. Any book on the Constitution, therefore, evokes a greater interest and in the present case more so because the author of the book under review[1] has a varied experience first as a law professor and then as a law reformer and administrator.

The author has addressed the book primarily to lawyers, teachers and students of law[2]—the three constituencies of differing requirements and needs. A book meant for teachers and students should give a penetrating treatment to the subject, preferably referring to the scholarly studies holding views opposite or similar to those held by the author in order to provoke the students and teachers to explore further. The present reviewer has always felt that most of the Indian writers of legal books do not give proper recognition to Indian scholarship by suitably referring to them in their treaties. Reading Tope's book does not add anything to change this view. [3]

1 T. K. Tope, *Constitutional Law of India* (1982). (hereinafter referred as *Tope*)

2. *Tope* Preface VIII.

3. It is true that there is a lack of standard legal writings in India, but this certainly cannot be said about Constitutional law. There is a wealth of standard legal material on almost every topic of the Constitution. In any discussion on the matter of Directive Principles of State Policy and their relationship with Fundamental Rights, for example, a reference to the following studies is inevitable. P. K. Tripathi, "Directive Principles of State Policy—The Lawyer's Approach to them Hitherto Parochial, Injurious and Unconstitutional" 1954 *S. C. J.* 7; Upendra Baxi, "Directive Principles and Sociology of India Law" (1969) 11 *JILI* 245; G. S. Sharma, "Concept of Leadership in the Directive Principles of State Policy" (1965) 7 *JILI*, 173. In any discussion on Martial Law in India, reference to P. K Tripathi's two articles published in AIR 1963 (J) 66 and AIR 1964 (J) 82 since reproduced in P. K. Tripathi, *Spotlights on Constitutional Interpretation*, 1973, 176, 181. and also P K. Tripathi, "Article 359 the Sole Repository of the Power to Declare Martial Law" *AIR* 1976 (J) 66 seems very necessary. These are but only two examples and obviously all cannot be given. Tope even does not refer to a seminal study of its own kind by Upendra Baxi, *The Indian Supreme Court and Politics*, 1980 while discussing the political nature of some of the Supreme Court decisions.

The author does not seem to agree with the liberal policy of reservation and preferential treatment to backward class.[4] He realises the weakness of the policy of reservation for backward class which gives rise to social tensions as only a small section is benefited by it. The author suggests that the seats in reserved quota should be available only to the first generation learners from the backward classes. The reservation policy benefits only the sons and daughters of the elite among backward class. It is to be noted that Arts. 15(4) and 16(4) are enabling provisions giving discretion to the State in the matter of confering certain benefits on backward classes. Again the power to decide who are backwards is given to the state without any policy guidelines in the constitution. Given the facts of Indian life that such a discretionary power can be abused by the party in power for their own vested interests, it is the duty of the Court to set aside such exercise of the power and to lay down clear policy directives. When the Supreme Court said in *Rajendran*[5] that the caste can be the sole criterion for determining backwardness in certain cases, it did not realise that the caste will ultimately emerge as the only criterion dominating the social, educational and economic backwardness. That is what is really happening. The Supreme Court has also failed to state clearly the extent of preferential treatment to backward classes, for example, in *N. M. Thomas*,[6] the Supreme Court supported 80% reservations and did not follow the 50% rule of *Balaji*.[7] Again majority in *N. M. Thomas* did not regard Art. 16(4) as an exception to the general principle of equality of opportunity in public employment in Art. 16(1). As a result of *N. M. Thomas*, it is now permissible to give preferential treatment to the socalled disadvantaged sections of the society under Art. 16(1). The discussion of *N. M. Thomas* is very surfaceal,[8] its implications should have been discussed in detail.

The author discusses[9] *Menaka Gandhi*[10] and its implications and observes that the Supreme Court laid down in that case that "Article 21

4 *Tope*, at 62, 69.

5. *Rajendran* v. *State of Madras*, A. I. R. 1968 S. C. 1012, *See* also *State of A. P* v. *Balaram* A. I. R. 1972 S. C. 1375.

6. *State of Kerala* v. *N. M Thomas*, A. I. R. 1976 S. C. 490. *See* also *Akhil Bharatiya Soshit Sangh* v. *Union of India*, A. I. R. 1981 S. C. 298.

7. *Balaji* v. *State of Mysore*, A. I. R. 1963 S. C. 649.

8. The case is discussed in *Tope*, at 69.

9. *Id.* at 122-124.

10. *Menaka Gandhi* v. *Union of India*, A. I. R. 1978 S. C. 597 (hereinafter as *Menaka Gandhi*)

is controlled by Art. 19"[11]. Bhagwati, J. said that "Article 21 does not exclude Art. 19" and a law taking away personal liberty might fulfil all the requirements of Art. 21 but such a law "in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article"[12] This, of course, is a very simple proposition[13]. Every law has to comply with the Constitution and a law which takes away the personal liberty is no exception. It has to pass the test of Arts. 20, 21, and 22 in particular and the other Articles of the Constitution in general. If a law taking away the personal liberty also operates upon or affects the enjoyment of a citizen's right under Art. 19, such a law has to be tested upon the touch-stone of Art. 19 also. In that sense, the procedure established by law in Art. 21 is controlled by the requirements of Art. 19 when the law in question infringes any one of the fundamental rights guaranteed by Art. 19. Bhagwati, J., who delivered the leading majority judgment in *Menaka Gandhi*, brought the general concept of justness, fairness and reasonableness of procedure in Art. 21 from Art. 14. This was done by treating Art. 14 'a dynamic concept' and not 'a narrow, pedantic or lexicographic' concept.[14] So understood, equality meant absence of arbitrariness and presence of fairness. Bhagwati, J., said :

> Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Art. 21 must answer the test of reasonableness in order to be 'right and just and fair' and not arbitray, fanciful or oppressive : otherwise it would be no procedure at all and the requirement of Art. 21 would not be satisfied.[15]

The author discusses the consequences of deleting Articles 19 (1) (f) and 31 from the chapter on Fundamental Rights in the Constitution and adding a new Art. 300-A, making the right to property only a consti-

11. *Tope*, at 123.
12. *Menaka Gandhi*, at 623.
13. For a recent critique of the majority approach in *Menaka Gandhi*, see S. Paul, "was 'Due Process' Due ?—A critical study of the Projection of 'Reasonableness' in Art, 21 since *Menaka Gandhi*" 1983 (1) S C C. (J.) 1.
14. *Menaka Gandhi*, at 624.
15. *Ibid.*

tutional right.[16] He is of the opinion that it would be possible to argue as a result of the enlarged concept of personal liberty in *Menaka Gandhi* that the right to property is a part of personal liberty and therefore still a fundamental right.[17] Further, the concept of compensation and public purpose could be brought in Art. 300-A through the reasonableness, justness and fairness of law.[18] In his opinion, the right to property is more secure than before as Art. 300-A is not subject to the Directive Principles as Art. 31 previously was nor is the protection of Nineth Schedule available to Art. 300-A.[19] It must be mentioned, however, that even the subordination of the right to property to some of the Directive Principles could not prevent the judicial review of law depriving an individual of property as it was still open to the courts to see whether the law had been passed *genuinly* to give force to the Directive Principles contained in Art. 39 (b) and (c).[20] The same result can now be obtained by putting into service the principle of harmonious construction which implies that the right to property which is a general provision should give way to more specific provisions contained in Art. 39 (b) and (c).

The author expresses the fear that the changes in the property right might be declared by the Supreme Court to be an infringment of the basic structure of the Constitution.[21] This fear may not be well founded. All the fundamental rights taken individually have not been declared as basic feature of the Constitution[22] and the right to property

16. *Tope*, at 170-192, Chap. 9. Many Constitutional stalwarts have expressed their opinion on this point. No mention, however, is found about it in the book under review. See in particular, P. K. Tripathi, "Right to Property after Forty-Fourth Amendment—Better Protected than ever before", AIR 1980 *(J)* 49 ; Seervai, *Constitutional Law of India*, 2nd Ed., Vol. 3 at 1728-1753 ; D. D. Basu, *Shorter Constitution of India*, 1981, 617, 682. S. P. Sathe, "Right to Property after the 44th Amendment : Reflections on Prof. P. K. Tripathi's observations", AIR 1980 *(J)* 97.
17. *Tope*, at 174, 179.
18. *Id.* at 175, 177, 179-180, 184, 189, 191
19. *Id* at 175, 177-179.
20. This was the conclusion of majority in *Keshavananda Bharti* v *State of Kerala*, AIR 1973 S. C. 1941. This has now been reinforced by the majority opinion in *Minerva Mills* v. *Union of India*, AIR 1980 S. C. 1789
21. *Tope*, at 186.
22. Even in *Keshvananda Bharti*, *supra* note 20 the majority did not say that Fundamental Rights taken as whole are the basic feature of the Constitution, the balance being maintained by Khanna, J., who held that the right to pro-

has never been declared so. Even if the right to property is taken as one of the basic features of the Constitution, this right has not been taken out of the Constitution altogether but only from the chapter on Fundamental Rights. The changes effected do not affect the substance of the right on the contrary they give better protection to it.

While discussing Martial law.[23] the author thinks that the power to proclaim martial law may be derived from Art. 355 read with entries 1 and 2 of List I in 7th Schedule[24]. He does not think the suspension of Art. 21 necessary for martial law and says that the emergency and martial law are two different situations.[25] The author considers the addition of Fundamental Duties in the Constitution as of great significance and thinks that since there is no bar for their enforcement, they can be enforced by the courts.[26] But it must be noted that even if the Fundamental Duties are not made specifically unenforceable, they cannot be enforced because of the vague, expandable and indefinite language in which the most of them are expressed. It is difficult to expect from a predominantly rural illiterate Indian "to develop the scientific temper, humanism and spirit of inquiry and reform" and still more difficult for the court to enforce it. The ideal can be well achieved by the executive through proper education and information. The Fundamental Duties can only serve as ideals expected to be followed by its citizens. From the point of view of enforceability by the court, they are of little consequence unless the violations of some of them are declared as specific offences by law. Their contribution to Indian Jurisprudence seems very doubtful.

The author sees the Indian Constitution creating "a new form of federalism and that is the co-operative Federalism."[27] He discusses the relations between the Union and the States in this light.[28] There are

perty did not form part of the basic structure or frame work of the Constitution. In *Indira Gandhi* v. *Raj Narain*, AIR 1975 S. C. 2299, however, the concept of equality in Art. 14 has been held to be a basic feature of constitution.

23. *Tope*, at 210-212.
24. *Id.* at 210.
25. Obviously, he does not agree with majority in *ADM Jabalpur* v. *S. Shukla*, AIR 1976 S. C. 1707 and with P. K Tripathi *supra* note 3.
26. *Tope*, at 258.
27. *Tope*, at 521
28. *Id.* at 520-566, Chap. 25.

interesting chapters on 'The Supreme Court and the Constitution'[29] and 'Courts and the Interpretation',[30] discussing the role of the Supreme Court under the Constitution and making it a workable document. The author also points out the political nature of some decisions of the Supreme Court.[31] The recent *Judge's* case[32] having far reaching consequences with regard to the position of the High Courts vis-a-vis the executive has been discussed in some detail.[33] Two more subjects of topical interest also find a place—'Emergency and its Aftermath'[34] and 'the Suitability of Parliamentary form of Government to India.[35] The author is of the opinion that Parliamentary system does not suit to Indian conditions and favours French type of democracy.[36]

One finds at some places in the book quotations attributed to different personalities without refering to the source from which they are taken.[37] Sometimes, stray remarks are also made having no reference to the context which confuse rather than clarify the law.[38] Unnecessary repitition of ideas can also be eliminated appreciably reducing the volume of the book. Inspite of these short comings, *Tope* is an important addition to the literature on Constitutional Law of India.

V. P. Magotra*

29. *Id.* at 413-423, Chap. 18.
30. *Id.* at 424-440, Chap. 19
31. *Id.* at 433.
32. *S. P. Gupta* v. *Union of India*, AIR 1982 S. C. 149.
33. *Tope*, at 488-498.
34. *Tope*, Chap. 36.
35. *Id.*, Chap. 37.
36. *Id*, at 701-703. See also T. K. Tope, "Should India Adopt Presidential System of Government", 1982 (2) *S. C. C. (J)* 25.
37. *See*, e. g., *Tope*, at 254, 616, 690, 695.
38. *See*, e. g. *Tope*, at 33. It is stated while discussing the Directive Principles "Judicial interpretation of these Principles points out that in case of conflict between these Principles and the fundamental rights, the latter would prevail." One doubts the correctness of this statement. Again at 580, it is stated, "The Supreme Court laid down that 'money-lending' is not trade." This, however, is not correct. In *Fatehchand* v. *State of Maharashtra*, AIR 1977 S. C 1825 what the Supreme Court said was that the rural money-lending which is exploitative in nature is not trade. Money-lending activity as such was considered very much a trading activity. See Rajiv Dhavan, "The Morality of Trade—A Socialist Supreme Court's Animadversions to Rural Debt Collectors' 1978 (1) *S. C. C. (J)* 10,

* Lecturer, Law School, Banaras Hindu University, Varanasi-221 050

V. N. Shukla's Constitution of India*, revised by Prof. D. K. Singh (Seventh Edition), 1982, Eastern Book Company, Lucknow, pp. XLV+ A-47+779. Rs. 90.00

THE Constitution of India came into force in the year 1950. Since then this sappling has grown into a banyan tree through the constitutional amendments, the legislations and the judicial constitutional legislations. Shukla also appeared at the same time and now it is in its thirty second year. It has grown in size not by padding the material but by well meaning academic exercises.

This is an articlewise commentary which is more acceptable to the readers than the general or topicwise treatment. It makes easy to locate the relevant literature in no time which is a demand of the computor age. The book is divided into twelve Parts dealing with each part in great detail.

It starts with an 'Introduction' divided into three parts. The first part deals with the historical retrospect with a bird's eye view of the developments from 1600 down to the framing of the present constitution. This pattern is followed by the textlbooks on the Constitutional History of India. But the resume' of historical retrospect, in a book on the Indian Constitution, may find a better shape by arranging the materials under the three heads of evolution of the legislative, the executive and the judicial authorities. This arrangement will give a clear picture of the developments in these areas and will help in better connecting with the future course of action. Even in the brief treatment the 1935 Act, a blue print on which the Constituent Assembly framed the present Constitution, misses a systematic approach. The second part of the introduction gives ample material to appraise the readers with "the fundamental aspects of the Constitution." The topics of Indian federalism and the form of Government are discussed in a greater detail than the other text books. At some places one is also exposed to the comparative approach. The last part of Introduction deals with 'judicial interpretation'. This topic breaks a link in the foregoing discussion. Moreover, the doctrines discussed herein are discussed at relevant places and such a separate treatment may find a place in a treaties on interpretation of statutes.

* Hereinafter referred to as *Shukla*

After the 'Introduction', the chapter on Fundamental Rights deserves a mention. This is one of the longest treatment of *Shukla*. This part has grown tremendously because of the judicial legislation and the constitutional amendments. No effort is left in this work to deal with the leading and relevant case law on the subject. The opinion of Justices handing down the leading cases and a critical appraisal thereto are the added attractions of the present work. However the volume requires some cut in the size. At many places the old case law of the previous editions is still continued in the present edition. Some of these cases have been followed with new dimensions or have been overruled. The study of such case law may be of great interest to the researchers but the residuary consumers are mainly interested in the current cases. The bulk of case law may be reduced in the following ways. The old cases may, if necessary, find a place in the footnote. Secondly, they may be categorised under the broad heads, for example, under the discussion of article 14 two broad headings may be made : reasonable and unreasonable classifications. However the above scheme should not mean that the reviewer is suggesting to cut down all the old case law. Though *Gopalan's* case[1] is the oldest judgement on Article 21 of the Constitution of India yet, no discussion on personal liberty can start without it.

In the Chapter on "Fundamental Rights" it is surprising that *Shukla* has missed three important developments. In the discussion on Article 19(1) (f)[2] there is no reference to the Constitution (Forty-fourth Amendment) Act, 1978 which omitted this fundamental right. Similarly, there is no reference to the said Amendment Act in the discussion on the right to life and personal liberty. Now the enforcement of this right cannot be suspended during emergency. A similar reference is missing in the topic on "Emergency and Writ of Habeas Corpus."[3] Further, the history of Preventive Detention law is traced "till October 1980 when the President promulgated the National Security Ordinance, 1980;"[4] whereas the Appendix 11[5] to the present work gives the provision of the Act. The fact is that the Ordinance was replaced by the National Security Act, 1980 on 27th December, 1980. This Act is in operation with certain modifications till to date.

1. *Gopalan* v. *State of Mad* , A. I. R. 1950 S. C. 2.
2. *Shukla*, at 93.
3. *Id*. at 621.

In the area of the Directive Principles of State Policy, the study is confined to the analytical approach of the provisions and the discussion of case law in this area. One does not get any material as to how far the State has implemented or followed these directives. A resumé of state action in this area may give the readers an idea of response of the state in this direction. Take for example, the Directive Principles relating to the protection and improvement of environment and the fundamental duty of the citizens thereto are the important provisions which the Constitution of India provides for. We have taken a lead in the World Costitutions by incorporating such provisions in the constitution, handing down the water and air pollution laws and also judicial activism in this area. This has been a remarkable contribution in a developing country.

In our teaching experience we have realised that the students find difficulty in understanding the election process in case of the Presidential election. If a chart is given while discussing the provisions, one may be able to get a clear picture in this regard. The present work may add such a chart.

The Chapter on the Union Judiciary is another part which has been discussed at great length but justice is not done with the topic of advisory jurisdiction. The Supreme Court by now has rendered several advisory opinions but a reference of these opinions are mentioned in the footnote.[6] A brief mention of these opinions will save the time of at least the undergraduates from reading each and every advisory opinion from the Supreme Court Cases or the All India Report.

The students of Federalism find the present work most useful. All the articles are discussed in great detail. The doctrines and the case law also get elaborate treatment. However, *Shukla* may look to the following suggestions to give a clear picture of the Indian federalism There are legislations passed under articles 249, 252 and 253 and a reference of such legislations may be given. Further, the distribution of legislative powers is not the only topic in the Centre-State relationship. The financial relation is the most important aspect in this area and here *Shukla*, in his articlewise treatment, misses expansive approach. Moreover, the articlewise discussion also avoids the reference to the extra-constitutional cooperative and centralised forces.

4. *Id.* at 130.
5. *Id.* at 744.
6. *Shukla*, at 335, note 10.

In the Chapter on "Amendment of the Constitution" *Shukla* may introduce a topic on 'amending process in action'. In this a bird's eye view of all the amendments may be given. This will help the students to know the direction of the constituent power. This may be displayed through a chart giving information about the procedure and the provisions amended and their future directions.

The 'Selected Reading's in the Appendix III is an added attraction of *Shukla*. This approach is generally missing in the other publications in this area. However it is not exhaustive. It is surprising that Basu has no place in the 'Selected Readings'. Moreover, it is mainly confined to the references in the Journal of the Indian Law Institute or the Supreme Court Cases only. There are other periodicals which also contribute articles in the field of constitutional law. In the comparative study, the mention of some of the leading text books on the major constitutions of the world can be of great interest.

In the present growing cost of paper and printing and looking to the volume of the present work it cannot be said that the price is too expensive. But looking to the students pockets they feel it a bit expensive. After cutting the size on the lines suggested above can *Shulka* come in the student's edition ? This will allow a wide circle of consumers.

Above are some of the suggestions to make the present work one of the text-book widely read. *Shukla* is a multidimensional work. The undergraduates in law can find the basic materials, the postgraduates will get detailed, critical and comparative approaches. The lawyer's can have easy references on all articles of the Constitution of India. *Shukla* has the quality to fit in the case law system or otherwise. Those preparing for I. A. S. and other competitive examinations or even examinations of other disciplines will find the present book of a great help. Last but not the least all those who are interested in the study of the Constitution of India cannot afford to miss *Shukla* on their bookshelves.

The Eastern Book Company also deserve praise for the nice gate-up with only few printing mistakes and a low price for such a bulky volume of nearly one thousand pages.

C. M. Jariwala*

* LL. M., Ph. D. (London), Reader in Law, Banaras Hindu University, Varanasi.

Statement of Particulars under Section 19D (b) of the P. R. B. Act read with Rule 8 of the Registration of Newspapers (Central) Rules, 1956.

FORM IV

1.	Place of Publication	Law School, Banaras Hindu University, Varanasi
2.	Periodicity of its publication	Yearly
3.	Printer's Name Nationality Address	Rama Shanker Pandya Indian Tara Printing Works, Kamacha, Varanasi
4.	Publisher's Name Nationality Address	D. S. Mishra Indian Asstt. Librarian, Law School, Banaras Hindu University, Varanasi
5.	Editor's Name Nationality Address	Prof. M. C. Bijawat Indian Dean, Faculty of Law, Banaras Hindu University, Varanasi
6.	Name and address of individual who own the papers and partners or shareholders holding more than one percent of the total capital	Law School, Banaras Hindu University, Varanasi-221005

I, D. S. Mishra hereby declare that particulars given above are true to the best of my knowledge and belief.

D. S. Mishra

Edited by Prof. M. C. Bijawat for Law School,
Banaras Hindu University

Published by D. S. Mishra for Law School,
Banaras Hindu University

Printed at

Tara Printing Works, Varanasi
for the Law School

LAW SCHOOL

BANARAS HINDU UNIVERSITY

SRI DASHRATHMAL SINGHVI MEMORIAL CITATION AND AWARD

Dr. L. M. Singhvi, a leading advocate of the Supreme Court of India has instituted an award in memory of his father to be called **'Sri Dashrathmal Singhvi Memorial Citation and Award'**. The award shall be administered by the Banaras Hindu University.

According to the terms and conditions, the award will be given to the author of a book, monograph, lectures or dissertation in the field of **Public Law.** Outstanding judges and lawyers will also be eligible for the grant of the award.

The award shall be given once in three years and shall consist of a plaque along with a citation.

The committee for the Award shall consist of the following :

(i) The Vice-Chancellor, B. H. U. or his nominee,

(ii) The Dean, Faculty of Law, B. H. U.; and

(iii) A distinguished Judge, Lawyer or Law Teacher nominated by the Vice-Chancellor, B. H. U. as suggested by the Donor.

The decision of the Committee shall be final. The Committee shall however have the right not to recommend the Award, if it finds the work submitted for consideration or recommendation is not of sufficient high merit.

The Banaras Hindu University invites published or unpublished material for the consideration of the Award. The recommendations can also be sent by the Faculties of Law, Research Institutes, Bar Associations and any other recognised bodies.

The material or recommendation for the Award should be sent to the Dean, Faculty of Law, Banaras Hindu University, Varanasi-221005 by December 31, 1984.