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THE EQUITABLE APPORTIONMENT OF INTERNATIONAL RIVERS

R. C. CHHANGANI*

I. Introduction

During the days of Hugo Grotius[1], international rivers were considered to be "Marching highways", and were used for navigation, fishing, domestic and sanitary uses, and small irrigation projects etc. These uses hardly gave rise to international disputes among the riparian states. But due to scientific and technological developments, apart from the traditional uses of water, many new uses have come into existence and gained importance, e.g. large scale irrigation, production of hydro-electric powers and needs of industrialization etc. In modern times, the emphasis has shifted from navigational uses to non-navigational uses of water. With the increasing new uses of river-waters, the international community in general, and the riparian states in particular, are faced with the complex problems of diversion, regulation, and control of river-waters, because such new uses substantially affect the flow of river water. In other words, the modern uses of river-water need an adjustment of the conflicting interests of the riparian states.[2]

II. International River

It is difficult to give an agreed definition of international river; however, we may say that an international river is one which passes through the territory of several sovereign states. Thus, a river may flow through the territory of more than one state (successive) or which may separate the territories of two or more states (contiguous). The general character of a international river is that it flows from the upstream state towards downstream state, like the "moving clouds" or "migratory birds"[3]. Owing to the fluid character of the river-waters, when they are substantially diverted or used by one state within its own territory tend to produce adverse effects on the territory of lower riparian states.

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1. H. Grotius, Book II, Ch II, Ss 12, and 13.
2. S. N., Jain, A. Jacob, and S. C Jain *Inter-State Water Disputes in India*, (Tripathi Publication), (1971), Ch. IV, p. 91,
3. *Missouri v. Holland* 252 U. S. 416 (1920).

The modern uses of the waters of the international river may sometimes create tensions or frictions and mar the good neighbourly relations among the riparian states. The rights and obligations of riparian states with regard to use, diversion, and control of water flowing from one state to another, have been regulated by four important principles[4]. These principles, have been advocated from time to time by politicians, statesmen, and publicists to justify the interests of their own states. The aim of the present paper is to examine and analyze the principle of "Equitable Utilization" of waters of the international rivers. The author, feels that, it is necessary to examine briefly the traditional principles, before attempting to analyze the principle of Equitable Utilization.

III. (a) Absolute Territorial Sovereignty

According to this principle each riparian state is absolutely free and has sovereign authority to dispose of the waters flowing through its territory, irrespective of the consequences or injury resulting to the other riparian state or states.[5] This principle gives a preferential right to the upper riparian state in disposing the water passing through its territory, without taking into account the interests of the lower riparian states. The diversion of water of the Rio Grande river, lying within the territorial jurisdiction of the U. S. A., was justified by the then Attorney General of the U.S. in the following words : "The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from the considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the U.S." This statement is popularly known as the Harmone doctrine.[6] This doctrine is reluctant to admit any limitation upon the sovereignty of the upper riparian state, especially when the river water is flowing through its territory. The chief exponents of this principle are Briggs, Fenwick,

4. F. J. Berber, *Rivers in International Law*, (1959) 14; J. Lipper, "Equitable Utilization", in : *The Law of International Drainage Basins*, by Garretson, Hyton and Olmstead (1967) p. 15,
5. J. Austin, "Canada-U.S. Practice and Theory Respecting the International Law of International Rivers study of the History and Influence of the Harmon Doctrine", *37 Can. Bar Review* (1959) p. 393; G.S. Raju, "Principles of Law Governing the Diversion of International Rivers", *2 I,J.I.L.* (1962) p. 370.
6. Austin, *supra* note 5, at 393.

Hackworth, Hyde, Kluber and others.[7] Till the beginning of the twentieth century this principle was frequently justified by the upper riparian states. The United States pleaded this principle in its favour in water disputes with Canada and Mexico.

In the modern times, this principle has been criticised on the following grounds. *First*, it gives an absolute right to the upper riparian state to use or misuse the river-water passing through its territory, irrespective of the consequences suffered by the lower riparian state. *Second*, it negativates the theory of "equality of states" in international law by giving higher status to the upper riparian state.[8] *Third*, it looks at the international river, from the segment point of view, rather than from integrated approach. *Lastly*, it gives unnecessary temptation to upper riparian state to start hasty and uncordinated development of water projects, without taking into account the social and economic consideration of lower riparian states, which may sometimes mar the good neighbourly relations among the riparian states.

(b) Territorial Integrity

The principle of territorial integrity, on the other hand, safeguards the interests of lower riparian state in getting continued flow of water without bothering about the interests of the upper riparian state. This principle intends to create servitude in favour of lower riparian state to receive natural flow of river water. It is based on Roman Law relating to protection and use of waters among the citizens in relation to others.[9] Thus; according to this principle, a lower riparian state is entitled to demand natural and continual flow of water from the upstream state, irrespective of latter's needs and interests. Max Huber, the chief exponent of this theory, observed that, "every state must allow rivers..irrespective of their length or their breadth, to follow their natural course". Oppenheim, similarly, has observed that the upper riparian state should not alter the natural conditions of river water to the detriment of other riparian state.[10]

It is thus clear that this principle restricts the right of upper riparian state, relating to the utilization of river water within its jurisdiction, if it substantially affects the natural flow of water. The corollary of this principle is that the lower riparian state has a right to put *absolute veto*

7. Berber, *supra* note 4, at 14-19.
8. Jimen de Arechaga, "International Legal Rules Governing Use of International Water Courses", *2 Inter American Law Review* (1960) p 329.
9. L. A. Teclaff, *The River Basin in History and Law*, (1967) p. 88.
10. Oppenheim, *International Law*, Vol. I, 8th ed. p. 475.

on the economic development of the upper riparian state. The demerit of this principle is that it belives in giving undue emphasis on the continual flow of water, irrespective of latter's (lower riparian state) capacity or means to utilize river water or it goes to sea without any use. Further, it may create impediments in the use of river water in a comprehensive way.

(c) Community in the Waters

According to this principle, water-course of the international river is common property of all riparian states, and they are equally entitled to its benefits, irrespective of the political boundaries. This principle is based upon the principle of equality of states, that is equality of riparian states. This principle contemplates positive cooperation and consultation among the riparian states to achieve the objective of maximum utilization of waters for their economic development, irrespective of territorial boundaries. Henry Farnham and Smith[11] are the chief exponents of this theory. Farnham is of the view, that a river, which flows through the territory of several states, is their common property and neither state can do any act which will deprive the other of the benefits of those rights and advantages—the gifts of nature are for the benefits of mankind.[12] This principle aims to establish perfect equality among the riparian states irrespective of their political territories. This principle was first established by the Permanent Court of International Justice in the *River Oder Case*.[13] The Court had observed that the basis of a common legal right—the essential features of which are the perfect equality of all riparian states in relation to others—the consideration of justice and utility form the basis of community approach.

This principle has been criticised on the following grounds. *First*, it does not take into account the sovereign aspect of the territorial jurisdiction of riparian states. *Second*, it gives undue emphasis to the integrated development of entire river basin without taking into account the different levels of economic development of riparian states. *Third*, this principle cannot be applied when riparian states are at different stages of economic development, and entire river basin is not developed at the same time; as such, this principle is less practical and pragmatic.[14]

(d) Limited Territorial Sovereignty

According to this principle, the riparian states are prohibited to use the water course passing within their territory in such a way that it

11. H.A. Smith. *The Economic uses of International Water* (1931) p. 149.
12. Farnham, *Law of Waters and Water Rights* (1904).
13. *The River Oder* Case (1929) *P.C.I J. Ser* , A. No. 23, p. 609.
14. P. K, Menon, "Water Resources Development of International Rivers with Special References to the Developing Countries" *9 Int. Lawyer* (1975), p. 441.

may lead to serious damage or injury to other co-riparian state. It does not believe in giving preferential treatment to either upper or lower riparian state, but believes in putting reasonable restriction on them according to the peculiarity of the river system. However, it may be mentioned that small and insignificant inconveniences are to be overlooked by riparian states. because they are parts of international life and have to be adjusted within the scope of good neighbourly relations.

This principle has been advocated by a number of publicists, *viz.* Von Bar, Lederle, Brierly, Winiarski, Fauchille, Quint, Sauser Hall, Sosa-Rodriguez, and others.[15] The principle has been recognized and applied by various states in their governmental pronouncements,[16] adjudications[17] treaties,[18] conventions,[19] and declarations.[20] The concept of limited territorial sovereignty emerged from Madrid Declaration 1911[21] and the Salzburg Resolution, 1961,[22] which in turn, led to the development of the concept of "equitable apportionment" of waters, based on considerations of equity, fairness, and justice. The Helsinki Rules, 1966 developed by the International Law Association (ILA), have made a valuable contribution in the development of modern river law and specially the principle of equitable utilization.

IV. The Principle of Equitable Apportionment

It is generally recognized that each riparian state has a right to utilize the waters of a common river. The real controversy is related to the question of exact quantum of water, to which each riparian state is entitled. The traditional principles could not provide effective and satisfactory solution regarding the determination of quantum of water to each riparian state, while the modern principle of "equitable utilization or apportionment" tries to solve such complicated problems of riparian states by balancing the needs and benefits of one state against the damage suffered by the other on the basis of equity, fairness and justice. In

15. Berber *supra* note 4, at p. 29-39.
16. The Dutch govermental prouncement in 1862, quoted in Lipper, *supra* note 4 at 25.
17. The *Lake Lanoux Arbitration* between France & Spain.
18. The Niger River Treaty, 1963.
19. Arts 3-4 the Geneva Convention on Hydraulic Power (1923).
20. Declaration of American States at Montevideo Conference, 1933, *see* also, Inter-American Bar Association Resolution, 1957.
21. Madrid Declaration prohibits the diversion of water by a riparian state which causes substantial damage to the other state.
22. Salzberg Resolution mentions that the settlement of water disputes among the co-riparian states will be settled on the basis of *equity* and *fairness*

determining the equitable share of water of each riparian state, what factors should be taken into account and how to reconcile the conflicting interests of co-riparian states, are the real problems of modern river law. According to this principle, each riparian state is entitled to share the water of a common river and other benefits on the considerations of "just and reasonab'eness", In determining the just and reasonable share of water, to which each riparian state is entitled, it is necessary to balance the needs and interests of riparian states in a equitable manner, after taking into account the advantages gained by one state against the injury suffered by the other.[23] The principle of "equitable apportionment "has been called by other names by various authors. Hartig has described it as a "principle of coherence". Eagleton has described it as "integrated river system, or unified system". Fortuin has termed it as "fullest possible profit", Garland has named it as the principle of "full utilization". Bourn calls it as the principle of "limited territorial sovereignty" or "equitable apportionment".

There is no international decision (except the *Lake Lanoux Arbitration*) applying the customary rules of international law relating to diversion, or sharing of waters of a common river. The decisions of the municipal courts and commissions are, therefore, relevant under article 38(1)(d) of the Statute of International Court of Justice, in analogous situations.[24] Having reviewed the decisions of various municipal courts, viz. U. S., Switzerland, Italy, Germany, and France, Saucer Hall has come to the conclusion that this principle is a contribution of municipal law to international law.[25]

The inception of this rule may be traced to the case of *Aargau v. Zurich*[26], decided by the Swiss Court in 1878. In this case, the Canton of Aargau made a petition alleging that owing to the diversion of the water of Jonabach river by Zurich Canton, she had suffered damages. The Swiss Federal Court dismissed the petition and observed that each Canton is entitled to take necessary measures for a rational utilization of public waters. The Federal Court further observed that Aargau's right to claim "reasonable share" of the flow of water was not infringed because Zurich statute had made an "equitable provision" for protecting the

23. M. Basheer Hussain, "The Law of Inter-state Rivers in India, Principle of Equitable Apportionment of River Waters." *16 I. J. I. L.* (1977), p. 43.
24. H. Lauterpacht, "Decisions of Municipal Courts as a Sources of International Law". *10 B. Y I L.* (1929), p 65.
25. Sauser Hall, "L' uti ization Industrielle des Fleuires Inter nationaux" *83 Recuil des Cours 517*, Hague Academy (1953).
26. Schindler, "The Administration of Justice in the Swiss Federal Court in International disputes". *15 A. J. I. L.* (1921), p. 149

interests of riparian owners by depositing an amount for the construction of remedial works in Aargau. The formulation of this embroyonic rule laid down by the Swiss Federal Court was carried further by the U. S. Supreme Court, which for the first time, discussed the rule of equitable apportionment in *Kansas v. Colorado*.[27] In this case, the right of Colorado to divert the waters of the river Arkansas was justified, even though the diversion of water diminished the flow of water and caused damage to Kansas. The Court dismissed the petition on the ground that the loss to Kansas can be outweighed by the benefits to Colorado.

This principle was further developed and refined in *Wyoming v. Colorado*,[28] *Connecticut v. Massachusetts*,[29] *Nebraska v. Wyoming*,[30] and in other cases.[31] In *New Jersey v. New York*,[32] Justice Holmes observed that this principle of "equitable apportionment" was to be applied in flexible manner "without quibbling over formulas". The U. S. Supreme Court further observed that it was difficult to define the term "just and equitable" share of water among the co-riparian states in mathematical way. This principle was similarly developed and applied by the Courts of Germany[33] and Italy.[34]

Sauser Hall[35] has observed that this rule was not originally based on precise rules, but was subsequently developed by publicists, judicial decisions, and treaty provisions.[36] Some publicists[37] have supported this principle in their writings. Griffin[38] writes that each riparian state is entitled to share in use and benefit of common river's water on *just and reasonable basis*.[39]

27. *206 U.S. 46.97* (1907).
28. *259 U S. 419* (1922).
29. *282 U.S. 660* (1931).
30. *325 U S. 589* (1944).
31. *Washington v. Oregon 297 U.S. 517* (1936).
32. *282 U. S. 336* (1931).
33. *Wuerttemberg and Prussia v. Badan Annual Digest of Public International Law Cases.* 1927-28, p. 128.
34. *Societe Energie Electrique due Littoral Mediterraneen v. Campagnia Imprcse Electriche Liguri. Annual Digest of Public International Law Cases* 1938-40.
35. Hall, *supra* note 25, at 471, 582.
36. The Treaty between India and Bangladesh, 5th Nov. 1977, regarding the sharing of the water of the river Ganges.
37. *supra* note 4, at 29-39.
38. Legal Aspects of the use of Systems of Intereational Water. U S. Doc. No. 118 (1958).
39. *Emphasis* supplied.

The recent efforts to codify the law relating to non-navigation uses of water have been made by publicists,[40] governmental bodies, and non-governmental organizations and the United Nations etc. The contribution of ILA in this regard is noteworthy especially in developing the Helsinki Rules. The Helsinki Rules have elab rately discussed the principle of equitable apportionment in its Chapter II in the following words.[41] "Each basin state is entitled within its territory to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin". Article IV of the Helsinki Rules is the key principle of international river law. It may be mentioned that only beneficial uses of water are worthy of protection and are considered to be reasonable. In such circumstances, the diversion of a river water by a state with a view to harrassing the other riparian states cannot be considered to be reasonable. But at the same time, it is wrong to think that the beneficial uses of water must be most productive use to which the water may be used. It does not mean that the utilization of the water should be done by the most efficient methods known, in order to avoid the waste and to insure the maximum utilization of water. Thus, it is possible that a less-developed riparian state can derive the benefits of water, even though a developed riparian state may use the river water in most productive and in a most effective way.

The Helsinki Rules have prescribed certain rules,[42] as guiding rules or norms for determining the reasonable and equitable share of the water, keeping in view the concept of international drainage basin :

(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each state.

(b) the hydrology of the basin, including in particular the contribution of water by each basin state.

(c) the climate affecting the basin;

(d) the past utilization of the waters of the basin, including in particular existing utilization;

(e) the economic and social needs of each basin state;

(f) the population dependent on the waters of the basin in each basin state ;

40. S. C, Jain, "The Codification of Inter ational Water Resources Law" *2 Kurukshetra Law Journal* (1976), p. 197; H J. Manner, "The Present State of International Water Resources Law", in, *The Present State of International Law*, (ed) M. Bos. (1973), p. 131.

41. Art. V (2), the Helsieki Rules, 1966.

42. Art. IV, the Helsinki Rules, 1966.

(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin state;

(h) the availability of other resources;

(i) the avoidance of unnecessary waste in the utilization of waters of the basins;

(j) the practicability of compensation to one or more of the co-basin states as a means of adjusting conflicts among uses; and

(k) the degree to which the needs of a basin state may be satisfied without causing substantial injury to a co-basin state.

The rapporteur of the sub-committee, appointed under the Afro-Asian Legal Consultative Committee.[43] had similarly suggested factors for determining the reasonable and equitable share of water of the international rivers. The guiding rules, as suggested by the sub-committee for determining the equitable apportionment of waters among the riparian states, were identical to article V (2) of the Helsinki Rules.[44]

V. Analysis of the Principle of Equitable Apportionment

We now propose to analyse the principle of equitable-apportionment according to its main features which should enable us to understand its true nature and scope :

(a) Flexibilty : The Helsinki Rules have prescribed certain essential factors for determining the reasonable and equitable share of river water among co-riparian states. The factors, listed in article V(2) of the Helsinki Rules, are guiding factors and further they are enumerative, rather than exhaustive. Apart from them, other factors may be suggested, such as, the quality of water after the use by a riparian state, the seasonal variations in the use of water etc, for determining the share of equitable apportionment of water of the international river[45]. The Rules suggest that each relevant factor has a comparative value for determining the equitable apportionment of water. Thus, it must be weighed in comparison to other factors. In other words, no factor has any independent value; and the Helsinki Rules do not provide any arithmatical formula to determine the share of river water, but provide general and flexible criterion for the same.

43. See the work of the Asian- African Legal Consultative Committee 1956-74 (New Delhi), p. 43

44. III rd proposition of the A.A.L.C.C. (1972), p 69

45. Lipper, *supra* note 4, at 29.

(b) Priority of uses : The principle of equitable apportionment does not recognize any preference value for a particular use of water, viz, the navigation or non-navigational uses. Article VI of the Helsinki Rules has made it clear that "a use or category of uses is not entitled to any *inherent* preference over any other use or category of use". It means that navigational or non-navigational uses of water stand on equal footing. In other words, the uses of river water, as mentioned in article V (2) of the Helsinki Rules, from "a" to "k" cannot claim any priority over each other. The Rules do not create any artificial preference among the uses of water, but rely on inductive process of determination.[46] Thus, it can be concluded that the Rules do not attach any fixed or rigid priorities for a particular kind of uses of water. The priority varies from place to place, time to time, and river to river system. In the past, navigational uses of water claimed higher priority over other uses of water, while in modern times, non-navigational uses of water, such as, for generating electricity etc. claim high priority; however, it is very difficult to draw any hard and fast rule regarding priority in uses of river water.

(c) Resonable Restrictions on Sovereignty—The rule of equitable apportionment rejects the absolute territorial sovereignty of riparian states. It believes in putting reasonable restrictions on the sovereignty of all the riparian states, with a view to achieving the maximum utilization of water, for each riparian state with minimum of detriment. The cornerstone of this principle is equality of right or equal status to each riparian state. The equal status for each riparian state does not mean that each riparian state, upper or lower, is entitled to *equal division of water* or *identical share.*

(d) Prior-appropriation—The rule of prior-appropriation[47] means that the first user has a superior right in comparison to subsequent user. Blackstone justified the sacrosancy of this rule on the basis of "seniority". The Helsinki Rules, to some extent, do recognize and protect the right of the first user. The partial protection of this rule has been envisaged in its article V (2) (d). The Rule specifically provides that the past utilization of water by basin state is one of the factors in determining the share of river water among the riparian states; however, it is not a sole or preponderent factor. It is to be considered in totality of circumstances. The past utilization of waters by a state does not mean that state has acquired a vested right. It is suggested that the rule of prior-appropriation should not become an obstacle in achieving the end of maximum

46. *See* Comments to Art. V. of the Helsinki Rules, 1966.
47. Other names are natural right, historical right, immemorial use, ancient use, vested right etc.

utilization of waters.[48] In short, this rule is to be appreciated in association with certain other rules for determining the reasonable and equitable share of water among the co-riparian states.

(e) Protection of Existing uses : In determining what constitutes equitable apportionment of water, existing uses generally create difficulties. The Helsinki Rules partially protect the existing beneficial uses of water so long as such uses are reasonable and justified. In other words, the first user or the prior user does not acquire a vested right to use river water to the exclusion of other or subsequent users. The Helsinki Rules permit the displacement of existing uses of water, when the contemplated use of water offers benefits of such a magnitude that it is sufficient to outweigh the injury to the existing uses.[49] In other words, the Rules permit modification or termination of the existing uses of river water, if there are reasonable and justifiable grounds and further the first user has been duly or reasonably compensated. The price of displacement of existing uses cannot be full compensation in any case, because if it is so, the developing countries could not think of making use of water subsequently. The developing countries would not accept the formula of full compensation, but would like to substitute it with "reasonable compensation", after taking into account the circumstances of the displacing state and other peculiarities of the river system. In Indus Water Dispute between India and Pakistan, the displacement of existing uses of water was settled by compensation through the instrumentality of the World Bank, on, the basis of enrichment of developing state, (India), rather than than on the damage caused to the prior user, i. e. Pakistan.[50]

(f) The Concept of Future uses : There are two conflicting principles with regard to the uses of river water, viz, present uses of water as opposed to the future uses of water. The present and future uses of water among the riparian states may sometimes be conflicting. The Helsinki Rules intend to resolve this conflict in favour of present reasonable uses of water. It provides that a basin state may not be denied the "present reasonable use" of water of an international drainage basin, on the ground that the other co-basin state will use the water in future.[51] The Helsinki Rules protect the rights of the first user on two grounds. *First*, it is unreasonable to prevent a riparian state from using water for its present beneficial uses, in comparison to the future uses. Admittedly,

48. C. B. Bourne, "The Right to Utilize the Waters of International Rivers". *(1965) Canadian Y B.I L. 232.*
49. Lipper, *supra* note 4, at 58; Art 8, the Helsinki Rules.
50. Arechaga, *supra* note 8, at 329-330.
51. Art VII, the Helsinki Rules, 1966.

the present uses of water are certain and provide certain and immediate benefits, while the future uses are generally uncertain and hypothetical. *Second*, it is better to make available use of water for present uses rather than reserve the same for future unless such uses are accompanied by detailed plans or most likely to be materialized in very near future. The use of the word "mere" suggests that a state must show a genuine need and not a speculative one in order to limit the right of co-riparian state to use water for present development. The U. S. Supreme Court has been reluctant to protect the future uses of water in comparison to present beneficial uses in inter-state water disputes.[52]

The developing states criticise this aspect of the Helsinki Rules. These states are in favour of reserving the river water for future. Further, these states suggest that the "future uses" of water should be an important factor in determining the equitable apportionment of water among the co-riparian states. In fact, the developing states want an assurance from the first user to make available for them reasonable quantum of water *in future* when they need. The demand for protecting the future uses of water is gaining ground and has been incorporated in many treaties among the co-riparian states. For example, the Nile Treaty between U. A. R. and Sudan, the Columbia Treaty between U. S. and Canada, have taken into account the future uses of water of Sudan and Canada respectively.

(g) **Review Procedure** : The merit of this principle is that it is not static but subject to change or revision. The reasonable and equitable share of river water once determined among co-riparian states is not final and conclusive for all times to come. It is subject to change, modification or alteration depending upon the material changes in river conditions or any other sufficient causes.[53] It means that what was once a reasonable and equitable share of water among the riparian states, may not necessarily be equitable share for all times to come. The entire scheme, provisions, and the spirit of the Helsinki Rules indicate that the rule of equitable apportionment is flexible, and subject to change or variations in certain circumstances. The recent treaty between India and Bangladesh regarding the sharing of water of the river Ganges has incorporated a review procedure.[54]

52. *Connecticut v Massachusetts*, *282 U S 660* (1931). *New Jersey v. New York*, *283 U. S 336* (1931).
53. Art. VII, the Helsinki Rules, 1966
54. Art. 13, Indo-Bangladesh Treaty on Sharing of the Ganges Water, 5 Nov. 1977 *I L.M. Vol. XVII* (1978), p. 103,

VI. Criticism of the Rule of Equitable Apportionment

The Helsinki Rules in general and the rule of equitable apportionment in particular have been criticised by some publicists.[55] The criticism against the rule of equitable apportionment may be summarized as under. *First*, the Rules have been formulated by a private organization like the ILA, consisting of citizens of various nations in their private capacities. Further, the ILA lacks proportionate representation as the Asian and African countries have not been duly represented; therefore, the rules codified by such an organization cannot stand at *par* with the rules codified by the International Law Commission. *Second*, the Helsinki Rules have introduced a new concept of "international drainage basin" which is not generally acceptable.[56] *Third*, the rule is vague and is not susceptible to definite formulation. The vagueness of the rule creates more problems and difficulties in determining the reasonable and equitable share of water among the co-riparian states. *Fourth*, the rule is not complete in itself. It needs to be supplemented by other agrements or arrangements for determining the exact quantum of water to which each riparian state is entitled. It may be mentioned that generally riparian states agree in principle regarding the sharing of river water in accordance with the principle of equitable apportionment, but they hardly agree over exact quantum of water to which each riparian state is entitled. *Fifth*, the rule de-emphasises the significance of the "future uses" of water which the developing states regard as most important in determining the reasonable and equitable share of river water. The Rules protect "existing uses", which leads to discrimination between developed and developing states, as such, they are unable to suit the needs of the third World.[57] *Sixth*, the Rules do not provide any definite machinery for determining or reviewing the reasonable or equitable share of water among the co-riparian states. *Seventh*, the rule of equitable apportionment has introduced an element of flexibility which in turn may create more problems for riparian states. This creates obstacles to reach an agreement over an exact quantum of water each riparian state is entitled.

VII. Concluding Observations

The concern of the international community is to achieve rational and maximum development of the common resources for the benefit of each riparian state. The Helsinki Rules have substantially developed the rule of equitable apportionment of waters of international rivers, with a view to achieving the end of maximum utilization of river waters, with a

55. *U. N. Doc* A/C 6/S. R. 1225 at 5
56. *Report of the Int. Law. Comm.* 28th Session (1976), p. 384.
57. *Supra* note 55.

minimum of detriment to riparian states. The rule of equitable apportionment does not believe in giving any preference to any riparian state, either upper or lower, like the traditional rules, *viz*, the rule of absolute territorial sovereignty and the rule of territorial integrity. In other words, now-a-days, riparian states do not press their claims regarding the determination of share of river water on the basis of the Harmon doctrine or on the basis of the theory of territorial integrity, but support their arguments for increased share of water on the principle of equitable utilization.

In a recent water dispute between India and Bangladesh regarding the sharing of water of the river Ganges, both states have advocated the principle of equitable apportionment and reached an agreement,[58] though both the states are making efforts to settle the exact quantum of river-water.

Despite all criticisms, the rule has the merit of providing the "negotiable base" to start negotiations and to help the riparian states to arrive at mutually agreed treaties, for determining the exact quantum of river water.[59] This rule is based on considerations of fairness, equity and justice. In short, this rule replaces the earlier inflexible rules of absolute territorial sovereignty or territorial integrity. The balancing of interests of riparian states, keeping in view, the maximum utilization of river water is the essence of this principle. Some authors are of the view that there is a need to revise the Helsinki Rules, so as to reconcile the conflicting interests of developed states and developing states with regard to protection of the future uses of water.[60] It may be suggested here that it is better, if the substantive rule of "equitable apportionment" is further supplemented by the procedural rules.[61]

Thus, it is concluded that the rule of equitable apportionment may not provide a sure guide in a mathematical way for determining the allocation of water resources among the riparian states, but certainly provides a useful guide. The sincere implementation of the rule by riparian states in a positive and co-operative spirit will help in reconciling the competitive and conflicting uses of the common river water resources.

58. The Farakka Agreement, *supra* note 54
59 T. Olawale Idris, "Development, Law and Administration of the Chad Basin" 4 *A. S. I L. Proc* (1972), p. 600.
60 W. Michael, "The Allocation of Waters of International River". *Natural Resources Lawyer* Vol VII (1974), p. 45.
61. e. g. duty to give notice; duty to exchange information, duty to consult and duty to negotiations and consent etc.

THE CONCEPT OF CRUELTY

B. P. BERI*

Byron said that marriage is "the bloom or blight of all men's happiness." One of the aches in the field of matrimony is that behaviour which robs either or both of the spouses of their happiness. The totality of such painful behaviour may be broadly described as cruelty. In the Anglo-Saxon jurisprudence the term cruelty in the field of matrimonial law had significance even in those days when divorce was not permitted amongst Christians. The party who was treated cruelly by the other spouse could make a grievance of it before the clergy. It is both a weapon for seeking relief as well as a shield to protect oneself from further injury as a reasonable cause not to live together.

The definition given in *Russel v. Russel*[1] by Lord Davey, namely, "legal cruelty may be defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or is to give rise to a reasonable apprehension of such danger." This classic definition of cruelty has been adopted and acted upon in innumerable cases throughout the world. Probably it inspired the draftsmen of the Hindu Marriage Act 1955 when it defined cruelty in section 10(1)(b) as follows :—

"Has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party." This definition came to be considered in *Dastane v. Dastane*[2] and their Lordship of the Supreme Court again referred to the classic concept of cruelty as given in *Russell's* case to determine the dimensions of the word cruelty.

Despite the fact that the Matrimonial Causes Acts have been enacted dozens of times by the British Parliament it never attempted to define cruelty. The Indian Parliament also abandoned the verbal boundaries of cruelty when it came to amend the Hindu Marriage Act 1955 in the year 1976. Perhaps it acted wisely because in the changing concept of matrimonial relationship cruelty also keeps on acquiring new and added meaning. Basically however, we may say that no judgement since Lord Davey's pronouncement in *Russell's* case has been able to improve upon the foundational features of the concept of cruelty.

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1. Russel v. Russel (1897) A. C. 395, 467.
2. Dastane v. Dastane 1975 2, SCC. 326.

Broadly speaking, we may examine the term cruelty in the physical and mental fields. Threats with or without violence by one spouse towards another would amount to cruelty. Words of menace importing actual danger of bodily harm will justify a court to interfere for it will be foolish for the law to wait until the mischief is actually done. Law is also an instrument of prevention.

It will be profitable to refer to the definition of hurt given in section 319 of the Indian Penal Code in this context. It means "whoever causes bodily pain, disease or infirmity to any person is said to cause hurt." It will be interesting and relevant to refer to the concept of "Criminal Intimidation" as envisaged by 503 of the Indian Penal Code which provides, omitting the unnecessary parts, "whoever threatens another with any injury to his person or to the person of any one in whom that person is interested with intent to cause alarm to that person commits criminal intimidation." According to the concept of cruelty in the criminal law threat of violence by one spouse against another or threat of violence to the child of the marriage amounts to cruelty. Persistent cruelty to an infant child of the complainant or to an infant child of the defendant who at the time of the cruelty was a child of the family provides grounds on which a matrimonial order may be sought. It is not necessary for the purposes of establishing this cruelty to prove actual or apprehended injury to the health of the complainant. It is only cruelty to the child which is sufficient. Reference may be made in this connection to *Suggate v. Suggate*.[3] An indecent assault on a child by the husband of marriage even in the absence of the wife may amount to cruelty to wife because any man of ordinary intellectual capability must know that such an assault if discovered by or brought to the notice of wife would be a dreadful blow to her normal susceptibility.[4]

Lord Denning employed a very fellicitous phrase in measuring mental cruelty. He said that the ordinary 'wear and tear of matrimonial life' must be constituted of such a conduct which is grave and weighty and which endangers health bodily or mental. It must be also ascertained by the Court whether the cumulative conduct was so serious that the sum total of it could be characterised as cruelty.

The matters which are to be considered while determining the question of cruelty is the totality of conduct which sours the matrimonial relationship, keeping in mind the strata of the social mileu to which the parties belong.

3. *Suggate v. Suggate* 1859 W. S. T. and T. R. 489.
4. *Cooper v. Cooper* 1955 P. 99.

Quite often the question is that if the act complained of was not done with the intention to cause hurt bodily or mental, will it still constitute cruelty ? This question has been authoritatively answered in *Gollins vs. Gollins*[5]. It has been held that it is not necessary to prove actual or presumed intention to hurt as a necessary ingredient to constitute cruelty. If the conduct alleged gives birth to such consequences that the complaining spouse must have a remedy it is sufficient. It is immaterial to ascertain as to what was the state of the mind of the offending spouse. It must be borne in mind, however, whether a particular conduct between a particular couple would amount to cruelty or not. In *Williams vs. Williams*[6] it was observed that in cases where one of the spouses is insane, i. e. unable to exert his reason so as to control his acts in the normal way or is incapable of forming a decision about his acts it will still be cruelty if it endangers the health of the suffering spouse.

The capacity of the offended spouse to suffer the conduct of the offending spouse is also a circumstance which must not be lost sight of. Where a husband made inadequate house keeping allowance, frequently told his wife that he hated the sight of her; shut the door in her face to prevent further discussion; the husband was rude and threatending in the presence of their children; the husband attempted to commit suicide : wife alleged that the husband knew these matters injured her life, health and peace of mind, but he persisted, then these acts amounted to cruelty.[7]

Cruelty and Veneral Diseases

Exposing to or causing infection of *veneral disease* by one spouse to another would fall within the ambit of either physical or mental cruelty. It is physical because it causes infirmity within the definition of hurt which we have already noticed earlier. It is mental because the apprehension of disease which endangers health and even in some cases the much-cherished fertility of a female spouse is indeed a grave fear. Some typical cases may be noted in this context. To infect veneral disease is cruelty. It is not necessary for the petitioner to establish that the disease was wilfully transmitted. It is for the respondent to prove that the disease was not knowingly or ignorantly communicated.[8] When a husband is aware that he is suffering from veneral disease and yet insists on co-habiting with his wife despite her resistence on the ground of his being diseased

5. Gollins Vs. Gollins (1963) 2 all E. R. 966 H. L.
6. Williams Vs. Williams (1963) 2 All E. R. 994 H. L
7. Jaimeson s. Jaimeson (1952) A. G. 525, 548.
8. Browning Vs. Browning (1911) P. 161.

and even though the wife has not been infected, it has been treated as cruelty.[9]

Sex and Cruelty

Sex is an important aspect of matrimonial relationship. Either on account of orthodoxy or ignorance, often enough people hesitate to give expression to the agony which stems from this cause. In *Sheldon vs. Sheldon*, the husband had normal sexual life with his wife for 8 years but then abstained for the next 6 years without giving any reason or explanation for this abnormal conduct and despite the warnings from the wife and the Doctor that it was adversely affecting her health, the husband abstained from sex, the court held that it amounted to cruelty.[10] The court further observed that if the wife refuses sexual intercourse it will be more serious. It is submitted that such a distinction between the two sexes is un-warranted. The researches made by Master and Johnsons in this area will be a rewarding reading. In *Evans vs. Evans*[11] the wife unjustifiably refused sexual intercourse for about 7 years. It amounted to cruelty.

Birth Control and Cruelty

Where the wife refuses to have a child and insists on the use of contraceptives knowing that her conduct was injuring her husband's health, she was guilty of cruelty[12]. Similarly a husband resorted to *coitus interruptus* because the wife feared conception and the normal sexual fulfilment suffered and the wife left the husband. It was considered to be cruelty[13].

Where the husband got himself sterilised without giving medical reason and without the consent of wife, it was held to be a cruelty[14]. An argument is sometimes raised that it should be the privilege of the woman to veto whether she is going to have or not a child. The reason advanced is that it is she who suffers the pregnancy and the labour pains. Perhaps it is forgotten that the very concept of marriage implies, unless otherwise expressly agreed upon, the raising of family with all the consequences incidental thereto. Such a veto, unless agreed upon, is arbitrary and is basically contrary to the institution of marriage itself and perhaps inconsistent with normal female instinct.

9. Foster Vs. Foster (1921) P. 436 C. A.
10. (1966) 2 All E. R. 257 C. A.
11 Evans Vs Evans (1965) 2 All E. R. 789.
12. Ford Vs. Ford (1955) 2 All E. R. 311.
13. P (D) Vs. P (J) (1955) 2 All E R 436
14. Bravery Vs Bravery (1954) 3 All E. R. 59 (CA).

Abstinence, if cruelty

The husband abstains from sexual intercourse and the reason he advanced was the lack of desire. It was held not to be cruelty[15]. In *Avinash Pd. Srivastava vs. Chandra Mobini*[16], it has been held that if a wife deprives the husband cohabitation for a long time she inflicts mental cruelty on the husband. A marriage without vigorous sexual activity is an anathema. Nothing is more disappointing than the lack of adequate sexual life was observed in a Karnatak case.[17]

Impotence whether cruelty

Impotence is incapacity. It is not voluntary. It may be either physical or psychological. In either case it cannot be characterised as cruelty because cruelty is something voluntarity done or omitted to be done by one spouse against another. Where a wife knew before her marriage that she was marrying an impotent husband and thereafter berated him she was guilty of cruelty towards the husband[18].

Sexual excess or malpractices

Persistent inordinate sexual demands or malpractices in matters of sex have been treated as cruelty[19]. Where a husband has been found guilty for his bullying conduct or acts of indecent exposures, he was guilty of cruelty towards his wife[20]. Any attempt on the part of a husband to commit sodomy or bestiality may be sufficient to find a decree for divorce on the ground of cruelty[21]. Philandering on the part of a husband with other women may constitute cruelty where the wife's health is thereby adversely affected[22]. Perversion or unnatural practices by a wife, such as lesbianism, amount to cruelty[23].

Mental cruelty

Keeping a concubine under the same roof was held to be an act of cruelty in *Lalita Devi vs. Radha Mohan*[24].

15. P. Vs. P. (1964) All E. R. 919.
16, Avinash Pd. Srivastava Vs. Chandra Mohini AIR 1964 265
17. Srikant Rangacharya V. Anuradha 1980 Kant 8.
18. J. Vs. J. (1967) 111 80 L. J. 792x.
19. Hollburn Vs Hollburn (1947) All E. R. 32.
20. Crowford Vs. Crowford (1956) P. 195.
21. Statham Vs. Statham (1929) P. 131 C. C. A.
22. Lewis Vs. Lewis (1958) 1 All E. R. 859 C. A.
23. Spicer Vs. Spicer (1954) All E. R. 208,
Kusum Lata Vs. Kanta Prasad (1965) All. 280,
24. Lalita Devi Vs. Radha Mohan, 1976 AIR 150 (Raj) (26)

Constant nagging by the wife endangering husband's health amounted to cruelty[25] Deliberate neglect, or studied indifference which make life intolerable amounts to cruelty[26]. A wife who refused to keep a 2-month old child and deserted the husband and the child consequently died, it was held to be cruelty by wife against husband[27]. Where a wife neglected to visit a seriously injured husband for 8 months despite the SOS by the army it was a cruelty on the part of a wife[28].

Groundless charge of adultery levelled against a wife is cruelty according to Indian standards[29]. Where a husband called his wife a prostitute it was held to be cruelty[30].

When a wife lodges a false police report and attempts to commit suicide, it is cruelty[31].

Drunkenness is cruelty when it becomes a menace to the other spouse. Drug-addiction has been held to be cruelty if the mental condition flowing therefrom injures the other spouse[32].

Coleridge rightly said : "Show me one couple unhappy merely on account of their limited circumstances, and I will show you ten who are wretched from other causes".

25. Alkins Vs. Alkins (194) 2 All E. R. 637.
26. Deek Vs. Deek (1953) 2 S. A. 896 (CPD).
27. Gurcharan Singh Vs. Sukhdev Kaur AIR 1979 P and H 98.
28. Rajinder Singh Joon Vs. Tarawati 1980 MIR 102 (Delhi).
29. Kusum Lata Vs. Kampta Prasad, AIR 1965 All 280, 283-86; Kamla Devi v. Amar Nath, AIR 1961 J. and K. 33, 34; Umri Bai Vs. Chittar, AIR 1966 MP 205 (DB); A Kuppuswami Vs. Alagammal, AIR 1961 Mad. 391; Iqbal Kaur Vs Pritam Singh, AIR 1963 Punj 242; Madan Mohan Kohli Vs. Sarla Kohli, AIR 1967 Punj 397.
30. Shanta Wadhwa Vs, Purshottam Mohandass Wadhwa, 1978 MIR 44 (Bom).
31. Rajinder Kumari Vs. Daryodhan Lal, 1980 MIR 87 (P and H).
32. BvB. (1962) 106 Sol Jo 573.

INDIAN WATER POLLUTION LAW : THE HISTORY AND PROSPECTS

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Water is the basic component of our environment and any change in its physical, chemical or biological properties would affect not only the living but also the non-living things. To conserve such a valuable element, efforts were made right from ancient down to the present time. The present paper highlights only the historical prospective without going in detail about the nicety of the approach. The study of history is important because it tells the does and don'ts and from the historical experiences we can fashion our model, to be launched for the future. From the whole history of water pollution law only three periods are selected. The ancient period is taken to show what lesson we can learn to lessen the present sufferings from our rich heritage. The Britishers were criticized as exploiters of our resources. What has been their contributions in this field during British India is an important field of study, and lastly, what has been the role of "We the People of India", finds a discussion in this paper. The problem of controlling water pollution is a sensitive and most technical matter and it requires a special machinery. What machineries and at what levels were adopted to prevent water pollution ? Another point which requires discussion is the changing dimension of criminal sanction in this area. The techniques, areas, pollutants which attracted the legislative efforts at different time is also examined. And finally in view of the history we have to examine what are the future directions for the legislative approach in the field of legal control of water pollution.

THE DHARMA OF WATER

The lawyers start the history of Indian water pollution law from the British period. This is nothing but our slavish mentality of British Raj and our ignorance about the efforts made in ancient India relating to control of water pollution. The ancient literatures are full of evidence to show that the society in ancient time paid more attention to the protection of *Jal* (water) than in the modern times.

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It was the dharma[1] of each member of the society to protect water from getting impure. Water, the basic element of nature, according to Manu was the first creation of nature and then came other things.[2] Following are some of the many contributions highlighting the efforts made in ancient time to protect, regulate and prevent water pollution.

The ancient text defines 'pure water' to mean that water which is in its natural state not polluted by any impure thing and that has a natural colour, taste and odour.[3]

According to Sankh,[4] "the water of a flowing river is always pure". The pure water has given so much importance that Visvarupa[5] has gone to the extent to say that in case of doubt whether a thing was pure or not, it could be resolved by touching the disputed thing with water. There are references to support that river water had not only the ability of self-purifying but also the capacity to purify other things[6].

Some of the references dealing with impurity of water included : water stored overnight; a dead body lying in a well; taking bath, washing clothes; throwing dirt or excreta; mixing of poison or blood etc.[7] The Dharmasastra also provided for protective and preventive measures. If a well was polluted then the whole well was to be emptied, dried and be rebuilt with burnt bricks.[8] The fresh wind and sun light were considered as purifier of the polluted water.[9] The sastric texts talks of many more purifying substances and also lays down that each purifier should be adopted according to the origin and condition of impurity, and time and

1. Though the paper is confined to Hindu Dharmasastra but the other dharmasastra have given equal importance to pure water. For example, see, *The Sacred Books of the East*, Edi. Max Muller, 1965, Vol. II, Part I, 182. M. M Ali, *The Holy Quram*, 1917, 436, 536. One may notice here that the water being the very life of everything unlike other objects like idol or other sacred object, was never a bone of contention for the communal rift.
2. *Manusmriti*, 1 8.
3. *Budh. Dh* 5 I. 5 65, *Manusmriti*, *V*. 128,
4. 16.12-13, Quot - by शु. कौ., 297; *Manusmriti*, *V*, 108.
5. Visvarupa on *Vig*. I 191.
6. Vishnupuran, 11.8.120-121. Quoted by *Gangava*, 110, *Tirthachi*, 202; *Gamgabhakti*, 9.
7. Devala quot by *Apararka*, 272; *Manusmriti*, IV, 156; Katyayan—758-59; Narayanam on Manu, 1 x 28 M. P. C. C. C XXVII, 173-74, Apastamba quot by Suddhikaumudi, 299.
8. Brihaspati quot. by *Apararka*, VII. 272,
9. *Apararka*, VII, 34.

place of impurity.[1] In order to protect the river water from pollution, Naradya suggests that no body shall reside on the bank of a river.[2]

There were various punishments for making the water impure.[3] The punishment included from first amercements to capital punishment. The pollutor was also required to take such action to remove impurity and make good the losses so caused.[4] The punishment was imposed on the basis of seriousness of the act. In case of minor impurity, the polluter was required to pay to the king a nominal fine, or had to clear the dirt, while in case of 'extreme' impurity, cutting of the head of the polluter was prescribed.

To sum up, in the ancient time efforts were made mainly to protect and maintain the naturalness of water. Each member of the society considered his duty to interfere least with the quality of natural water. There was not much scope of a right to exploit the water or to pollute the water. It was this duty consciousness which played an important role in maintaining the purity of water.

THE BRITISH RAJ

During the reign of the East India Company, the Company was mostly busy in making more and more profits and to extend its territorial power. In this busy schedule, the Company or its establishments showed no concern towards regulating water pollution and still the Dharmsastras held the ground.

At the dawn of the British Raj in India a beginning was made to control water pollution. One of the first attempts included the Oriental Gas Company Act, 1857. Section 15 of the Act provided that gas of the said company shall not foul the water of any stream, reservoir or any other place for water, otherwise the company was required to pay to the Government a sum of Rs. 1000/- and in case the company continued to foul the water, then it was required to pay an additional sum of not exceeding Rs. 500/- for each day. The East India Irrigation and Canal Act, 1859, was one of the other attempts where the legislature provided for free supply of wholesome water for irrigation purposes. But in both the initial attempts no systematic efforts were made to define fouling of

1. Bandhayan on Mit. Quot. also by Vishwarup on *Vij*. 1, 195, and Medhatithi on *Manu* V. 118.
2. *Naradya Outtar*, 43, 119-120.
3. *Manusmriti*, IX, 279, IX, 281; *Kautilya*, IV. XI 227.
4. *Narayana* on *Manu* IX 28, MP. (CC XXVII. 173-74).

water. Moreover, in the former case the legislation came down with expensive fine basically not to control water pollution but to satisfy those who were agitating against establishment of the gas company which might pollute the holy or pure water.

The year 1860 was a landmark in the history of water pollution law when a systematic approach was adopted to control water pollution. Section 277[1] of the Indian Penal Code, 1860 defined fouling of water to mean "(V) voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used". The punishment prescribed for fouling of water was either imprisonment of either description for a term extending to three months or with fine which may extend to five hundred rupees or with both. In order to attract the provision of this section it is necessary that the act is committed with the intention and knowledge to foul the water. Thus an act committed involuntarily will not attract Section 277, whatever the consequence might be. This section is applicable to the water of public spring or reservoir only and it will not cover water in other types of courses. The words "corrupt" and 'foul' take care of purity of water but the pollution in the modern technological sense would go beyond these words. The fouling of water must render the water less fit for the purpose for which it is ordinarily used. The court considered spitting[2], washing one's own body or cloths therein[3], causing putrofaction by strewing branches of trees[4], etc., as rendering the water less fit for the ordinary use. The class ridden society wanted to enforce Section 277 to punish a low caste person for taking water from a public cistern, but the Bombay High Court did not allow the above interpretation. The legislature simply prescribed a minimum punishment for the fouling of water. At that time it did not force the seriousness of water pollution. It is surprising that since then none of the state legislatures in India made any amendment to Section 277, whereas, there were many state amendments to the other sections dealing with offences affecting the public health wherein the state legislature enhanced the penalty.[5] Section 277 forms part of the offences affecting public health and so effects of fouling of water other than affecting public health would not attract any penal action.

1. There are other sections which may indirectly deal with water pollution for example Secc. 268, 425.
2. *R.* v *Ramkaran Lal*, 13, M. L. R. 68.
3. *R.* v. *Bhagi* (1900) 2 Bom. L. R. 1078.
4. *R.* v. *Hulodhur Poroe*, I. L. R. 2 Cal. 383.
5. See Ratanlal and Dhirajlal, *The Indian Penal Code*, 1987, 595-603.

In this period of history of water pollution, the law attracted only few prosecutions and that, too, of minor nature. The reasons may be that the dharma of water still held the field and the people were afraid of taking recourse to the cumbersome criminal procedure. During this period the education of environmental pollution did not start and thus ignorance in this field allowed the legal provision to remain in the dormant state.

The Post-Penal Code era of British India did not see any major change in the regulation of water pollution. However, there were laws which included *inter alia*, protection of fishes[1] animals[1a] crops or forests[2] and human being[3]. There were provisions in the Easement Act, 1882 specifically dealing with pollution water. S. 28(d) of the Act allows the prescriptive right to pollute water to the extent of the pollution at the commencement of the period of user or completion of which the right arose.[4]

Prescriptive right is also conferred on the owner of a land where the water naturally passes over or percolates through his land. It says that no person shall 'unreasonably pollute' the water or make material alteration in quality, direction force or temperature of the water.[5] The illustration (J) of Section 7 of the Act says that every owner of land abatting on a natural stream has a right to use and consume its water for the household purposes, watering his cattle for irrigation or for any manufacturing situated thereon but the provision to this illustration limits the right not to cause any 'material injury to other like owners'.

Alongwith the above developments, the English law of Torts was also gaining ground in the Indian soil but the compensatory remedy could not play an important role in the area of water pollution in British India. On the contrary there were legislations dealing with Poisons (1919) Explosive Sustances (1988), Cruelty to Animals (1890), Factory Act (1891, 1934), Insects and Pests (1914), but they had no reference to pollution of water.

1. See for example, Indian Fisheries Act, 1897, Indian & Fisheries Preservation Act, 1879, Bengal Fisheries Protection Act, 1889.
1a. See for example, Poisons Act, 1919
2. See for example, Northern Indian Canal and Drainage Act, 1873, Indian Forest Act, 1927.
3. See for example, The Indian Factory Act, 1891, The Delhi Joint Water Board, 1926.
4. See also Illustration (iv) to Section 15 of Act of 1882.
5. Illustrations (f) and (h) of Section 7.

The Post-Penal Code legislative approach shows the following directions. Firstly, the legislature adopted a casual approach to water pollution. Secondly, it failed to play any positive role in this area; on the contrary it gave what may be called a lincense to pollute water. Thirdly, the fine of either Rs. 50/- or Rs. 250/- for such a serious offence made the criminal sanction nothing but a farce and lastly, the compensatory remedies had yet to establish their roots in the present area.

THE TWO DECADES OF INDEPENDENCE

During this period the Constituent Assembly did not give pollution as such, any place in the Constitution of India. On the contrary a fundamental right to pollute water was available through the right to carry on business and avocation and the property right. Thus, the problem of water pollution could not get constitutional recognition or protection. Now coming to the Central Legislature, it paid attention mainly to the industrial pollution. The factories were required to keep the drinking water clean (1948). The Central Government was given a special power to take the control of the industry which was functioning in a manner highly determental to public interest (1951). The Explosive Substances (1952), Inflamable Substances (1952), Petroleum (1948), Atomic Energy (1962), Insecticites (1962), etc., laws indirectly regulated pollution of water. Basically these laws were passed to regulate these industries so as to bring India on the map of the industrially developed countries and the public health was almost neglected. Parliament also passed water laws authorising the Damodar Valley Corporation (1948) and the River Boards (1956) to prevent pollution of water of the valley and the interstate rivers respectively. It also provided mechanism to solve Interstate Water Disputes (1956). On the other hand, the State Legislature operated on wider areas in an extensive manner, which included town planning, protection of fisheries, protection of agriculture from pest and other diseases, etc.

At the Municipal level there was jungle of laws and byelaws where the municipalities and the municipal corporations were authoritised to regulate the discharge into water any substance prejudicially affecting the purity and quality of water. These laws, took into consideration the pollution of water through the domestic use of water. There was also penalty for polluting water. The problem of water pollution, if handed properly and effectively at the grassroot level, could go a long way to curb this evil at the national level. But the unfortunate part was and is that it had an inactive machinary to curb water pollution. This

phenomenon continues till today, inspite of repeated strictures and directions from the judiciary.

Thus the first two decades of Free India did not see any systematic approach to regulate water pollution, it rather made piecemeal attempts in this area. Parliament, the State legislature, and the Municipality all tried to regulate some of the water pollutants, but the whole attention was on industrial development. The minor penalty under the respective laws made them ineffective. Further, the time was not ripe yet to get a specific constitutional protection to curb the evil of water pollution. All these reflect a capitalistic attitude in handling the problem.

THE LEGISLATIVE PADYATRA

At the Dawn

At the start of the specific legislative control of water pollution, it was the State of Orissa, which in 1954, took the initiative. In 1970, Maharashtra made a systematic attempt to provide the first detailed water pollution law, followed by Gujarat's attempt in 1971, which materalized in 1977. It was the Maharashtra Prevention of Water Pollution Act, 1969 (Act No. XVI of 1970) that formed the model of the parliamentary water pollution law of 1974.

The Maharashtra legislation was passed for the control and prevention of pollution of 'surface and underground water resources by industrial effluent and trade waste' and "domestic sewage and sullage". The important provisions were : the Act for the first time, defined pollution to mean : (i) contamination of water, (ii) alteration of the physical, chemical or biological properties of water, (iii) discharge of sewage or trade effluent, (iv) discharge of any solid, liquid or gaseous substance which may or is likely to create directly or indirectly a nuisance or, (v) render such water harmful or injurious to public health, safety or welfare or to the domestic, commercial industrial, agricultural, recreational or other legitimate uses or to animal, plant or aquatic life and health. It provided for a Board to prevent water pollution and executive committee of the Board to execute the plans. Section 18 of the Act authorised the state government to declare an area as the water pollution prevention area. The water board was given the power to control existing and new outlets and discharges. And lastly, the Act provided for separate treatment of different offences, which included non-compliance with the direction of the board, obstruction in the implementation of the Act or violation of any prohibition under the Act. The

maximum penalty was three months imprisonment or/and fine of one hundred rupees. The Act also provided for enhanced penalty for the habitual offenders. Any offence committed by a company also attracted the penal provision of the Act. Though the Maharashtra Act took the lead, yet it confined its area to the two pollutants : industrial waste and the domestic sewage, and secondly, the water pollution was given a second grade treatment because of minimum punishments which were prescribed under the Indian Penal Code for non-serious offences.

The First Parliamentary Law

The seeds of the Water (Prevention and Control of Pollution) Act, 1974[1] were sown as far back as 1962 when the Ministry of Health of the Government of India appointed an expert committee to prepare a draft legislation to prevent water pollution from domestic and industrial wastes. The Committee, suggested *inter-alia*, "a central and state legislation may be enacted." The report of the committee was circulated to the state governments, the Union Territories and the Central Council of local self-government. In 1965, the Central Council jointly with the state Ministers of Town and Country Planning considered the report. The report was also examined by the committee of local self-government representing the States of Bihar, Tamil Nadu, Maharashtra, Rajasthan, Haryana and West Bengal. The recommendations of the above committees had unanimity on two points : firstly, that there should be a comprehensive Parliamentary legislation on water pollution; and secondly, there should be a rigid control to prevent pollution of water.

The state laws showed no uniform practice and the states were neither geared up to handle such an evil nor had enough finances to clean their water. In these circumtances the Central government decided to bring a central water pollution law. Water being the state subject, the Centre circulated a draft bill to all the States with the request to pass a resolution under Article 252 authorising Parliament to enact the water pollution law on their behalf. In the beginning only the industrially under-developed and developing states passed resolution to this effect; whereas, the developed states did not favour an uniform approach in this matter, rather they wanted to continue with their own laws. It was only after the Act of 1974 was passed that they also joined hands with other states.

The legislative attempts did not end here, when the Bill was introduced in the Council of States for its consideration in 1969, the

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Council of States sent the Bill to Lok Sabha for referring the same to a joint committee of both the Houses. The Bill was referred to a joint committee of twenty four members. In 1972 the committee submitted its report and the Bill was redrafted.

Now coming to the deliberations in both the Houses of Parliament, the Rajya Sabha and the Lok Sabha debates show the following directions. Firstly, both the Houses in a very short time with thumping majority passed the Bill. This may be due to a long continued discussions on the measure outside Parliament. Secondly, the Bill was welcomed by all the political parties. However, the socialists suggested a rigid control, but both the Houses favoured an approach which would not adversely affect the industrial growth. And thirdly, the members showed a great concern for the industrial pollution which badly affected the quality of water.

Some of the improvement over the existing legislative attempts and the shortcomings of the present exercise were :—It defined the word 'pollution' in the same language as the Maharashtra Act, but still the use of strong fertilisers, pesticides and insecticides and radioactive and atomic substances in air around the factories which get deposited in the water nearby the factory, the exposure of water to temperature changes, etc., are kept outside the purview of this legislation. The Act is applicable to the water of the river, well and other water courses but the water courses of large inter-state rivers are not included.

There are provisions for the central, state or joint water board for the prevention and control of water pollution. The constitution of the board is such that there is no representation for a member of the social interest group and the lawyer. It has representatives mainly from certain avocation, business and trade and a health engineer. The functions of the board included mainly to educate people and to lay down standard for a stream and well. In order to enforce the provision of this Act, Section 33 says that the recourse shall be had to the court to restrain apprehended pollution of water after the approval of the water board.

The acts of company and government department also attracted the penal provisions. The Act prescribed wide ranging penalties from minimum three months to seven years imprisonment or/and fine which was not defined. The excessive punishment in the present legislation shows a shift from the liberal to hard treatment. Now the legislature realised the seriousness of water pollution. The doctrine of mensrea still

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THE CONSTITUTIONAL INNOVATIONS

Parliament all these years was busy in handing down ordinary legislative measures and it did not use the constituent power so as to give pollution a specific constitutional recognition. It was in the year 1976, that India took a lead in the history of world environmental law[1] and made a landmark achievement by incorporating duties of the state and the citizen of India to protect and improve the environment. The Constitution (Forty-second Amendment) Act 1976 introduced Article 48A which now imposes a duty on the state, ''to protect and improve the environment..'' Thus the state cannot remain a police state but a guardian or a protector of the environment.[2] Since the commencement of the Indian constitution, the people of India were busy in claiming their rights and the concept of corresponding duty was almost in eclipse. And thus the people got, what we may call, a fundamental right to pollute environment, including water.[3] This is now taken care of by Article 51 A (g) which imposes a fundamental duty on the citizen of India, "to protect and improve the natural environment including..lakes, rivers." The third important advance is in the Preamble to the Constitution where the Indian Republic has been given 'socialist' dimension so that India may experience a transition from the capital to socialist direction. However, in the above innovations, the distribution of legislative power with respect to pollution was left untouched.

In the field of constitutional innovations, the judiciary has also played an important role. The judicial constitutional legislation has conferred upon Parliament the residuary legislative power with respect to environmental protection and the greatest achievement is that the right to live in a clean environmeat has been given a status of fundamental right guaranteed under Article 21 of the Constitution.[4]

LESSONS AND PROSPECTS

It is not an easy job to sum up the long history of water pollution law in India, however, an humble attempt is made to highlight some of many conclusions.

1.
2. See C. M. Jariwala : The Constitution 42nd Amendment Act and the Environment in *Legal Control of Environment Pollution, I. L. I.* New Delhi, Publication, 1980, 1. C. M. Jariwala : The Changing Dime sion of the Indian Environmental Law, A paper presented In the IXth International Symposium on Tropical Ecology, 1987. See also Author's, Amendment of Legislative Powers : Prospects and retrospect in *Basis Issues on Centre State Relations*, Edi, Sangaoba, 1985.
3. *Mupl Corpn. of Julluudur City* v. *Union of India*, AIR 1931 P & H, 287.
4. *T. Damodar Rao* v. *S. O. Mupl. Corpn, Hyd*, AIR, 1987 A. P. 191.

It is wrong to start the history of water pollution law either from Section 277 or the Stockholm conference. In the ancient time India made great contributions in maintaining the purity of water. Today's industrial world is fast losing contact with the *dharma* and the a *dharma* has brought mankind to a crossroad where he is now worried for his own existence. The *dharma* can hold back the distruction.[1] The people and the king both followed as a matter of duty the *dharma* of water and the right to exploit or pollute the water did not exist in the ancient society. In the present time it is the fundamental right to pollute water which predominates the other values. It is unfortunate that *adhatma* of water has become the law and the self-interest aggrendisement has caused eclipse on the societal interests. Unless this attitude gets new blood, the control of water pollution will remain a cry in wilderness.

The Britishers infused the capitalist dominance in the Indian society and the legislative approach for the reasons best known to all of us, forced India on the runway of industrially developed world. The trouble within the industrially over-developed countries is that at the take-off stage they did not make detailed planning to control the pollution problems. And at this late hour of supersonic development process, they are demanding rigid controls. In this explosive developments people are taking shelter in the developing countries. We in India cannot close our eyes to these developments. In this polluted world, Section 277 was the only mild medicine to operate on a limited area. The narrow vision of law, the ignorance of people and the cumbersome criminal process allowed the polluters to badly pollute the Indian waters.

In the first two decades of Free India the influence of the British Raj continued with the mild dose capsule of Section 277 in the polluted waters of Independent India. The main thrust was on the development of industries so that India could find a place on the map of the industrially developed countries. Parliament and the State Legislature continued their efforts to speed up the developmental process with little attention to water pollution. The municipalities' concern in this area could be seen, but unfortunately this grass root level machinery has yet to rise from its hibernation period. This is one of the important instrument to directly deal with the water pollution. In order to activise the municipalities more financial help and responsive role are the needs of the day. The social action group must come forward to lend a helping hand in this venture. In this race unfortunately the Constituent Assembly also did not do justice with the polluted water.

1. यदा यदा धर्मस्य ग्लानिर्भवति भारत ..... संभवामि युगे युगे ॥
Chapter 4, 8 *Bhagwad Gita.*

The last two decades progress saw new innovations and transformations. During this period the capitalist approach was giving way to the socialistic pattern of society and in this transformation took place the historic innovations in the Constitution of India. The Indian Republic was inflused with 'Socialist' vigour and in that wave length it imposed a fundamental duty or obligation on the citizen and the state as well to protect and improve the environment. This duty must be given an effective force. One of the ways to make the duty effective may be if the right to live in a clean environment becomes a part of our fundamental right, this will transform the existing *adharma* to the right and virtue.

The specific control of water pollution in India was initiated by an underdeveloped state and then the developed state, followed by the Central cooperative intervention. The Central joint venture is for a temporary period and that, too, under the delegated power. The time has come when the constituent power must give the environmental pollution, including water, a place in the Concurrent List.

The Indian Parliament after the 'Socialist Republic' has been alive to the problems of water, and as a whole the enviromental pollution. During last eight years it adjusted and readjusted the legal control to solve the problem in a better and comprehensive way. But we should not feel contended with what we have achieved. The legislature must go on with continuous evaluation of the existing laws and the supersonic developments. This will avoid the legal control to become outdated and outmoded. One of the highmark of the legislative history of this period was that the water pollution law attracted large public participation. Now it is the duty of the legislature, executive and the judiciary, to allow this fragrance in the foul water world.

All these years the legislatures concentrated on the industrial pollution. No doubt the industrial pollutants are the biggest enemy, but we cannot lose sight of the small enemies too. Moreover, the individuals are not the only polluters, there are the big companies, the multinational corporations, the state-owned establishments and even those who are the guardians of natural waters have badly polluted or failed to control the pollution of water. The law must socialise its outlook and provide equat treatment for any category of polluter.

There has been a gradual shift from the liberal sanction to enhanced penalaties and fines. The compensatory remedies have not yet played their due role. The pollution problems are such that due to water pollution, some of the human beings, animals, plants, or aquatic

organism may die, some may be on the verge of death and others may carry undetected effects which may bring deformities in the long run and may even affect genes and hereditary character. In this far-reaching diseases the state cannot feel contended by awarding damages or imposing severe penalities, but it has to adopt reformative and corrective measures to lessen the sufferings. Moreover, there was no real incentive to those who contribute to the improvement in the existing stresses on water. The cess rebate can hardly be said to be a strong motivative force. Recently the Parliament has taken initiative to give a slight jolt to the firmly established doctrine of mens rea by allowing the concept of strict liability into this sensitive area. This is an important innovation in controlling offences of the present nature.

We may end with Bankim Chandra Chatterjee's 'Vande Matram' though a source of inspiration to the people of India in the struggle for freedom yet, could be a source of inspiration to all of us who are striving hard to make our motherland "richly watered, richly fruited....."

MEDICINE AND LAW-WITH SPECIAL REFERENCE TO MEDICAL NEGLIGENCE IN INDIA

MAHESH C. BIJAWAT*

The primacy of law as a noble calling has nowhere been more aptly summed up than in the statement. "Law was an ancient and honourable profession, when medicine was being practiced by barbers and science was the province of magicians." The West has restored to law its pristine position and law as an instrument of social engineering has taken great strides along with the advances made in the fields of science, technology and medicine. The legal challenges thrown by such medical innovations like artificial insemination, organ transplant, surrogate motherhood and other medico-technological advances have been squarely met by legislative and judicial responses. One area where law interacts with medicine pertains to the field of medical negligence and countries like the United States have evolved sophisticated judicial norm for adequately protecting the interests of victims and their dependents. However, in this country the law relating to medical negligence has hardly reached the "take off" stage, even though innumerable instances of medical malpractice endangering the life and health of the people have come to light. A close scrutiny of the medical profession in India reveals the utter callousness with which patients are treated and the occasional cases which have come up before the courts do not even represent the tip of the iceberg.

This paper examines the problems of medical negligence in this country, especially that of doctors, the grossly inadequate judicial response inspite of the large scale malpractice and suggests steps for educating the public in this area with a view to improve the community health.

Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff.[1] It means "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a reasonable and prudent man would not do."[2] Thus in cases of negligence a person is under a legal

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1. *Winfield and Jolowiez on Tort*, 12th Edition (19 4) p. 69.
2. Lord Alderson in *Blyth* v. *Birmingham Water Works Co.*, (1856) 11 Ex. Y. 784.

duty to take care and he does not observe such care; the standard of care depending on the circumstances of each case.

English law spells out the criteria of medical negligence as—

> "A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give, and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient."[3]

Delienating the degree of skill and care required by a doctor,

> "The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the highest, nor a very low degree of care and competence judged in the light of the particular circumstances of of each case, is what the law requires, a person is not liable in negligence because someone else of better skill and knowledge would have prescribed different treatment or operated in a different way, nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, although a body of adverse opinion also existed among medical men."[4]

The aforesaid principles have been adopted by the Supreme Court of India in *Dr. Laxman Balkrishna Joshi* v. *Dr. Trimbak Bapu Godbole*.[5]

In this case, Ananda, the son of the respondent met with an accident on the sea beach, resulting in a fracture of the femur of his left leg. A local physician, who was called for assistance, just fastened the boy's legs to wooden planks with a view to immobolise him, and advised that the boy be shifted to Poona for further treatment. The boy's father who was also a medical practitioner, reached Poona and Ananda was taken to Tarachand Hospital where the leg was screened. It was found that he had an overlapping fracture of the femur which required pintraction. He was, thereafter, taken to Dr. Joshi's hospital, where he was examined by

3. *Halsbury's Laws of England*, Vol. 26, p. 17.
4. *Ibid.*
5. A. I. R. 1969 S. C. 128.

the appellant who directed his assistant to give the boy two injections of morphia at an hour's interval. However, only one injection was given. The boy was then taken to the X-ray room where two X-ray photos of the injured leg were taken. Thereafter, plaster splints were put on the leg. Dr. Godbole, was assured that Ananda would be out of the effect of morphia by 7.00 p. m. and so he left for Dhond. At about 6.30 p. m. it was noticed that the boy was finding it difficult to breathe and was having cough. Thereupon, Dr. Irani called Dr. Joshi who started giving emergency treatment until 9.00 p.m. when the boy expired. The cause of death was given a fat embolism.

Dr. Godbole filed a suit alleging negligence of Dr. Joshi in the treatment of his son. The trial court found Dr. Joshi guilty of negligence and wrongful acts which resulted in Ananda's death and awarded general damages of Rs. 3,000. The Court based its decision on the fact that Dr. Joshi in performing reduction of the fracture had applied excessive force with the help of three attendants and such reduction was done without giving anaesthetic, and this treatment resulted in cerebral embolism or shock which was the "proximate cause of the boy's death."

The High Court upheld the decision of the lower court on all the points. The Supreme Court affirmed the decision of the High Court. Referring to the medical authorities which indicate the line of treatment that is usually adopted in such cases the Court concluded :

> "....that death was due to shock resulting from reduction of the fracture attempted by the appellant without taking the elementary caution of giving anaesthetic to the patient."[6]

Indeed, the concurrent findings of all the courts regarding the absence of due care on the part of the appellant, are justified in the circumstances of the case.

Another interesting case which deserves to be noticed in the present context is that of *Philips India* v. *Kunju Punnu.*[7] In this case, the company's doctor diagnosed the illness of an employee of Philips India as having been caused by venereal disease and started a line of treatment in that direction under Dr. Suleman. When the employee's condition became worse, he was admitted to a nursing home in Poona. Dr. Grant, the consultant, diagnosed it as a case of small-pox and not venereal disease and directed Gopal, the employee, to

6. *Id.* pp. 134-135.
7. A. I. R. 1975 Bom. 306.

the infectious disease hospital, where he expired. All this transpired within eleven days. A suit was filed by the dependants of the employee alleging gross negligence of the company doctor in treating the patient. It was asserted that the doctor did not make a correct diagnosis and even though the brother of the deceased had told the doctor that Gopal was not suffering from V.D., the company doctor pursued the treatment for V.D. leading to the death of the employee. The trial Judge held the doctor guilty of negligence and awarded a compensation of Rs. 18,000 to the mother of the deceased.

The High Court reversed the finding of the lower court. Dilating upon the standard of care and skill required of a doctor, the court quoted with approval of the observations of Charlesworth on Negligence[8] :

> "The duty of a medical practitioner arises from the fact that he does something to a human being which is likely to cause physical damage unless it is done with proper care and skill. There is no question of warranty undertaking or profession of skill. The standard of care and skill to satisfy the duty in tort is that of an ordinary competent medical practitioner exercising the ordinary degree of professional skill. A defendant charged with negligence can clear himself if he shows that he acted in accordance with general and approved practice."

Regarding wrong diagnosis, and ensuing injury the court observed :

> "The diagnosis of ailments is normally the first matter with which the medical man is concerned, and there can be no doubt that he may find himself held liable in an action for negligence if he makes a wrong diagnosis and thereby causes injury or damage to his patient (as for example where the false diagnosis leads the medical man to apply a wrong treatment or to refrain from applying some treatment which if it had been applied at once, would have averted or cured the condition complained of). It follows, however, from what has already been said as to the standard of care required of a medical man, ***that a mistaken diagnosis is not necessarily a negligent*** diagnosis... A practitioner can only be held liable in this respect if his dignosis ***is so palpably wrong as to prove negligence***, that is to say, if his mistake is of such a nature as to imply an absence of reasonable skill and care on his part, regard being had to the ordinary level of skill in the profession."[9]

8 Fifth Edn. pp. 181 and 182 para 272.
9. Nathan, *Medical Negligence*, 1957, p. 43.

The court, relying upon the above criteria concluded that the death of Gopal was not due to either the wrong diagnosis or negligence on the part of Dr. Suleman. In fact the evidence was that the cause of death of Gopal was due to haemorrhage small-pox, for which no treatment existed at that time. Thus, both the company and Dr. Suleman were exonerated.

Two recent cases shed some light on the hazards which even a well-intentioned doctor faces in the course of his profession. In *J. N. Srivastava* v. *Rambiharilal*,[10] a single Judge of the Madhya Pradesh, High Court, Justice Malik, reversed the judgment of the trial Judge, holding Dr. J. N., Srivastava guilty of negligence. In further appeal before a bench of two judges of the same High Court,[11] this decision was reversed and the doctor was held guilty of negligence in the given circumstances.

The facts were as follows. Smt. Kanti Devi, wife of Rambiharilal the Collector of Shadol, had severe abdominal pain with occasional vomiting. Dr. Srivastava, the experienced medical officer and a surgeon of repute, was called for treatment and he gave her strepto-penecillin injections for two days along with sedatives. However, the pain did not abate, and the temperature started rising. The doctor diagnosed it as a case of acute appendicitis and advised appendectomy (namely, the removal of appedix). Initially both Rambiharilal and his wife were hesitant for an operation and this was fortified by the advice given to them by Dr. Mishra, District Medical Officer, Umaria, who was consulted on phone. Dr. Mishra was of the opinion that an operation was not necessary for the present, as 48 hours had passed and the pain had subsided considerably and was conservative line of treatment should be followed.

Dr. Srivastava, however, did not agree with this opinion and finally Rambiharilal and his wife gave their consent for the operation. Smt. Kanti Devi was brought to the hospital at 1.00 p. m. and prepared for the operation. When the abdomen was opened, the doctor found the appendix normal. He, however, found the gall bladder fundus acutely inflamed and full of stones. It was of enormous size. The first incision was closed and a second one was made and the gall bladder was removed. Even though the anaesthesic used was ethly-chloride induction, maintained by chloroform, the condition of the patient was good throughout the operation. However, when her condition started deteriorating in the evening, Rambiharilal called another surgeon from the Medical College, Rewa, for consultation. Subsequent tests revealed extensive damage to

10. A. I. R. 1982 Madhya Pradesh 132.
11. *Ram Behari Lal* v. *J. N. Srivastava*, A. I. R 1985 Madhya Pradesh, 150.

kidneys and liver. She developed jaundice and despite all the medical treatment given by the team of experts, the patient expired.

Dr. Shrikhande, another surgeon concluded that the death was due to overhelming toxemia consequent upon a progressive hepeto-renal failure which developed after an operation was done under prolonged chloroform anaesthesia.

The District Judge held that Dr. Srivastava was negligent on several counts, namely of wrong diagnosis, not obtaining the consent of the husband for cholecystectomy, namely, the removal of gall bladder, performing the operation in all illequipped hospital, the use of chloroform as anaesthetic and the non-examination of the urine before the operation was performed, which would have clearly indicated that the patient was already suffering from damaged liver and diseased kidney.

On appeal to the Madhya Pradesh High Court, Malik J. dealt with each allegation of negligence separately and ruled out negligence in all of them. The learned judge observed that the doctor should not be judged for negligence by the unsatisfactory result, particularly in a case where a quick decision had to be taken during the course of an operation. In the present case, the doctor was a qualified surgeon, who had worked for 9 years with consultant surgeons in the United Kingdom. He had his own reputation to protect in Shadol and had 98% success with about 300 major operations performed during the year. Rambiharilal had confidence in Dr. Srivastava's professional skill. Unfortunately Mrs. Rambiharilal died three days after the operation, not because of any negligence in removing the offending organ, but "because the lady could not withstand the trauma of surgery or because of some type of toxemia developed." In fact, the surgeon had followed the recognised practice and had shown reasonable care and skill in performing the operation, and hence he could not be made liable in damages for negligence. Malik J. rightly relied upon the observations of Lord Denning regarding the hazards a surgeon faces in operating his patients :

> "It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical Science has conferred great benefits on mankind, but these benefits are attended by considerable risk. Every surgical operation is attended by risk. We cannot take the benefit without taking the risk. Every advance in technique

is also attended by risk. Doctors, like the rest of us, have to learn by experience, and experience often teaches in a hard way. Something goes wrong and shows up a weakness and then it is put right."[12]

However, in the special appeal before the Division Bench the learned judges reversed the findings of the single judge and held the doctor guilty of negligence. The learned judges held that the doctor had wrongly diagnosed the ailment to be acute appendicitis without proper investigation and performed surgery on her without perparing the patient for the operation. She had a history of abdomenal pain and if blood and urine tests had been carried out they would have indicated that the ailment was in her kidney. Unfortunately the doctor hastily proceeded to operate her. The Court agreed that the doctor did possess the necessary skill and knowledge to perform the operation, but he was over-confident. He took the decision to operate in a hurry, and failed. In fact, he did not even heed the advice of the D.M.O. He should have been put on guard when he could not get urine even by catheterization. Before operating he did not find out Murphy's sign which would have shown that the ailment was in gall bladder. He proceeded to remove the gall bladder without further investigation and without preparing the patient for the second operation. In fact, it was lack of foresight on his part when he kept the patient under chloroform for two hours especially when her kidney was affected. No preventive steps were taken to counter the toxic effects of chloroform on the kidney and liver by giving glucose and vitamins. Further, the consent of the husband was not taken for the removal of gall bladder even though he was available in the immediate vicinity of the operation theatre. Moreover, Dr. Srivastava should not have undertaken such a major operation in a hospital which lacked basic facilities. The operation theatre was under repairs, there was no facility for oxygen and blood transfusion, no qualified anaesthesist was there, even some life saving drugs were not available, pipette for blood test was broken, the saline apparatus was not in order and there were only two staff nurses for a 28 bedded hospital. Under these circumstance, the Court felt that Dr. Shrivastava should have advised Rambiharilal to take his wife to Rewa Medical College, where the operation could have been performed after proper investigation and preparation. The Court held that the doctor failed in 'his duty of care' in undertaking the operation and was therefore, held guilty of negligence and liable to pay damages.

12. *Roe's* case (1954) 2 Q. B. 66, quoted at page 136 of A. I. R. 1982 (M. P.).

In *T. T. Thomas* v. *Elisa*,[13] the husband of the respondant was admitted to the General Hospital, Ernakulam on 11-3-1974 for severe abdominal pain. It was diagnosed as a case of acute appendicitis. Dr. T. T. Thomas, who was one of the civil surgeons of the hospital, examined the patient and confirmed the diagnosis pursuant to which the patient was removed to the surgical ward. He was, however, not operated upon the next day and his condition deteriorated fast and thereafter no surgery could have been performed upon him. He died on 13-3-1974 due to "perforated appendix."

The mother, the widow and the children of the deceased filed a suit for damages for Rs. 50,000, on the ground of negligence of the doctor and vicariously of the State. The lower court held the doctor guilty of negligence in that he did not operate immediately, which would have saved the life of the deceased.

The main contention was whether there was negligence on the part of Dr. Thomas in not performing surgery on the deceased. One of the arguments advanced by the doctor was that he could not operate as the patient had not given his consent for the operation.

However the evidence on record did not prove that the patient had refused to give his consent. The Court held that where a doctor relies on absence of consent as a defence to his inaction in an emergency case, the burden lies heavily on him to establish the want of consent. They observed :

> "When a surgeon or medical man advances a plea that the patient did not give his consent for the surgery or the course of treatment advised by him, the burden is on him to prove that the non-performance of the surgery or the non-administration of the treatment was on account of the refusal of the patient to give consent thereto. This is especially so in a case where the patient is not alive to give evidence. Consent is implicit in the case of a patient who submits to the doctor and the absence of consent must be made out by the person alleging it. In most instances, the consent of a patient is implied. A surgeon who fails to perform an emergency operation must prove with satisfactory evidence that the patient refused to undergo the opeation, not only at the initial stage, but even after the patient was informed about the dangerous consequences of not undergoing the operation."[14]

13. A. I. R. 1987 Kerala 52.
14. *Ibid*, p. 55.

Since the surgeon could not discharge this burden his failure to perform the emergency operation on the deceased amounted to negligence.

In a recent case, (reported in *Times of India*) the principal civil judge of Mangalore ordered two doctors to pay Rs. 2 lakh with 10 per cent interest, by way of damages for gross negligence which ultimately resulted in the death of a patient.

In this case, a 35 year old lady had a small swelling on her neck which was diagnosed as "nortoxic adenoma"—an ailment not uncommon in coastal Karnataka. She was advised to undergo a minor surgery. Since she was planning a business-cum-holiday tour abroad, she decided to undergo the operation before the tour. The date of operation was fixed and tests showed that everything was normal. She was taken to the operation theatre before 2.00 p. m. but the doctors did not turn up. It appeared that they were attending a party hosted by the owner of the nursing home, who was also the anaesthetist. Finally the doctor arrived and the operation was performed.

When the patient was brought out from the operation theatre she was unconcious and her body had turned blue. After a while, her body temperature dropped dangerously but there was no doctor to attend to her. Later on when the doctors came they decided to put her on oxygen, which was not available in the nursing home. The husband managed to get a cylinder from somewhere. He was told that his wife would regain consciousness in a week.

Inquiries made by the relatives from the staff revealed that the anaesthetist who had hosted the party was drunk when he administered the anaesthesia and had not monitored her blood pressure and pulse rate. As a result her heart stopped, which was revived after extensive massage during which a few of her ribs were broken. All this created complications and her condition deteriorated. She was taken home after four months where she had to be constantly attended to by servants, and a nurse. She suffered for four years and died in October 1985.

The husband apart from filing a complaint with the Karnataka Medical Council filed a civil suit also in the Court of the Civil judge, Mangalore in 1985. The Medical Council held that, as far as the surgeon was concerned, it was an error of judgement. In the case of the anaesthetist, even though the Council found him guilty of negligence he was let off with a mere warning. The Civil Court, however, in its trend setting judgment ordered the surgeon to pay Rs. 50,000 and the anaesthetist to pay Rs. 1,50,000 byway of damages for negligence.

The meagre case law provide scant guidelines for resolving cases relating to medical negligence. They are, indeed, woefully, inadequate to meet the present situation wherein the tribe of errant doctors is increasing. There is an urgent need to evolve measures to meet the menace of medical negligence. However, the current scenario presents a strange spectacle. Despite the increase in cases of medical negligence, the affected public hardly litigate for vindicating their rights. Perhaps fatalism has benumbed their desire to pursue legal remedy against the doctors. Even the few tnat pursue the legal remedy find the judicial process extremely torturous. Further, even where the judicial decisions fix the liability of the doctors, the recompense awarded normally is shamefully meagre. Such an attitude hardly encourage the suffering public to litigate in this area. Therefore, as a first step, we have to educate the public not to ignore established cases of medical negligence and encourage them to sue the offending doctors. The judiciary should also respond effectively by awarding liberal compensation to the victims of medical negligence drawing an analogy from the area of motor vehicles accidents and the related law. Once such a trend takes shape, doctors would show better appreciation of the medical needs of the common people and would be more careful in their treatment. Further, it will also encourage the doctors to take 'malpractice' insurance for protecting their interests. We would like to emphasise that the mere fear of their reputation getting smudged will not be a potent factor for instilling vigilance among the doctors. It is the damocles sword of tortious liability which alone will make them more alert in the discharge of their professional responsibilities. Not that we want every alternate doctor to be pilloried. Whereas we are able to compete with the West in the fields of science and technology, our attitude and response in the field of medical negligence is primitive. The sooner we abandon this attitude of indifference, the better it is for the health of the community. Let us begin with a better awareness in this all important area.

FORGED CHEQUES AND BANKER'S LIABILITY

P. M. BAKSHI*

The law relating to banker's liability for payment of forged cheques has been the subject of important judicial decisions during the last few years and now deserves a fresh look. Some bankers seem to believe that they are protected, having told the customer that the customer should keep the cheque book in safe custody. But this is not an absolute defence, as will be shown later in this article.

The basic principle

For a correct appreciation of the legal position, one should bear in mind the basic principle. Essentially, a cheque is a mandate by the customer to the bank to pay the amount entered in the cheque. The bank is bound to honour it, if the funds are sufficient. But this is not the only obligation of the banker. He has a negative obligation as well. He is bound, not to honour a cheque drawn by any person other than the customer. It is only in certain special situations that the banker is freed from this obligation. Customer's negligence in drawing the cheque is one such special situation. But the general rule is that stated above.

Forged signature

An important decision concerning banking law was pronounced by the Supreme Court two years ago. *Canara Bank* v. *Canara Sales Corporation.*[1] It held that when a cheque presented for encashment contained forged signatures, the bank had no authority to make payment of such a cheque, and if the bank still made payment, it would be liable to the customer. When a customer demands payment for the amount covered by such a cheque, the bank must repay the amount to the customer. The Supreme Court observed as under :—

> When a cheque duly signed by a customer is presented before a bank with whom he has an account, there is a mandate on the bank to pay the amonnt covered by the cheque. However, if the signature on the cheque is not genuine, there is no mandate on the bank to pay. The bank, when it makes payment on such a cheque, cannot resist the claim of the customer with the defence of negligence on his

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1. (1987) 8 Reports (SC) 210.

> part such as leaving the cheque book carelessly so that third parties would easily get hold of it. This is because a document in cheque form, on which the customer's name as drawer is forged, is a mere nullity. The bank can succeed only when it establishes adoption or estoppel.

Cheque in favour of a fictitious person

If a cheque is drawn in favour of a fictitious or non-existent person, it may be treated as a bearer cheque. In *Bank of England* v. *Vagliano Bros.*[2], a trader's clerk, who dealt with foreign correspondents, forged the signature of a foreign correspondent as the drawer of a number of bills drawn in favour of another firm in whose favour that correspondent had drawn genuine bills. Other documents from the correspondent were also forged. When the trader claimed back from the Bank of England the amount of the bills which had been paid and debited to his account, the Bank pleaded that the bills were payable to fictitious persons and were therefore payable to bearer. The plea of the bank was upheld by the House of Lords.

Mistaken debits

Contrary to a common misconception, a customer is not bound to inform a bank of mistaken debits. If a bank makes debit on the basis of forged cheques, the bank is liable. Only duty of the customer is to take reasonable care to avoid chances of forgery or forged additions. Even a condition of the bank account that mistaken debits should be intimated does not free the banker from liability for paying a forged cheque. *Tai Hing Cotton Mills* v. *Chong Bank*,[3] followed in *Canara Bank* v. *Canara Sales Corporation.*[4]

Forged cheques

The Supreme Court of India has recently held that a banker has no authority to pay a forged cheque and the banker cannot debit the customer with amounts covered by such cheques. *Canara Bank* v. *Canara Sales Corporation.*[5] The bank can succeed in denying payment, only when it establishes that the customer is disentitled to make such a claim and only if it can prove—

(a) adoption, or

(b) estoppel, or

2. (1891) A. C. 41.
3. (1985) 3 W. L. R. 317 (PC).
4. (1987) 8 Indian Judicial Reports (SC) 1210.
5. (1987) 8 Reports (SC) 1210 (Judgment of 22 April, 1987).

(c) the fact that the customer had knowledge of the forgery (and still acquiesced).

Long inaction of the customer is not a ground for denying relief. Where the customer did not, by his conduct, facilitate payment, mere negligence by him does not constitute a bar, In the instant case, the plaintiff company did not, during the period when the cheques were encashed, know anything about forgery. When the matter was discovered, immediate action was taken. Hence the plaintiff could not be non-suited on the ground of negligence or inaction.

The authorities in England have also, more or less consistently held that there is no duty on the part of the customer to intimate the banker about any error in the pass book. The customer can claim an amount paid on a forged cheque, even if he has not been careful enough to discovor the error. *Tai Hing* v. *Lin Chong Bank*.[6] There have been earlier decisions to the same effect in India.[7]

Customer's duty

Of course, the customer is under a duty to take usual and reasonable precautions to prevent a fraudulent alteration to the cheque which might occasion loss to the banker concerned. This duty arises from the relationship between the customer and the banker and is said to be an implied condition of the contract between the two.

The existence of a duty of care on the part of the drawer of the cheque has been affirmed in India. *Joydeb Das* v. *National Bank of India Ltd.*[8]

English law : Duty of the customer

In England, this question has arisen more than once, with varying results. In *Young* v. *Grote*,[9] Mr. Young, a customer of a bank, gave his wife printed cheques signed by himself requesting his wife to fill the blanks up according to the exigency of his business. His wife caused one cheque to be filled up with the words "Fifty Pounds" and the figures "2s. 3d". The word "Fifty" was begun with a small letter and placed in the middle of a line. The amount of the cheque was also given in figures "50.2.3", but these were also placed at a considerable distance from the printed £ sign. In this state, the wife

6 (1985) 2 All E. R. 947.

7. *Bilita Cooperative Development Cane Marketing Union* v. *Bank of Bihar*, (1967) 2 S. C. R. 846; *New Marine Coal Co. (Bengal) Pvt. Ltd.* v. *Union of India*, (1964) 2 S. C. R 859.

8. (1961) 65 Calcutta Weekly Notes 282; See also *Tanjore Permanent Bank* v. *S. R. Rangachari*, A. I. R. 1959 Mad. 119

9. (1827) 130 English Reports.

delivered the cheque to her husband's clerk to receive the amount. The clerk made certain alterations, which raised the amount to £350.2.3. This he achieved by inserting, at the beginning of the line in which "fifty" was written, the words "Three hundred and" by inserting between the £ sign and the "50", the figure "3". The banker paid the altered amount £350.2.3 and it was held that the loss must fall on the customer.

Foundation of the doctrine as to bank cheques

After the decision in *Young's* case various views were expressed as to the true foundations of the doctrine; and some of the judges who were to examine the decision later thought that the reasoning was, that a person who drew a cheque in blank gave authority to any person in whose hands it was, to fill up the cheque in whatever way the bank permitted. Some judges thought that the situation was only an instance of the general principle that as between two persons, he whose negligence enabled fraud to be committed must bear the loss. Others took the view that the drawer is precluded by his negligence from disputing the authority of the banker to pay the cheque as altered.

Some discordant voices were expressed in England about the *young's* case. But ultimately, in 1918, it was held that if the customer, by negligence, draws a cheque in such a manner as to facilitate forgery by a subsequent holder unauthorisedly increasing the amount, he must suffer the loss.[10] The High Court of Australia, in the case of 1981, agreed with this view and pointed out that this view promotes the negotiability of cheques. It afforded banks, which have to determine the authenticity of so many cheques in a short period of time, the assurance that the drawer, by his negligence, may not increase the risk of loss through fraudulent alteration without being responsible for the consequences.[11]

Thus, arising from the contract between banker and customer, there is a duty on the customer to take usual and reasonable precautions in drawing a cheque so as to prevent a fraudulent alteration which might occasion loss to the banker.

In *Slingsby* v. *District Bank*,[12] the Court of Appeal held that the customer did not have a duty to fill in any space after payee's name. In that case, a cheque was signed in favour of AB. The clerk who had written out the cheque then added, after the words "per X and Y" after the payee's name, endorsed the cheque and paid it into his own account.

10. *London Joint Stock Bank* v. *Macmillan*, (1918) A C 777.

11. *Commonwealth Trading Bank* v. *Sydney-Wide* Stores, (1981) 55 A. L J. R. 574

12. (1932) 1 K B. 544 (CA).

It was held that the bank was bound not to honour the cheque.

Duty to disclose forgeries

But the customer has an implied duty to inform the bank if he discovers that cheques purporting to have been signed by him have been forged.[13] In these cases, plaintiff's failure to inform the bank of forgeries precluded the plaintiff from successfully suing the bank.

Australian Position

In this context, an Australian case is of interest, because the situation involved in that case can arise in India also. In that case, the problem of unauthorised alteration in a cheque arose in very interesting circumstances, and led to litigation by the Sydney-Wide Stores against the paying bank (and also against the collecting bank), in respect of certain cheques drawn on the account of the Stores, with the paying bank.[14] The Stores had, at that time, in its employ a man named Prior. From time to time, it became necessary for the Stores to draw cheques in favour of an organisation called "Computer Accounting Services", with which it had business dealings. The cheques were made out "Pay CAS or Order". The Stores alleged that Prior (the employee of the Stores) altered the cheques in question, so as to make them read "Pay CASH Or Order". This was achieved simplly by adding the letter 'H' after the letters 'CAS'. The Stores alleged that the paying bank failed to make proper inquiries of the Stores before paying the cheque and that this was in breach of the paying bank's contractual duty to exercise reasonable care. The failure to exercise reasonable care on the part of the bank (it was alleged), resided in the fact that each of the cheques was crossed and carried the words "Not negotiable" and "Account Payee only". Moreover, each cheque was for a large amount, so that it was the duty of the paying bank to make proper inquiries. In defence, the bank pleaded that as a customer, the Stores owed a duty of care to the bank in drawing cheques and that the Stores had acted negligently by drawing cheques in such a way that it became easy for another person to convert the name of the payee from "CAS" to "CASH".

The trial judge in the Supreme Court of New South Wales struck out the defence of the bank, on the ground that there was an earlier decision of 1904 of the High Court of Australia, which had held that the negligence of the customer is not a defence (in such circumstances) from the legal point of view. From this order striking out the bank's

13. *Greenwood* v. *Martins Bank*, (1933) A. C. 51 (HL); *Brown* v. *Wetminster Bank*, (1964) 2 Lloyd's Rep. 187.
14. *Commonwealth Trading Bank* v. *Sydney-Wide Stores*, (1981) 55 A. L. J. R. 574.

defence, an appeal was taken to the High Court of Australia with special leave. The High Court ultimately held that the customer was bound to take reasonable care and did not approve of the earlier decision of 1904. The High Court held that as a result of modern notions of the duty of care expected of a reasonable man, the reasonable man should, in appropriate circumstances, take account of the possibility that others might break the law and act accordingly. This duty attached to the customer of a bank also, in his dealings with the bank. (The case was remanded for trying the other issue, namely, if the paying bank was also negligent).

American and Canadian Positions

In the United States also, most of the courts have recognised the existence of a similar duty on the part of the customer, though it appears that in some instances, the rule has been modified by statute.

The drawer's duty of taking reasonable care in drawing cheques has been also recognised in Canada[15] and in New Zealand.[16]

Precautions to be taken by customer

In the light of the ruling case law, in drawing a cheque, a customer would be well-advised to take certain precautions.

(i) One should never give a blank cheque to anyone—not even to one's spouse. The danger is not that the spouse will make an alteration, but that some third person, to whom the spouse may give the cheque, will make an alteration and change the amount; or will effect some other alteration, thereby increasing the burden on the drawer of the cheque.

(ii) Even apart from not leaving the cheque or amount (or name of payee) totally blank, care should be taken to ensure that no *blank space or gap* is left in any other respect. For example, if the amount to be paid is in three digits, the three digits should be written close to each other, and, before the first digit and after the last digit, no blank space should be left which may facilitate forgery in shape of increase in the amount.

(iii) Similarly (apart from blank spaces in the amount), no blank spaces should appear in the name of the payee. This precaution is of great practical importance, as will be manifest from the Australian case mentioned above.[17]

15. *Kilborn* v. *Co-operative Centre Credit Union Ltd*, (1971) 33 Dominion Law Reports (3d) 233, 239 to 241.
16. *National Bank of New Zealand Ltd.* v *Walbold and Patterson Ltd*, (1975) 2 N. Z L R. 7.
17. *Commonwealth Trading Bank* v. *Sydney-Wide Stores*, (1981) 55 A. L. J. R. 574.

RESTORATION OF SHAREHOLDERS' DEMOCRACY IN COMPANY'S MANAGEMENT

SURENDRA NATH*

DEO MUNI PRASAD**

The Backdrop

An over-riding principle underlying the Companies Act, 1956 (referred hereinafter as the Indian Act) is that companies in India must operate in conformity with the social and economic policies of the nation. The Indian Act constitutes a landmark in the history and development of company law in India. In no other country in the world, perhaps, there is any Act relating to companies so detailed and voluminous. The Indian Act is not merely a statute regulating the formation, management and winding up of companies; it is also a piece of social legislation and it makes an attempt to effectuate some of the directive principles of the Constitution of India. It also takes into account the recent trends in the social and economic development in India and the development in laws of other countres. The Indian Act reflects the prevalent trends of public opinion. Prior to the enactment of the Indian Act, the industry in India was in such a condition that very few people had confidence in it; the economy was almost crippled. On the other hand, the nation's wealth was in a few hands, mostly managing agents, who regarded the company-organisation as vehicle for their personal prestige and source to fill up their coffers. Shareholders were treated with the contempt with which an aristocrat regards the lower classes or a rich person treats a poor.

The status of a shareholder had changed from an active participant to that of a spectator of a business play financed by his own money;

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he had degenerated from a controlling proprietor to a mere dividend recipient. As the capital had become dispersed among a multitude of small investors, the voting rights were disproportionate, the shareholdings and the management was totally divorced from ownership, the control of shareholders over the management had become "illusory". These changes led the directors to have a false feelings that they were the owners of the company (as the executive power was vested in them) and were entitled to do what they liked in the administration of the company's affairs. The unsatisfactory nature of shareholders control over the affairs of a company conducted by their elected representatives had been the subject of much comment and criticism by a number of Expert[1] Committees[2]

1. In U. K. the *COHEN COMMITTEE*, while stating reasons for such state of affairs, observed thus :

> "The illusory nature of the control theoretically exercised by shareholders over directors has been accentuated by the dispersion of capital among an inereasing number of small shareholders who pay little attention to their investments so long as satisfactory dividends are forthcoming, who lack sufficient time, money and experience to make full use of their rights as occasion arise and who are in many cases too numerous and too widely dispersed to be able to orgenise themselves."

The *Cohen Committee*, while commenting on the sea change that had taken place in the status of shareholders during the last 100 years further observed :

> "In the early days of joint stock companies investors were usually people of wealth who had knowledge of and experience in financial matters; or if they were not, their affairs were administered by advisers who had such knowledge and experience In the last 100 years, there has been a great redistribtuion of wealth so that many small investors have holding in companies. This tendency is growing at the present time and the number of shareholders is likely to increase further with a corresponding diminution in the size of the holdings. The small investor seldom takes a close interest in or attends any meetings of the companies in which he holds shares."

Report of the Committee on Company Law Amendment, Cmd 6659 (1945) para 124, London.

See also *Report of the Company Law Committee* (known as *Jenkins Committee*) Cmd. 1749 (1962), paras 104, 105, 107 (London)

2 The *Bhabha Committee*, on whose recommendations, the Indian Act was redrafted observed thus :

> In addition the factors mentioned, some recent developments in corporate finance, e. g , the growth of investment trust companies have further tended to widen the gap between the ultimate investor and those in charge of the management of his investments, while circumstances

and Commissions set up in U. P., India and elsewhere.[3]

Company law proceeds on the democratic principle that a company is subject to the control of its shareholders exercised by the majority of shareholders in the general meeting of the company. However, due to the special characteristics of a company form of organisation, like being a corporate entity separate from its shareholders[4] and an artificial person, it cannot act without the help of a human agency. The business of the company is either conducted by the majority of shareholders of the company in the general meeting or by the agents appointed by the company, i.e., again the majority of shareholders acting collectively in the general meeting. The operating procedure for companies might be described in terms of an *hour glass* in form. At the base are the shareholders who elect the Board of directors and delegate certain powers to them. Usually, we find such authority and the matters to be delegated in the articles of the company or in the Companies Act. In turn, the Board of directors appoint officers, agents, etc., who have some discretion but in general are deemed to execute the polices formulated by the Board.

A company is, in some respects, an institution like a state functioning under its "basic constitution" consisting of the Companies Act and

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in this country have imposed a special handicap on them. The comparatively low standard of business knowledge and experience of the average investor, the absence of any well informed, and reliable financial press, and long distances which make it difficult for investors to combine for the exercise of their rights have renderd them partially ineffective.

Report of the Company Law Committee (1952), para 70, New Delhi.

3. As early as in the year 1932, Berle and Means concluded that as corporate wealth had become more widely dispersed, control had come to be divorced from ownership. They opined that :

> Parallel with the growth in the size of the industrial unit has come to a division in the ownership such that an important part of the wealth of individuals consists of interests in great enterprises of which no one individual owns major part. Frequently.. ownership is so widely scattered that working control can be maintained with but a minority interest.. Under such conditions control may be held by the directors or titular managers who can employ the proxy machinery to become a self-perpetuating body, even though as a group they own but a small fraction of the stock outstanding.

4. Greer, L. J., *John Shaw and Sons (Salford), Ltd.* v. *Shaw* (1935) All E R. 456, 464; *Salomon V. Salomon and Co. Ltd.*, (1897) A. C. 22; *Buchhv* v. *Commissioner of Income tax*, A. I. R. (1955) S. C. 74;

the memorandum of association. Carrying the analogy of constitutional law a little further, Gower has described "the members in general meeting" and "the directorate" the two primary organs of a company and compared them with the legislative and the executive organs of a Parliamentary democracy where legislative sovereignty rests with Parliament, while administration is left to the Executive Government, subject to a measure of control by Parliament through its power to force a change of Governments.[5] Like the Government, the directors will be answerable to "Parliament" constituted by the general meeting. But in practice (again like the government) they will exercise as much control over Parliament as that exercises over them. Although it would be constitutionally possible for the company in general meeting to exercise all the powers of the company, it would certainly not be practicable (except in the case of one or two small companies) for day-to-day administration to be undertaken by such a cumbersome piece of machinery. So the modern practice is to confer on the directors the right to exercise all the company's powers except such as the general law expressly provides must be exercised in general meeting. Under the Indian Act, the powers of the Board are more secured as the Board has been made responsible by the Act to "exercise all such powers and to do all such acts and things, as the company is authorised to exercise and do except those which are reserved for the company in general meeting". Of course, the powers which are strictly legislative are not affected by the conferment of powers on the directors as section 31 of Act of 1956 provides that an alteration of an article would require a special resolution of the company in general meeting.

Efforts of the Legislature for Restoration of Shareholders Democracy

The Company Law Committee suggested two ways by means of which the Company law could partially redress the balance in favour of shareholders :[6]

(a) Fullest possible disclosure of the facts relating to the promotion, formation and working of joint stock companies; and

(b) By the enactment of such suitable provisions for the holding and conduct of company meetings as will enable active and competent shareholders to take an effective part in the business transacted by them.

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5. Gower, L. C. B., *Principles of Company Law* (2nd Ed.) pp. 16-17.
6. *The Report of the Company Law Committee* (1952), New Delhi, page 71.

In order to protect the interests of the investors and to give them an active control over the management, the law as regards the company's meetings, notices, etc., giving more rights to shareholders and ensuring their exercise by the shareholders, was drastically changed and various statuatory provisions were made to make it difficult for directors to secure the hurried passage of controversial issues (by stating that certain important matters could only be transacted by the general meeting of shareholders), and as for as possible to encourage shareholders to consider carefully any proposals required by law to be put before the shareholders by the directors (by making provisions regarding notices, resolutions, etc. in the Companies Act itself). Although the Board of directors was declared the primary executive organ of the company, its authority was restricted to the management of the regular business affairs of the company, unless extensive powers are expressly conferred by either the articles or the Act. The fundamental changes in the character of the organisation of the company, winding up of the company, variation of shareholders rights, etc. now cannot be made by the Board of Directors unless expressly authorised to do so, because such matters do not relate to "ordinary business." In many cases the Board has to take consent of the shareholders in general meeting and certain transactions are required by the statute to be made by concurrent authorisation of the shareholders and the board of Directors.[7] Although detailed provisions were made regarding the procedure of meetings, etc. in the Act of 1956 (instead of leaving the matters to be decided by the Articles of Association, as is still the practice permitted under English law), a perusal of the provisions of the Companies Act makes it clear that in many cases the position of the directorate vis-a-vis shareholders is more powerful than that of the Government vis-a-vis Parliament. They still enjoy privileged position and the shareholders, particularly non-institutional shareholders, have very little say in the management of the company's affairs. The theory of parliamentary sovereignty would not, as suggested by Professor Gower, apply in its strict and literal sense by analogy to a company since under the Companies Act, there are many powers exercisable by directors with which the members in general meeting cannot interfere.

The most they can do is to dismiss the directors and appoint others in their place or alter the articles so as to restrict the powers of the directors for the future by reserving powers to be exercised by company in general meeting. Gower himself recognises that the analogy of the Legislature and the executive in relation to the "members in general

7 *See* sections 292, 293, 293-A and 294.

meetings" and the directors of a company is an over simplification and states : "to some extent a more exact analogy would be the division of powers between the Federal and the State Legislature under a Federal Constitution".

The Act of 1956 did make a two pronged attack on the problems : (i) shareholders were bedecked with effective weapons for exercising effective control over the Board of Directors and realising their rights; and (ii) the directors were restored to their rightful place of power and responsibility in the management of companies. The division of powers between the Board and the members has always been a subject of discussion by the judiciary and legal experts. Under English Law, the matter is left entirely to the discretion of the framers of the articles of association which can, of course, be altered from time to time by special majority of shareholders. Contrary to this, in order to solve the long-drawn controversy and strike an equitable and justifiable balance keeping in view the commercial exigencies and conditions prevalent in India, the matter with regard to the division of powers between members and the Board is not left to the discretion of the articles of the company; the Indian Act contains a provision which describes broadly general powers of the Board of directors vis-a-vis shareholders making decisions on behalf of company in its general meetings. Section 291 declares the Board of directors as the chief executive organ of a company. However, the delegation of the power to act on behalf of the company is not absolute, it is made subject to certain exceptions. If the Companies Act or the Constitution of the company provides that a particular power or act will be exercised or done by the company (i.e., shareholders acting collectively) in general meetings, that power or act has to be exercised or done by the general body of shareholders in the company's general meeting. The Board's power is further subjected to the provisions contained, in this behalf, in the Companies Act or any other Act, or in the memorandum or articles of the company, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting.[8]

The effect of the new section is that 'in exercising any such power or doing any such act or thing, the Board shall be governed by the regulations made by the company in general meeting from time to time but no regulation so made shall invalidate any prior act of the Board which would have been valid if that regulation has not been made'. In addition to the above major change, the Indian Legislature drafted several provi-

8. Section 291.

sions with regard to the convening and conduct of meetings, etc., based on the recommendations of the Bhabha Committee.

Although the Act of 1956 tried to democratise the corporate management and protect the interests of shareholders in addition to making the exercise of their various rights effective, some of the provisions of the Act "have proved to be ineffective to meet the present day need of corporate management and administration" as was pointed out in the Government resolution appointing the High-Powered Expert Committee in the year 1977[9]. The Committee was appointed to consider the provisions of the Act of 1956 and report, *inter alia*, on some of the following aspects :

(a) classification and formation of companies and the constitution of directions with special reference to protection of the interests of the shareholders who are in a majority;

(b) exercise of managerial powers, and protection of shareholders and creditors' interests and their relations, *inter se*;

(c) provisions which are required to be made to prevent mismanagement with special reference to safeguarding of company's interest and the public interest;

(d) measures necessary to promote professionalisation of management;

(e) measures by which re-orientation of managerial outlook in the corporate sector could be brought about so as to ensure the discharge of social responsibilities by companies.

The resolution categorically stated that 'as a result of such frequent changes, however, the structures of the Act has been effected and many of the provisions have become cumbersome and not amenable to easy interpretation and understanding'.

The Sacher Committee submitted its detailed report in the year 1978, although its recommendations did not receive due consideraton by the government for ten years. The Committee was of the view that -[10]

> It is notorious that a large number of small shareholders are apathetic—they have neither the time, money nor experience to make use of their rights and are too numerous and widely dispersed to be effective in exercising control over management.

9. *Gazette of India*, Extra-ordinary, Part I-Section I, No. 101, New Delhi, Tuesday, June 23, 1977, Ministry of Law, Justice and Company Affairs.
10. *Report of the Sacher Committee*, 1978, para 7.3.

The Committee, however, did not subscribe to the pessimistic view that it is useless to provide further safeguards to shareholders which they will not use. The Committee remarked that 'past experience has shown that weapons placed in the armoury of minority shareholders, for instance by the 1956 Act on the recommendations of the Bhabha Committee, have been often used to great effect..As we conceive it, a public limited company must be left free to deal with and regulate its own internal affairs with a minimum of external control. But in order that it should do this effectivly, there must be *more effective and meaningful* participation by its own shareholders.' In order to achieve this objective the Committee provided a broad pattern of investors control coupled with provisions ensuring better management at Board level and made specific recommendations with regard to protection of shareholders' interest under the following heads :

(i) More effective and meaningful participation by shareholders at general meetings and extraordinary general meetings of the company;

(ii) Ensuring better management at Board level;

(iii) Better and quicker remedies for oppression and mismanagement;

(iv) Promotion of coordinated activities of shareholders; and

(v) Miscelleneous.

With regard to the management structure and professionalisation of management, the High-Powered Expert Committee considered the following aspects of the corporate management structure :

(a) Exercise of managerial power;

(b) Workers' participation in management;

(c) Professionalisation of management; and

(d) Reorientation of managerial outlook.

The terms of reference of the Committee specifically required the committee to consider and report on improvements, if any, in the present administrative structure and procedure regarding the enforcement of the provisions of the Act of 1956. The Companies Act, 1956, incorporates the concepts of social philosophy and protection of public interest as advocated in the Constitution. The Committee kept in mind the following broad consideration while making suggestions for structural changes in the existing administrative machinery.[11]

11. *Id.*, para 16.7.

(a) The need for speed and efficiency with which decisions are made both on the judicial and the administrative side :

(b) The need for identifying functions which are purely administrative and those which have an adjudicative element, necessitating a judicial approach;

(c) The need for having a fresh lock at the system of prosecutions in the Act in order to see whether or not it is possible to provide for a more effective deterrent by way of imposition of penalty without imprisonment where this is feasible, and to limit cases of imprisonment to more serious offences involving the affairs of the companies;

(d) The need for bringing in greater decentralisation of authority, thus taking the authority exercising the power as near to the company's seat of operation as possible, especially keeping in view the question of costs likely to be incurred by smaller companies; and

(e) The need for a quasi-judicial tribunal, independent of the executive authority of the Central Government, which should not only ensure that the Act is administered in a manner which gives the affected party a right to be heard but also see that the decisions are taken uninfluenced by executive cons-derations.

In order to achieve these objectivess, the recommendations made by the Sacher Committee included, *inter alia* :

(i) The Company Law Board should be statutorily constituted as an independent quasi-judicial body on the pattern of the Income tax Appellate Tribunal with permanent Benches in the different regions, including Delhi region;

(ii) While matters of purely administrative nature should continue to be exercised by the Central Government, other matters which require exercise of quasi-judicial powers should be entrusted with the Company Law Board as reconstituted;

(iii) The Board should function indepedently of the Central Government ensuring speed and efficiency in discharge of these functions;

(iv) There should be powers to impose penalties for default in compliance of statutory obligations in place of the existing routine prosecutions;

(v) There should be rights of appeal against the order of the Company Law Board on question of law and opportunity should be given to the party to be heard before any order is passed.

In addition to the above-mentioned recommendations, the Committee also made other recommendations with regard to the structure and composition of the Company Law Board and its Benches. Although such valuable recommendations were made in the year 1978, the Government remained silent and inactive on it for about a decade, for the reasons best known to it. It is, however, heartening to note that the task reforming the company law on the basis of the recommendations of the Sacher Committee was taken up, although belatedly, and the Companies (Amendment) Act, 1988 was enacted and some of the recommendation were transformed into law.

Judicial Approach

Although the task of reforming the company laws was taken quite belatedly after 10 years in the year 1988, the Indian Judiciary did not lag in transforming the company law in accordance with the needs of the society. For instance, in the famous controversial case, *Life Insurance Corporation of India v. Escorts Ltd.*,[12] in which the rights of a business tycoon Swaraj Paul to get his shares registered and the right of shareholders holding majority shareholding-L. I. C. to requisition an extra-ordinary general meeting with a view to remove certain directors and appoint their own men were debated and discussed in the Supreme Court for 28 days, the Supreme Court emphatically reaffirmed the members/ shreholders these two basic rights. The Supreme Court held that, 'As already stated, the only effective way the members in general meeting can exercise their control over the directorate in a democratic manner is to alter the articles so as to restrict the powers of the directors for the future or to dismiss the directorate and appoint others in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, directors of their choice and the power to regulate them by a resolution for their removal, And, an injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another".

In *Bajaj Auto Ltd. v. N.K. Firodia*[13] the Supreme Court laid down the tests on which only the Board of directors were permitted to refuse registration of transfer. Curbs were also imposed on the powers of the

12. (1986) 59 Comp. Cas. 548 at 632 (S. C.).
13 A. I. R 1971 S. C. 321.

Central Government to order investigation on its own when in *Barium Chemicals Ltd* v. *The Company Law Board*,[14], judicial review was permitted as to the existence of circumstances which led to the ordering of investigation under section 237 (b). In the case of *Needle Industries (India) Ltd.* v. *Needle Industries Newey (India) Holding Ltd.*.[15], the Supreme Court deliberated at length the powers of the majority and Board of Directors with regard to the issue of further shares and the protection available to minority shareholders. In addition to two types of companies Public and Private a third type of company was also recognised, i. e. private companies which have become public companies by virtue of section 43-A but which continue to include or retain the three characteristics of a private company. In the famous case, *National Textiles Workers Union Ltd.* v. *P. S. Ram Krishanan*,[16] the changing concept of a company was recognised and the workers were given a right to represent and object in an winding up proceedings. The Supreme Court also curbed the tendency of forming the "Government Companies" under the Act of 1956, with a view to deny fundamental rights to its employee, etc.. when in the illustrious case of *Som Prakash Rekhi v. Union of India*,[17], it held that if the entire share capital of the corporation is held by government, it would go a long way towards indicating tnat the corporation is an instrumentality or agency of government. In number of cases decided by the Supreme Court and different High Courts, several inroads were made affecting the traditional principles of company Law, like- *rule in Foss* v. *Horbottle* or *rule in Turquand's case*. The Company Law Board, an administrative agency exercising judicial function, while hearing appeals against the refusal by the company to register transfer of shares has also responded to the challenges faced by the country and it is heartening to note that dispelling the fear expressed in some corners that it would work as a mouthpiece of the government, it has discharged its functions judiciously on well-established norms.

The steps taken by the government towards making the Company Law Board an independent quasi-judicial body are praiseworthy and they would definitely arouse confidence in those who have been given right to approach the Company Law Board in distress to vindicate their grievances.

14. A. I. R. 1971 S. C. 295, See also, *Rohtas Industries Ltd.* v. *S. D. Agrawal*, A. I. R. 1969 S. C. 707.
15. (1981) 51 Comp. Case 743.
16. A. I R. 1983 S. C.
17. (1981) 51 Comp Cas. 71 (S. C.).

Evaluation of the law

It may be concluded that the Act of 1956, amended by the Amending Acts of 1974 and 1988, has a far-reaching impact on the social climate and economics of incorporated business. There is a steady increase in the number of companies. The relationship between directors and shareholders has become healthier; much of the humbug and malpractices which were found in managerial action have disappeared. Directors have started concentrating on the managerial tasks for which they are primarily appointed. Now they are not considered paternal guardians of shareholders. The suppliers of capital-shareholders-have started taking interest in the company's affairs and they are able to know, in realistic terms the current worth of their investment. The Government is fulfilling an important function by enforcing the communication of clear and understandable information from directors to shareholders; it is also ensuring that the country's wealth is utilised for the betterment of the people. Shareholders have been given various rights, and they are well protected. The Cohen Committee's statement[18] which was approved by the Bhabha Committee[19] in India that the "control theoretically exercised by shareholders" is "illusory" seems to be an overstatement. Even in England, the conditions had changed after the Act of 1948 and, therefore, the Jenkins Committee also disagreed[20] with the Cohen Committee's observations made 17 years ago. The Act, of course, provides shareholders with powerful weapons but the only difficulty is that in many cases they are unable to use them. This type of handicap may not be faced by the institutional investors but it is quite likely that a small investor may not be able to organise the collective force which is required under the scheme of the present Act to comple the majority and/or the management of act in his favour.

Abuse seems to be inherent in the exercise of powers where money is concerned and the real remedy is that shareholders should be made more assertive to take care of themselves in this matter. In spite of all the efforts made by the Legislature through the Act of 1956 and subsequent amendments, this fact cannot, however, be denied that with the changed structure of the incorporated business organisation, a wide gap still exists between control and ownership on the one hand and management and ownership on the other. Since individual shareholders cannot

18 *Report of the Committee on Company Law Amendment*, London, 1945, Cmnd 6659, para 7 (e).
19. *Report of the Company Law Committee*, New Delhi 1952, para 70.
20. *Report of the Company Law Committee*, London : 1962, para 106.

properly discharge their responsibilities as neither they have an effective "will" to do so nor they have appropriate resources at their disposal-many of them consider the exercises of corporate membership rights an unproductive and uneconomic exercise, it is essential that adequate steps must be taken with regard to the promotion of coordinated activities of shareholders. One method to ensure effective participation of shareholders may be to promote bodies and associations of shareholders and strengthen the existing ones. The idea is not entirely a new one, but it has not so far received the attention it deserves in either country, India or England. In October 1932, in England a "Shareholders Protection Association" was founded but it lasted only for seven years. In June 1949-following upon a suggestion made in the Financial Times,the establishment of an "Association of Investors" was announced, but it never became a reality. It was intended to create an organisation with an aim to put an end to the nationalising of private industries and to ensure that, in case State did take over the business, shares would be purchased after a fair valuation of the assets. The "Council of Minority Shareholders" also died out. There are signs that British shareholders are dissatisfied with having no organisational frame-work. There had been certain people who were self-appointed champion of minority shareholders, one of the well known ones was Welsh Accountant Julian Hodge[21] In 1963, a voice was raised in the columns of the Guardian to organise shareholders. But nothing worth-mentioning has been done so far.

In India, the need for proper effective associations of shareholders is an inevitable one. It is somewhat paradoxical that while other elements connected with the corporate enterprises possess well-organised Unions or Associations, the shareholders, who are the kingpin of the corporate system cannot be said to be even loosely organised. The question of organising and developing shareholders' associations has several times been raised in the Parliament and although certain definite assurances in this regard have been given by the Ministers, nothing positive has been done. In 1955, Dr. H. N. Kunzru put the case in the following words :[22]

> I would like to refer again to some of the questions that I raised during the consideration stage. I suggested that the Department of Company Law Administration should regard it as one of its important duties to encourage the establishment of shareholders' associations wherever they did not exist and to strengthen such existing associations as are not in good condition. I also suggested

21. A Rubner, *The Ensnared Shareholders*, Penguins, Middlesex, pp. 132-137.
22. Dr. H. N. Kunzru, *Rajya Sabha Debates*, Vol. x, No. 32, Cols. 5152-53.

> that for the attention of the shareholders, the Department should consider the practicability of publishing literature which will enable them to understand the real position and to discharge their functions effectively.

The then Minister of Revenue and Civil Expenditure, Mr. M.C. Shah, assured the Parliament that "all possible steps would be taken to see that the existing shareholders' associations are strengthened and the new ones are formed".[23]

The Sachar Committee thoughtfully considered the issue relating to Shareholders' Association as it had received a number of representations for giving statutory status to such associations which could ventilate grievances of the large non-vocal body of members in every public company'. The Sachar Committee, although realising that 'in every large public company whose shareholders are scattered all over the country, it is difficult always to ensure effective participation', did not think it proper that such associations should be permitted to participate in the affairs of a public company. The reason given by the Sachar Committee for this rigid stand was that[24]. "It is a settled principle of company law that a person who is not a member of the company is not entitled to seek information from the company or participate in the deliberations of the company in general meeting unless he claims to represent such member. Permitting an outside body (even though it be a body representing shareholders generally) would be to set at naught this well-settled principle-if accepted, other bodies and associations affected by a public company's activities namely, consumers' associations, labour unions etc. would with equal justification seek to participate in its affairs." In spite of the above stand taken by the Sachar Committee, it, nevertheless, felt that 'a responsible shareholders' association in each region would contribute much towards ventilating the legitimate grievances of shareholders and promote a more meaningful relationship between management and members. Such a shareholders' association would also act as an agency through which information about the affairs of public companies would be channelised'[25].

23. M. C. Shah, *Rajya Sabha Debates*, Vol. x, No. 32, 28-9-1955, Vol. 5182. Raj K. Nigam, *The Present and Future Role of Shareholders' Associations*, Department of Company Law Administration, New Delhi 1960, p 25. Even at the time of submission of the Report of the Sachar Committee, there were very few associations who submitted their views—there were even less than 10 in number.
24. *The Report of the Sachar Committee*, 1978, para, 7 13.
25. *The Report of the Sachar Committee*, 1978, para 7.13.

The necessity of the formation of shareholders' association has constantly increased due to the qualitative changes in the organised sector of the Indian economy. As has been pointed out earlier, the four decades has witnessed a phenominal growth in the organised sector which is reflected in the number and size the paid up capital of the entities regis stered under rhe Companies Act, 1956. From a gross paid-up capital of nearly eleven hundred crore of rupees in 1956-57 it had risen to more than Rs. 40,000 crores by 1986-87; simultaneously, the number of registered companies also witnessed a manifold increase and was nearly 140,000. The private corporate sector has, thus, grown at a reasonably high rate. Within the private sector, however, one observes a few interesting developments. Firstly, in the private secctor, many big corporations have emerged. For instance, the number of companies with an annual turnover of Rs. 100 crores was only three in 1969-70 but by 1986-87 the number had risen to more than one hundred which is a sign of increasing concentration within the private sector. When one looks at the growth pattern of the India's large industrial houses, it is found that the gross assets of the top ten[26] rose from nearly Rs. 2,000 crores in 1972 to Rs. 17,455 crores by 1986—more than an eight-fold increase in about 13 years. Secondly, even in some of the largest private sector companies in India, an overwhelming part of the assets is held by such private companies in which the majority or the largest block of shareholding was with the public sector.[27] The growth and stability of the Indian private

26. The increase in aseets of these corporate giants during 1980-1986 and the percentage with respect to the total increase achieved by the ten together are given below : (In crores of rupees)

(a) Birlas	3174.58	26 1%
(b) Tata	2809.97	23.1%
(c) Reliance	1855.20	15.2%
(d) J. K.	817.22	6.7%
(e) Thapar	797.77	6 6%
(f) Mafatlal	553.41	4.5%
(g) Modi	661.36	5 4%
(h) L and T	614.53	5.0%
(i) A. C. C.	485.57	4.0%
(j) Bangur	406.20	3.3%

(Source : *Times Magazine*, Dec. 1988—Jan. 1989)

27. For instance, the combined shares of public financial institutions and of the State and Central Governments was 42.25% in TISCO and 44 84% in TELCO, the largest companies in the private sector in terms of net Sales in 1986-87. While the share of Tata Sons in TISCO was placed at less than 2.5%, TISCO was the major private sector shareholders in TELCO. In sort, a large part of big business assets is public—when classified as per ownership of risk caital,-Sk, Goyal "Corporate Affairs"—*Times Magazine*, Jan. '89.

monopoly capital, as represented by large houses, is financed, promoted and protected by the public sector financial institutions. The share of financial collaborations has increased from ten per cent, to 33 per cent during the period 1977-1988. In other words, the public sector financial institutions—the instrumentality of the state—are acting as private investors and as they represent majority shareholdings, they may act against the wishes and interests of those shareholders who may be in majority in number but have minority shareholdings. There is atleast one example of Life Insurance Corporation of India when the L. I. C. threatened to remove the efficient management of the Escorts Ltd. in order to help a non-resident investor on the strength of its majority shareholdings. Therefore, in the times to come, there is more need that scattered small investors must unite together so that at least they can protect their interests and rights given to them by the Act of 1956 and prevent major changes in the constitution of the company or the composition of the management by accumulating their votes. An independent shareholder's association can provide a suitable and effective remedy to the pitiable conditions of such shareholders.

The Shareholder's Associations can be registered as non-profit companies or associations under section 25 of the Act of 1956. They can also be registered under the Indian Societies Registration Act of 1960. However, shareholders' association in India may be any of these forms : industrial, regional, shareholders of companies belonging to common management, shareholders of big companies, or any association of particular class of shareholders. These associations may prove to be the beacon light over the corporate horizon for the independent average shareholders with a comparatively small shareholding to unite together in order to safeguard their legitimate rights and privileges guaranteed by the so-called social legislation—the Companies Act, 1956. But this can only be achieved if the organisers of such associations bear in mind that the shareholder's associations are not to be used as forums for carrying agitational and sensational activities directed against the company managements or the government on a small or a wide scale. They should also not act only for the purpose of sponsoring actions of certain shareholders or influential members. Such activities might affect the morals and working efficiency of the genuine company promoters, directors and management and hamper the growth of corporate activities in the country. The associations might also have a bad effect, because sometimes shareholder's associations may intimidate private companies as some non-well-conducted trade Unions have shown a tendency to

intimidate the employers. From this point of view, the recommendations made by the Sachar Committee with regard to the recognition of such associations may be accepted. Further, the other recommendation regarding the right to apply to court under sections 397/398 in cases of oppression and mismanagement on behalf of minority shareholders is worth accepting.

Some recent developments also deserve our consideration which have taken place in the United Kingdom with regard to the protection of investors (which obviously also include shareholders when further shares are issued to them) during the last decade. In England, Prof. Gower recommended to repeal the Prevention of Fraud (Investments Act 1958 and replace the same by a new Investor Protection Act (IPA). Professor Gower also suggested certain change in the present statutory provisions relating to company law and recommeded to include these changes in the IPA. These changes were relating to public issues, take-over and inside trading, compulsory acquisition, compensatory payment to directors on termination of their employment. One of the recommendations was that private and professional investors should receive equal treatment and same protection. The objectives of the Investor Protection Act was to provide a system whereby basic policy, overall surveillance and residual regulation of investment business, but not deposit taking regulated under the Banking Act, would be undertaken by a governmental agency but day-to-day regulation so far as possible by self-regulatory agencies, initially based on existing professional bodies and organisations, recognised by the governmental agency". In order to protect consumers from the wiles of the businessmen and business firms, recently Consumer Protection Act, 1986 has been enacted in India but no concrete steps have been taken so far to protect the investors (shareholders and depositors) as a class. Whatever protections are available to them, they are guaranteed under the various provisions of the Companies Act, 1956 with regard to 'prospectus' but they have not proved to be every effective. The Sachar Committee had also not deliberated on this aspect although it had suggested reforms with regard to public deposits in the companies. The amendments made in 1974 introduced stringent provisions relating to public deposits. There are several statutes and Rule made thereunder which deal with the issue of securities (which include shares) and interests of shareholders directly or indirectly, for instance, Capital Issues Control Acts 1974 various orders and rules made thereunder; The Capital Issues (Exemption) Orders, 1969; The Capital Issues (Application for Consent) Rules, 1966, Guidelines for issue of Bonus Share Capital, 1976; The Companies (Acceptance of Deposits) Rules, 1975; Non-banking Financial

Companies (Reserve Bank) Directions, 1977; The Miscellaneous Non-banking Companies (Reserve Bank) Directions, 1977; Non-banking Financial Companies and Miscellaneous Non-banking Companies (Advertisement) Rules, 1977; The Trustees (Declaration of Holdings of Shares and Debentures) Rules, 1964; The Companies (Declaration of Beneficial Interest in Shares) Rules, 1975; Foreign Exchange Regulations Aet, 1973; Public Companies (Terms of Issue of Debentures and Raising of Loans option to convert and debentures of Loans into Shares) Rules, 1977; The Companies (Appeals to Central Government) Rules, 1957; Companies (Issue of Certificates) Rules, 1960; Companies (Transfer of Profits to Reserve) Rules, 1975; Companies (Declaration of Dividend out of Reserve) Rules, 1975. Over and above these Acts and Rules, there are two more major legislations : Securities Contracts (Regulation) Act, 1956 and Rules and Monopolies and Restrictive Trade Practices Act, 1969. Securities Contracts, (Regulation) Act. 1956 deals with recognition of Stock Exchange and enlistment of Securities. In addition to the above mentioned jungle of legislations, there are innumerable notifications and guidelines issued almost every week by the Government of India, Stock Exchanges, Company Law Board and other governmental and non-governmental agencies' and it is impossible for an illiterate, innocent and relatively poor investor to "swallow" and "digest" all these "medicines" prescribed and manufactured by the government for his cure. Therefore, it is appropriate time that a fresh review be undertaken on the lines of the United Kingdom with a view to consolidate all the provisions providing protections to investors and a separate Investor Protection Act is enacted. Once, this Act is enacted, the proposed Shareholders Associations can be registered, recognised and regulated under the same.

In this connection, a reference needs to be made to the dissenting opinion expressed by an honourable member Mr. K.K. Ray of Sachar Committee relating to the representation of minority on the Board. Although the Sachar Committee did not favour for a compulsory adoption of the system of proportional representation by comulative voting, Mr. Ray expressed a contrary view which requires serious consideration. He was of the view that 'the feasibility of introducing certain non-legislative measures to ensure some representation or at least a say of the minority on the Board' must be considered. He advocated for looking into the reasons as to why the already existing provisions of section 265 have not been effective in bringing about minority representation on the Board. According to Mr. Ray, 'there was a basic contradiction of purpose

in section 265 which permits minority representation only when the majority so wishes. It was precisely this reason that reported cases of adoption of proportional representation by companies in accordance with section 265 of the Act were extremely rare'. To quote the words of Mr. Ray : "Virtually, therefore, this section has remained a dead letter on the statute book". He recommended that the minimum "should be to provide for compulsory adoption of cumulative voting by postal ballot for election of directors in the case of all public limited companies having not less than two thousand shareholders and listed on the Stock Exchange". We are in entire agreement with the views expressed by Mr. Ray : rather we would like to go few steps further. Alongwith the notice sent for the Annual General Meeting intimating shareholders to attend or appoint a proxy, the names of proposed directors alongwith the ballot paper should be sent with clear instructions that if any shareholder does not intend to attend in person or by proxy, he is entitled to cast his vote by postal ballot. This would ensure the participation of at least those shareholders who do not have sufficient resources to attend the meetings or who consider such participation uneconomical and unproductive.

Before we conclude, special attention may also be drawn towards the recommendations made by the Estimates Committee in 1964 with a view to enabling the shareholders to take intelligent interest in the affairs of the companies engaged in production. The Committee made the following recommendations :[28]

> Government may consider the feasibility of persuading such companies to furnish to the stock Exchange and *to shareholders*, if possible, quarterly statements containing *interalia* the following information :"
>
> (a) General survey of business development;
>
> (b) Comparative figures relating to production and sales; and
>
> (c) Current and future prospects.
>
> Deliberating on this point, the Estimates Committee opined that :
>
> "At present, companies in this country generally publish their working results once in a year. Such a big lapse of time interval between two reports naturally help rumour-mongers to manipulate the stock market. When such rumours overwhelm the market, if the companies were prompt enough to contradict the rumours, then the position would have been otherwise. But as such practice.. is rare in this country it is suggested that the companies should issue at least quarterly statements relating to working, earnings and important developments in their affairs. Such a quarterly report need not be a full-fledged balance sheet or profit and loss account, but a simple informative statement of interest to the shareholders. Though the issue of more elaborate statement is in vogue in the U. S., yet we believe that in this country the companies should make a modest beginning.

28. *53rd Report* (3rd Lok Sabha) on the Ministry of Finance, Department of Revenue and Company Law (Company Law Division).

We are in entire agreement with the views expressed by the Estimates Committee and feel that a closer relationship between the shareholders and companies which they own can defienitely be cultivated and personal interest in the working of the companies can be created among shareholders if information regarding production, output, sales, labour relations, expansion programme, foreign participation, financial institutions, involvement and the like are released to the shareholder and the general public from time to time. This type of information would provide a sound basis for making investment decisions and for evaluating investment results culminating into better protection to, and effective participation by householders. The stand taken by the Department of Company Law administration with regard to the supply of information to householders is praise-worthy. The Department has issued a clarification that "while it is not the intention of the Department that advantage should be taken by unscrupulous persons to harass company management or making irrelevant enquiries in an unreasonable manner, it is quite clear from the provisions of section 237 (b) (ii) that the members of the companies should be given all the information with respect to the affairs of their company which they might reasonable expect, including information relating to the calculation of the "commission payable to managing or other directors, etc"[29] The administrative directions issued with regard to the shareholders' queries on published accounts and their replies by Chairman in Annual General Meeting need serious consideration. The directions were that "the Chairman should disclose the name of each of such shareholders with the question or subject matter he raised in his letter in brief irrespective of its relevancy and should deal with separately in his speech." The justification for such directions are thus :[30]

29. Extract from *Fourth Annual Report on Working and Administration of Companies Act*, 1956—year ended March 31, 1960

30. Extract from Circular No 129-AC, dated 7-7 1972 issued by ACCI—Quoted in *Taxman's Circulars and Clarifications in Company Law*, 1987 pp 503-504. (Emphics add)

In dealing with this aspect by the Chairman it is to be borne in mind that majority of shareholders do not possess the legal and/or technical qualifications which is required in putting forward questions to the board regarding company affairs and in consequence thereof their questions may be lacking particulars, irrelevant and/or immaterial still they want that their letters are, properly respected, dealt with and replied to by the Chairman and in any event the Chairman should not be allowed to avoid the answer. *If this is not done, it is feared, the shareholders will loss interest to raise any issue in writing to the board regarding company affairs and they may also feel shy to invest their resources for the industrial development and promotion of industries in private sector which is very urgently required for rapid development of the Indian economy. Last but not the least, it will be impossible to maintain the confidence of shareholders in corporate management which the Legislature sought to achieve.*

We have no other option left except to support the above view—point and wish that this directive is put into practice in its true spirit.

The Companies Act, 1956, gives far greatrer powers and rights to shareholders-individually and collectively—than they ever possessed. It has also strengthened the position of shareholders. It has provided for a major internal control and put powerful weapons in the armoury of shareholders to exercise effective control over management and regulate the company's affairs. The recently enacted Companies (Amendment) Act, 1988, tries to minimise direct governmental interferce and povides for an independent quasi-judicial body the Company Law Board-as a forum for shareholders to ventilate their grievances against the company, its executive organ-the Board of directors and its legislative organ-the shareholders acting in general meeting. The Indian judiciary has also responded to the challenges of the time as and when such occasion has arisen. On the one hand, the courts seem to be conscious of the fact that the 'old nineteenth century view which regarded a company mechanism as a legal device adopted by shareholders for carrying on trade or business as proprietors has been discarded and a company is now looked upon as a socio-economic institution wielding economic power and influencing the life of the people' and, therefore, has held that when new situations arise, as indeed they are bound to arise having regard to the complexities of growth and change, the Company Judge cannot retreat into the corporate shell but must expand and expound.. He must recognise and expose the reality of the workers, interest and the dubiety of the interest of the others. He must acknowledge the transformation which corporations are presently undergoing from

capitalist contrivances into socialist instruments''.[31] The Courts have "to adjust and adopt, limit or extend, the principles derived from English decisions,.. suiting the conditions of our society and country in general always, however, with *one primary consideration in view that the general interests of the shareholders may not be readily sacrificed at the alter of squabbles of directos of powerful groups for power to manage the company*".[32] On the other hand, the Supreme Court is also conscious of the fact that "Courts of justice are well-tuned to distress signals against arbitrary action. So, corporate giants do not hesitate to rush to us with cries for justice. The court room becomes their battle ground and corporate battles are fought under the attractive banners of justice, fair play and the public interest".[33] Under this situation the Supreme Court has expressed that we do not deny the right of corporate giants to seek our aid as well as any Lilliputian farm labourer or pavement dweller *though we certainly would prefer to devote more of our time and attention to the latter. We recognise that out of the dust of battles of giants occasionally emerge some new principles, worth the while that is how the law has been progressing until recently. But not so now. Public interest litigation and public assisted litigation are today taking over many unexplored fields and the dumb are finding their voice*".[34] The above mentioned change in the approach of the highest court of India has given a ray of new hope that even if the shareholders are in minority or are economically less powerful, their voices would be heard and properly attended to and they can avail the benefit of new PAL/SAL jusrisprudence[35] through the shareholders' or investors' or other like associations to ventilate their grievances against the wills of controlling majority and/or the management.

With all these improvements-legislative and judicial, it may be said that this is the "golden age" of shareholders. This statement would, however, be perfect only when reforms proposed in this paper are taken into consideration and proper steps are taken to ensure that the tradi-

31. Per Bhagwati J., in *National Textiles Workers' Union v. Ram Krishnan*, (1983) 53 Comp. Cas. 184 at 196.
32. *Hind Overseas Private Limited* v. *Raghunath Prasad Jhunjhunwala and* others. (1976) 46 Comp. Cas. 91 at 104 (*Underlining* added.)
33. Per Chinappareddy, J. in *L. I. C. of India* v. *Escorts Ltd.* (1986) 59 Comp. Cas 548 at 559.
34. *Id*, at 560 (*underlining* supplied)
35. PAL denotes Public Assisted Litigation-expression used by Mr. Justice Chinnappareddy and SAL denotes Social Action Litigation-expression Used by Mr. Bhagwati, C. J. of Supreme Court.

tionally apathetic shareholders become inclined and interested to exert themselves to exercise the various powers and rights which the law affords to them. Only then, the Indian Act, i. e., Companies Act, 1956, would be able to provide an healthier environments for shareholders in general and small shareholders in particular in India and would also be able to serve as a model Act for other countries. The Indian Act has departed from the English Act to a considerable extent and has provided a legal framework of its kind for a special and different type of society which is prevalent in many Commonwealth and developing countries. Although the Indian Act if of very recent origin, it can be compared with company statutes of any advanced and industrialised country including the U. K. and the U. S. It would not be an exaggeration to say that in many cases it can supersede them beeause although it had been drafted primarily to suit the changing needs and requirements as well as socio-politico-economics conditions of the Indian society, it has also taken into account the experience of industrialised societies like those of England and the U. S. The English law had played a great role in company law in India, and the success of the Indian Act can be attributed to a great extent to the English Act which provided the skeleton for the Indian Act. However, the Act of 1956 cannot now be said a reproduction of the English Act, as it had been in the past, prior to independence. It can now stand on its own. Many of the Indian provisions have been adopted in Commonwealth countries, one of those in Ghana. The possibilities that the Indian Act will be followed on other countries cannot be entirely overruled; on the other hand they are enhanced.

DIRECTIVE PRINCIPLES OF STATE POLICY AND SOCIAL CHANGE WITH REFERENCE TO UNIFORM CIVIL CODE

P. ISHWARA BHAT*

Family Law, Religion and Social Justice

The family law, by controlling the institutions of marriage and property, determines the very course of human life. Marriage is a substantial tie in the life process of human being.[1] Family property is the source of sustenance and the basis of freedom of actions for the family members. Child care and maintenance are the important parental obligations. Justice in these matters is necessary for a happy home and this task is onerous when factors of love and morality do not generate fair familial relations.[2] It is for this reason that scholars have rightly observed that the test for a just social order lies in a just and fair family law.

The secular power of the modern welfare state, among other things, aims at establishing social relations within and outside the family on the non-exploitative plane of social justice and equality. The ethical considerations of familial responsibilities and the overtones of equality, liberty and justice in family life arising out of the guaranteed human rights have common ground and aim at promoting social happiness. However, application of state power becomes a must when the norms governing interpersonal relations within the family do not accord to guarante human rights. The 'living law' of the people namely, customary personal law, ought not to live in contradiction to the avowed policies and values enshrined in the Constitution or against the well-intentioned reformist legislations.[3] It has to make way for attaining social justice within the family.

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1. T. M. Knox, *Hegel's Philosophy of Right* p. 111 (1958)
2. For a detailed analysis *see* Steven Vago, *Law and Society* p. 265-267 (1981).
3. Eugene Ehrlich advocated the idea of 'living law of the people' which outpace the state made law. He held the view that the centre of gravity of legal development lies not in legislation nor in juristic science nor in judicial decisions but in society itself. However his concept of 'living law' was one which experienced

In its essence, social justice means the quality of being fair and just in social relations of human beings.[4] This noble quality is attained within the family by eschewing exploitation of the vulnerable members like women and children by the dominant members and by forbidding the operation of irrational notions and religious beliefs of blind nature, The concept of social justice aims to attain a social arrangement wherein the good things of the society, amenities and responsibilities are justly distributed among the members of the society.[5]

At the dawn of Indian independence, the isolated pockets of different personal laws prevalent in India were not only factors of communal disharmony and disunity but were veritable instruments of injustice and exploitation. As Pandit Jawaharlal Nehru observed, "our laws, our customs fall heavily on the women folk...and men happen to enjoy the dominant position".[6]

Permission for polygamy and child marriage, prohibition on inter-caste marriage and widow remarriage, absence of divorce and other matrimonial remedies, denial of woman's right to share in the family property[7] or in the property of the deceased persons and male dominance in matters like custody, guardianship and adoption of children caused unjust conditions in the Hindu Social order. According to Nehru, the British policy of non-interference with personal law and mechanical interpretation or perpetuation of Hindu customs stopped the natural growth of Hindu law and gave rise to petrified rules.[8] The

permanent evolution, rather than embodiment of static rules. If customary personal law does not generate and consolidate the forces of change and consequently becomes static and outmoded, the constitutional law and legislative reforms can reform them and make them live upto the expectations of evolving times. For a critical treatment of Ehrlich's idea *see* W. Friedmann, *Legal Theory*, p. 248-252 (Fifth ed. 1967).

4, K. Subba Rao, *Social Justice and Law* p. 1

5. R. W. M. Dias, *Jurisprudence* pp. 81-82;
Also *see* John Rawls, *A Theory of Justice* pp, 3-4 (1972)

6. *Nehru's Speeches* Vol. III p. 444 speech in Lok Sabha 16.9.1955 in the context of supporting the concept of divorce.

7. For a detailed analysis *see supra note* 2.

8. Speech of Nehru as reported in *The Hindu* 10.12.1951 and in Lok Sabha 16.9.1954 See Donald Eugene Smith, *Nehru and Democracy* p. 164 (1958); The British policy of non-interference is pointed out by several authors. See. M. P Jain, *Outlines of Indian Legal* History 472-74 (4th ed 1981) Also see J. M. Shelat, *Secularism-Principles and Application* p. 72 (1972).

Muslim personal law had incorporated still more rigid and unfair usages like polygamy, unilateral divorce, non-maintenance of divorced wife and gender discrimination in matters of succession. As Pandit Nehru wrote with thoughtful perception, "Thus Hinduism and Islam, quite apart from their religious teachings, lay down social codes and rules about marriage, inheritance, civil and criminal law, political organisation and indeed almost everything else. In other words, they lay down a complete structure for society and try to perpetuate this by giving it religious sanction and authority".[9] According to Nehru, the extreme religious reverence which some people gave to their personal laws was completely misplaced.[10] The attempt to extend the sphere of religion to all of the minute and changing situations of society would probably result in the weakening of the basic fibre of that religion. Giving religious sanctions to rigid social usages which increasingly come into conflict with changing modern conditions would ultimately discredit that particular religion.[11]

Eminent scholars of personal law and sociology regard the growth of different personal laws as mere by—products of specific cultural processes rather than as the inevitable results of religious principles and practices. On the contrary in the background of broad concept of *Dharma*[12] (justice) or the egalitarian charter in the *Shastrik* writings[13] and the *Quaranic* emphasis on human dignity and equality[14] it is not possible for any one to justify some of the unjust, discriminatery and exploitative usages of personal laws as in accordance with the true ethos of the religions. Derret, observes, "whether the sanction behind the law be the demands of religion or merely those of age and unbroken acceptance, a careful distinction is to be maintained between the law's authority and its content. No harm is done if the boundary between the two is allowed to become obscure provided that when the rules apparently authorised by the ultimate sanction cease to serve the purpose for which they were intended, there should be no obstacle to their relegation to the legal historians museum, unsurvived by their formal *rationes*.

9. Jawaharlal Nehru, *Glimpses of World History*, p. 736

10 Nehru's Speech as reported in *Times of India* 16.9. 1954.

11. Also see Donald Eugen Smith *supra* n. 18.

12. See M. Rama Jois, *Legal and Constitutional History of India*, pp. 3—10 (Vol. I, 1984),

13. *Ibid* pp. 582—584.

14. See Neil B. E. Bailliee, *Digest of Mohummudan Law* pp 62—65 (1957).

"Such is the outcome of the investigations whether the claim that Hindu law is based on Hindu rules. Rules that have religious foundation are, as we shall see in more detail, often neglected and without public cry. Rules which have no foundation are upheld on the formal ground that they are sanctioned, by religion. The liasion between religion and law is not close".[15] Derret has arrived at similar conclusions about Muslim personal law also.[16]

Even if religions have some influence on the broad outlook upon the social institutions like marriage and family or about intrafamilial relations, the constitution makers of free India had the indomitable conviction that "Religion must be restricted to spheres which legitimately appertain to religion and the rest of life must be regulated, unified and modified in such manner that we may evolve as clearly as possible, a strong and consolidated nation"[17]. Progress and clinging to the past, according to them, would not go together[18]. Nehru viewed, "India must break with much of her past and not allow it to dominate the present. Our lives are encumbered with the deadwood of this past, all that is dead and has served its purpose has to go. . We have to get out of traditional ways of thought and living which, for all the good they have done in a past age, and there was much good in them, have ceased to have significance today[19]. The only significant doctrines and values of the modern age are republicanism, secularism and social justice which move the generations and stir them to actions for social happiness. "The whole concept of the secular state is based on the elementary truth that the individual is the centre of social organisa-

15. Duncan J. M. Derret, *Religion, Law and the State in India* p. 117 (1968); Prof. S. S. Nigam considers that the wide range of personal law is essentially of civil nature and matters which are inseparable from religious beliefs and usages are comparatively few. See S. S. Nigam, 'Uniform Civil Code and Secularism in G. S. Sharma (ed), *Secularism : Its implications for law and life in India*, p. 153 (1966).
Also see for similar view, D. K Srivastava, 'Personal Laws and Religious Freedom' p. 584, 18, *J. I. L. I.* 4

16. *Ibid*, Derret p. 121 It is only in the inceptional stage of Islamic law that what James Bryce viewed becomes a correct explanation. Bryce had viewed, 'In Islam Law is Religion and Religion is Law, because both have the same source and equal authority, being both contained in the same divine revelation" See, James Bryce, *Studies in History and Jurisprudence* Vol. II, p. 237 (1901).

17. K. M. Munshi in *Constituent Assembly Debates* Vol. VII p. 548.

18. Alladi Krishnaswamy Ayyar *ibid* p. 549.

19. Jawaharlal Nehru, *The Discovery of India* p. 509 (1962)

tion and not groups-religions or otherwise and that equal rights should be secured to the citizens through democratic devices"[20]. Values promoting social justice are always to be preferred over the irrational traditional principle. Social change is necessary for this purpose.

Directive principles, social change and uniform civil code

"Social change means", observes Steven Vago, "modifications of the way people work, rear a family, educate their children, govern themselves, and seek ultimate meaning in life. It also refers to a restructuring of the basic ways in which people in a society relate to each other with regards to government, economics, education, religion, family life, recreation, language, and other activities"[21]. The question whether law can and should lead, or whether it should never do more than cautiously follow changes in society, has been and remains controversial. Despite the debate, modern welfare states, make use of laws as "instruments that set off, monitor, or otherwise regulate the fact or pace of social change"[22], Law can shape social institutions directly or indirectly. It can noselead the society, in its own way, to the land of social justice provided that factors resisting social change do not counter-balance the effort of the law[23]. Further, to be a successful instrument of social change, law should be free from technical defects and loopholes and should be effective[24].

Thus, when the ability of law in bringing about social change is so much dependent upon its ability to neutralise the factors-cultural, social, psychological and economic-which resist social change, the role of constitutional morality[25] in the social transformation cannot be so

20. K. T. Ramaswamy. *The Hindu* 14.7.1951 cited by Donaid Eugene Smith, *supra* n. 11, p. 151.

21. Steven Vago, *Law and Society* pp. 238-239 (1981); Also see B. S. Sinha, *Law and Society Social Change* p. 16-23 (1983).

22. Lawrence M. Friedman, Legal Culture and Social Development. *Law and Society Review* 4 (1) p. 29 cited by Steven Vago, *supra* n. 24, p. 241.

23. For a detailed discussion of factors resisting social change See Steven Vago, *supra* n. 24 pp. 262-70.

24. The importance of technical perfection of the legal instrument and efficient handling of it by administrators of law and justice is pointed out by W. Friedmann *Legal Theory* 177 (5th Ed. 1967).

25. Because of the characteristics of non-enforceability, the Directive Principles of State Policy are regarded as principles of constitutional morality. See H. M. Seervai, *Canstitutional Law of India* p. 1612 Vol. II (1984).

vital. To the thickets of sentiments and emotions it can penetrate only minimally especially because it lacks the teeth of coercive enforcement. It is with this awareness that we have to assess the relation between Directive Principles and Social Change.

True to the aspiration of being a social document Indian constitution has incorporated a set of directive principles addressing the state authority to undertake and implement the plans of social and economic progress of the people and the nation. The sincere effort to translate the tryst with destiny[26] into actuality can be found in the wide coverage of Part IV of the Constitution which includes the directives for economic democracy, labour welfare, fair working conditions and wages, right to work, protection against moral and material abandonment, amelioration of weaker sections, compulsory education, uniform civil code, promotion of public health and levels of nutrition, panchayat raj, upbreeding of livestock, respect for international treaties, law and peace. Thus the direction and content of social revolution and the contours of planned social change through state power are outlined in the Directive Principles of State policy. It is to be remembered that these are not dustbins of sentiments, or hobby horses of high ideologies, or lip sympathy embellishments.[27] On the other hand, they are down to earth instructions to the power holders about the inevitable goals of welfare state and also the means of achieving them. All the forms of state power are to be geared up to this task and the legal system is to operate as a purposeful enterprise towards these ends.

The high importance given to the Directive Principles of State Policy can be understood in the language of Art. 37 which declares that Directive Principles of State Policy shall be fundamental in the governance of the State and it shall be the duty of the State to make legistations for giving effect to Directive Principles. The non-enforceable character of the Directives is counter-balanced by the high appeal of constitutional morality made to the State. They are substantive sources of inspiration for various organs of government to bring about social

26. On August 15, 1947 Nehru said, "Long years ago we made a Tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially... The achievement we celebrate today is but a step, an opening of opportunity to the greater triumphs and achievements that await us". J. Nehru, "*Independence and After*" p 3-6.

27. See the criticisms by some of the members of constituent Assembly as summarised in K. C. Markandan, *Directive Pirective Principles in the Indiau Constitution*, pp. 123-1125 (1966).

reforms. The phrases "fundamental in the governance of the state" and "it shall be the duty of the State" in Art. 37 point out the normative character of the Directive principles. This constitutional intention should not go waste for the sole reason that courts of law cannot be resorted to for the enforcement of Directive Principles.[28] Because of the normative character of Art. 37, atleast it should be regarded that State action opposed to any of the Directive Principle is unconstitutional.[29] When the supreme law of the land positively shows particular direction towards which state shall move, moving in opposite direction or withdrawal of any step taken towards the constitutionally intended direction is opposed to the constitution.[30] By holding them void, the judiciary is not 'enforcing' it for the purpose of Art. 37 but merely removing the impediments in the path of implementing the Directive Principles. Thus, the choice for the state is between implementation of the Directives partly or fully, perfectly or imperfectly and non-action. There cannot be a third alternative of going against the Directives. In the backdrop of development like passing of Muslim Women (Divorce and Maintenance) Protection Act, 1986 such an approach salvages the importance of the Directive Principles.[31]

The constitution makers had no utopian idea that only by the constitution and law social change could be attained. They had the realistic approach of appreciating popular participation in the process of social transformation. For example, Dr. B. R. Ambedkar viewed that Part IV of the constitution would be a measuring rod to assess the success or failure of governments in fulfilling aspirations of people and that election result would be the political sanction against non implementation of the Directives.[32] It is doubtful, except in one or two general elections, whether voting behaviour of people in India really made use of this measuring rod.

Pandit Jawaharlal Nehru viewed, "when you talk about legislative changes in a democracy, you necessarily take into consideration the fact

28. Upendra Baxi, "Directive Principles and Sociology of Indian law : A reply to Jagat Narain". 11 *J. I. L. I.* p. 258,

29. See T. Dexidas, "Directive Principles; Sentiment of Sense ?" 17, J. I. L. I. (1975) 478 at 481.

30. *Ibid.*

31 *See. Infra*

32. Dr. B. R. Ambedkar, in *C. A, D.* Vol, VII p. 476, 494.

that the people have been brought up to the required level... a very large section of the people must also accept it or at any rate, actively or passively, be ready to accept it."[33] Therefore, it is essential to create a background, a mental climate in favour of the proposed law with the help of the means of propaganda and persuasion. Nehru advocated that along with legislative influence, there must be another influence also, 'the influence of the direct approach to the people, making them accept changes[34]. Law cannot achieve every change that is desirable. According to Nehru, "through legislation on the one hand, and through education of society on the other, we can bring about changes."[35] However, when the society showed deep syndromes of social evil, 'surgical operation' through law was necessary. According to Pandit Nehru, Hindu Code Bill and agrarian reforms were such surgical operations.'

From the social change perspective, Directive Principles of State Policy can be categorised into two classes. First, the Directives which do not require mental climate created through an active propoganda and persuasion in favour of the reform. The directive principles relating to labour welfare, social security measures, economic stability and equality through equitable distribution of material resources of production, equal pay for equal work, legal aid, amelioration of weaker sections and respect for international treaties and peace can be regarded as belong to this category. In the post-constitution period it has been experienced that without influencing and generating the public opinion a number of laws have been made and enforced in these spheres. Here law itself created public opinion in support of it. People receive such laws mainly because of the economic advantages and security created by them. Even though such legislations may go against the vested interests of few the popular acceptance of the same leads them to success. Further they do not shake the traditional or sentimental beliefs, psychic egos or religious feelings.

The second category of Directives need a favourable atmosphere welcoming their implementation. They require popular participation in the process of change. The Directives persuading for uniform civil code, compulsory education, panchayat raj, prohibition of cow slaughter and prohibition of alcoholism can be considered as belonging to this

33. Tibar Mende, *Conversations with Nehru* p. 93.

34. *Ibid.* p. 96.

35. Jawaharlal Nehru, *Socialism by Consent* p. 12,

category. Social morality, religious feelings, sentiments, ignorance and traditions inhibit any change in these spheres. Imposition of change through law without regard to the feelings of people would be simply counter-productive or futile in these matters[36]. As personal behaviour, beliefs and group psychology are interfered by such laws, legislator should first win the confidence of the legislative audience. However, religious fundamentalism and obscurantism should be sternly tackled by the State. The tendency of unduly wooing the favour of religious communities would defeat the welfarist goals and fan the fanatic waves of communalism. In the post-constitution period in this second category of Directives, social changes through law are meagre.

Article 44 of the constitution declares, "the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". The expression 'civil code' connotes a code law regulating civil matters including marriage, divorce, inheritance and such other matters governed by personal law. Such a code shall be uniformly applicable to all citizens irrespective of religion, race, caste and sex. Art. 44 does not hint at the features of future civil code. It also does not say whether uniformity of civil law is to be attained at a stretch or by piecemeal reforms. From the views of constitution makers at the making of the constitution, it can be gathered that uniform civil code is aimed to solve the problem of diversity of personal usages in different parts of India and the problem of gender discrimination based on religion[37]. In brief, its emphasis is on uniformity with justice.

Soon after the commencement of the Constitution the Government piloted the Hindu Code Bill to bring about large scale changes in major area of Hindu law. Despite the stern opposition from the orthodox, the law was enacted ultimately. Under Hindu Marriage

36. The failure of prohibition law, compulsory education programmes and panchayat raj can be traced to this reason.

37. See *Constitutent Assembly Debates* vol. VII pp. 547-550 Different systems of Hindu law in different parts of India also had posed the problem of diversity. As Derret points out, demand for unity, certainty, equality of sexes and elimination of restrictive and antique rules seemed to be the principal reasons for codification. Derret, supra n. 18 p. 29. As Justice Tulzapurkar has put it, "In the context of fighting the poison of communalism the relevance of uniform civil code cannot be disputed, in fact it will provide a juristic solution to the communal problem by striking at its root cause. Nay, it will foster secular forces, so essential in achieving social justice and common nationality. Tulzapurkar, J. 'Uniform Civil Code' A. I. R. 1987 *Journal* p. 17.

Act., 1955 new concepts like monogamy, divorce, valid requirements of marriage, intercaste marriage, matrimonial remedies and alimony were introduced. Under Hindu Succession Act, 1956 the concepts like widow's absolute right to property of her husband, equal shares among legal representatives without gender discrimination, limitation on rule of survivorship and principles governing devolution of female's property and escheat were established. Under Hindu Minorities and Guardianship Act, principles relating to equal rights of mother and father in the custody and guardianship of minor children, protection of interests of minors against the powers of guardians were recognised. Under Hindu Adoption and Maintenance Act, certain benevolent principles relating to obligation to maintain any spouse, children and parents who are unable to maintain themselves are recognised. Equal rights of women to adopt children are also recognised. Intercaste adoption was newly introduced under the Act. Through recent amendments in Hindu Marriage Act new grounds for divorce were introduced and the concept of divorce on mutual consent has been established. It is a notable achievment for a nascent democracy that a major segment of its population is emancipated from orthodox, irrational and discriminatory relations and in their place is governed by the principles of justice, equality and liberty[38] The task of the law giver was not one of much difficulty as the majority of the Hindu community was ready to receive the reforms.

Regarding reform of Muslim personal law in a large scale manner, there was distrust and protest by the representatives of the Muslim community in the Constituent Assembly[39]. They had a sense of undue reverence to Quaranic prescriptions which were considered as the basis of their personal law. With the obsession of effacement of their cultural identity by the majoritarian interference, suspicions loomed large about the noble intention of uniform civil code and its 'imposition' upon them[40]. Nehru felt that Muslims were not sufficiently educated to

38. The socially progressive aspects of Hindu code bill convinced Nehru to regard it as a symbol of progress inspite of the reactionary views in the social domain. According to him the spirit of liberation underlying the code made the Hindu people especially women folk free from out grown customs and shackles which had bound them. See Donald Eugene Smith, *supra* n. 11. p. 163.

39. This is clear from the views of Mr. Naziruddin Ahmed, Mehboob Ali Baig, Mohammad Ismail Saheb and Hussain Imam see *C. A. D.* Vol. VII p. 540-550.

40. Refer the speech of Naziruddin Ahmed in *C. A. D.* vol. VII p. 540.

accept and approve modern values. He observed, "Now, we do not dare to touch the Muslims because they are in minority and we do not wish Hindu majority to do it. These are personal laws and so they will remain for the Muslims unless they want to change them"[41]. He completely ruled out imposition in this matter. It is submitted. the tendency of overcare towards the minorities conspired with the fundamentalist obsession and as a consequnce, the notion of social justice became the scapegoat in this sphere unawaringly. Instead of overplaying the sympathy factor, there should have been an organised state propaganda for social justice in the area of family law[42].

The argument for retaining *status quo* in Muslim personal law with the reason that Muslim law is too sacrosant to be touched by legislature is not well-founded[43]. Enactments like Shariat Act, 1973, Dissolution of Muslim Marriages Act, 1939 and Muslim Women (Protection of Rights) on Divorce Act, 1986, show that legislations also have an important say in matters of Muslim law. In fact, the Dissolution of Muslim Marriages Act, 1939 brought about considerable changes relating to right to divorce by wife.

Except the Act of 1939 no other legislation provided for reform in Muslim personal law. The archaic customary practices, usages and religious prescriptions still govern the Muslim community.[44] Because of the hesitation of judges and jurists to adopt reformative approaches, the law became stagnant. Even the perversions of religious teachings were not rectified.[45] For example, regarding polygamy, Quran stated that one can marry more than one wife (upto four) only if he is able to treat all equitably.[46] Since such a treatment is impracticable, there is virtual discardment of polygamy. About the duty to maintain divorced wife also Quranic approach is liberal.[47] Rigid usages developed because of deliberate manipulation.

41. Tibor Mende, *Supra* n. 51.

42. Without moving the altruistic lever through emphasising on factors of duty and coercion, the much expected social action can never be attained, as per the view of Rudolph van Ihering. See W. Friedmann, *supra* n. 6 p. 323.

43. See Mohammad Ghouse, *Secularism, Society and Law in India*. p. 232 (1978) Also See Tulzapurkar J, 'Uniform Civil Code' A. I. R. 1987 *Jour.* 17.

44. See Tulzapurkar, *supra*, n. 47.

45. See V. R. Krishna Iyer, *Social Mission of Law* p. 187 (1976).

46. *Quran, sura* 4 : 3

47. *Quran, sura* 2, 226 and V. 2285 and v. 237.

In pursuance of the policy of rendering social justice and economic security to the dependents, Criminal Procedure Code (the earlier Act and the present one) provided for obligation of all persons to maintain his or her spouse, minor children, unmarried daughters and parents who are unable to maintain themselves. The duty of maintenance avoids the problem of moral and material abandonment in the family life. It is purely a secular measure. In *Bai Tahira*[48] and *Shah Bano*[49] cases the Supreme Court applied Sec. 125 of Cr. Pc. providing for the duty of maintenance and the arguments that Sec. 125 violated the Muslim personal law and religious freedom of the community were rejected. According to the Court, payment of Mehr and maintenance during iddat period did not absolve the husband from the duty to maintain. About the argument on the basis of religious freedom, the court viewed that for the purpose of secular and welfarist provision like Sec. 125 of Cr. Pc. application of religious principle was irrelevant. Even if the religion provided for otherwise, under Art. 25 of the Constitution the state has power to make legislations for social reforms in the semi-religious matters. However, the court viewed, after elaborate reference to the Muslim religious writings, that Muslim husband was under an obligation to pay maintenance to his divorced wife beyond the iddat period. The court laid emphasis upon the objective of uniform civil code under Art. 44.

Fundamentalists raised hue and cry against the *Shah Bano* decision. Parliament adopted the policy of appeasing the minority and enacted Muslim Women (Protection of Rights) on Divorce Act, 1986 amidst protest by the opposition. The Act absolved the husband to pay the divorced wife beyond the iddat period.[50] The responsibility of paying the maintenance[51] was imposed on the wakf Board also. The Act had the retrograde policy of preferring an archaic principle and rejecting the humanitarian approach of assisting the divorced wife who is facing social misery and economic impoverishment.[52] It is submitted, the policy underlying the statute has betrayed the constitutional intention of enacting uniform civil code and atttainment of social

48. A. I. R. 1979 S. C. 362.
49. A. I. R. 1985 S. C. 955.
50. See 4 (1)
51. See 4 (2)
52. See Tulzapurkar, *supra*, n. 47 p. 18.

justice.[53] The whole incident shows that the temporary will of the parliamentary majority is sometimes able to subvert the secular and egalitarian values. Such a measure as we have observed earlier, is unconstitutional.

Since the legislature has proved time and again its unreliable character and callous or partisan approach in the matter of enacting uniform civil code, hope is to be pegged on the judicial venture in this direction. Recent judicial approach on Directive Principles is really conducive to this. At the beginning of the constitution it was judicially viewed that Directive Principles shall conform to and run subordinate to Fundamental Rights[54]. Subsequently, judiciary held that laws implementing the directives amount to reasonable restrictions[55]. Slowly an approach became established that Part III and Part IV of the Constitution stand on equal footing, mutually complementary to each other and have common objectives of achieving social justice[56]. Hence harmonious interpretation of Part III and Part IV is the only possible way of subserving the values underlying these parts. Recently, going a step further, the Indian Supreme Court has made use of the elasticity of Fundamental Rights to incorporate in its fold the values of Directive Principles of State policy. For example, the court made use of Art. 14 of the constitution to effectuate the Directive Principle of 'Equal pay for Equal work' in a series of cases[56]. The principle of avoiding moral and material abandonment of children was attained through application of Art. 21 and Art. 23 of the Constitution[58]. The Directive Principle relating to social security at old age was found to be more fruitful under Art. 14[59]. The Directive Principle for Worker's participation in management was given effect requiring compliance with the duty to hear workers under Art. 14

53. See generally V. Krishna Iyer, *Muslim Women Protection Act* (1987).
54. *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226.
55. *F. N. Balsara v. State of Bombay* AIR 195 SC 318.
M. H. Qureshi v. State of Bihar 1959 SCR 629.
56. *Keshavananda Bharati v. State of Kerala* AIR 1973 SC 1463.
Chandrabhavan v. State of Mysore AIR 1970 SC 2042.
Minerva Mills v. Union of India (1980) S. C. C. 625.
57. *Randhir Singh v. Union of India* AIR 1982 S. O. 879.
58. *Kakshmikant Pandey v. Union of India* 1987 1 SCJ.
P. U. D. R. v. Union of India AIR 1982 SC.
59. *D. S. Nakara v. Union of India* AIR 1983 SC 130.

before winding up the company or closing down the industry[60]. This process of activising the Directive Principles by injecting their spirit into the veins of Fundamental Rights is a high water mark of judicial activism and achievement. In attaining the goal of uniform civil code this approach can contribute very considerably.

Fundamental Rights as the strategy for attaining Uniform Civil Code

In a normative constitutional system which guarantees basic human rights to the subjects any of the actions of the state directly or indirectly permitting, assisting, or enforcing discriminatory or unjust practices made by the people even in their interpersonal relations is basically *contrl legem*. There is no reason why the blessings of civil liberty should not percolate to the levels of inter-personal relations. From the view point of strict constitutionalism there cannot be a different conclusion, especially in the Indian context. But unfortunately, the development of law in this regard does not augur well. The result is that the natural elasticity in fundamental rights could not be made use of to the full extent to incorporate the welfarist goal of fair and just civil code.

Under Art. 13 of the constitution every law contravening any of the provisions of Part III is declared to be void. Under Art. 14 it is ordained that the state shall not deny to any person equality before law and equal protection of the laws. When state agency is made use of for implemeting customs, usages, and laws allowing discrimination in the matters of matrimonial rights, succession, partition, maintenance and guardianship. There is clear violation of Art. 14[61]. As per Art. 21 of the constitution everyone is entitled to personal liberty and its deprival shall be in accordance with the procedure established by law. Recent decisions of the Supreme Court have established that such procedure shall be just, fair and reasonable[62]. As family is a form of association it is amenable only to reasonable restrictions by the laws on the ground of public order and morality. On the whole these constitutional provisions insist on fair conditions even in the sphere of personal law.

60 *National Textile Workers Union v. Ramakrishna* AIR 1983 SC 75.

61 This is with the notion that judiciary is also state under Art. 12 of the Constitution, a principle which is not well-established.

62. *Maneka Gandhi v. Union of India.* 1978 1 (SCC) 248.

In addition, there are provisions enabling or directing the state to bring about social reforms. According to Art. 25(2)(b) nothing in this article, (namely, Art. 25 (1) guaranteeing freedom of religion) shall affect the operation of any existing law or prevent the state from "making any law providing for social welfare and reform..." Under Art. 15 (3), State is empowered to make laws creating special provisions for women and children. Further the right to conserve religion under Art. 29 (1) cannot be interpreted to protect personal laws either for the reason that personal law is not an essential matter of religion or for the reason that state is enabled to make social reforms under Art. 25 (1).

The application of Part III of the Constitution as a touchstone to test the constitutional validity of personal laws revolves around the issue whether personal law is law at all for the purpose of Part III of the Constitution. Logically speaking this is an unneccessary controversy because personal law either based on custom or in the form of statute is a set of legal norms regulating the behaviour. rights and obligations of people and is enforced by courts of law or by state power. However, in *State of Bombay* v. *Narasu Appa Mali*[63] the Bombay High Court in answering the question whether Hindu Bigamous Marriage Act, 1946 which imposed prohibition upon bigamy only upon Hindus and not upon Muslims was violative of Art. 14 of the Constitution, held that since personal law was not law under Art. 13 the need of testing it under Art. 14 did not arise at all. Chagla C. J., and Gajendragadkar J. laid emphasis on omission of the term personal law in Art. 13 and restrictive interpretation of the phrase 'custom or usage' in Art. 13. They gathered support from Art 17, Art. 25 (2) and Art. 44 for the view that the constitution makers had assumed that different personal laws were to prevail subject to modification by the State for the purpose of social reforms. According to the learned judges, if Hindu personal law became void by reason of Art. 13 then it was unnecessary to specifically provide for Art. 17 or Art. 25 (2).

It is submitted with respect, the reasonings adopted by the learned judges were fallacious. Firstly, the definition of the term law in Art. 13 (3) is an inclusive definition and hence the logic of omission or restrictive interpretation of 'custom or usage' cannot be sustained. The more relevant test for law under Art. 13 (3) is whether the concerned norm is capable of being enforced by the state power.

63. AIR 1950 Bom L This view is criticised by A. M. Bhattacharji "Personal law and State Action' AIR 1982 *Jour.* p. 113.

Secondly, Art. 17 and Art. 25 (2) are illustrative of abundant caution and express thinking made by the Constitution makers for reforming the social habits. There is no support to the proposition that the State cannot interfere in the field of personal law through any provision of Part III of the Constitution.

In fact, the challenged legislation was a measure of social reform; as the court correctly viewed, for equalising of the rights of males and females in Hindu community. The comparison between Hindus and Muslims could have been answered in this way : as distinct social, cultural and historical reasons are connected with personal laws of each of the communities, large scale reforms at one stroke affecting all communities cannot be enacted, but piecemeal and gradual reforms will have to be enacted reasonably choosing that community which is mature and ready to receive the reforms. The Constituent Assembly Debates on Art. 44, hint at the criterion that is to be adopted in this matter. When the basis of classification is explicable with convincing reasons from the sociological and cultural perspective, the impugned legislation could have been upheld as in accordance with Art. 14. This would have been the logical solution to the question on the ground of right to equality. By holding that personal law is not law for the purpose of Art. 13, the decision came in the way of libertarian or egalitarian influence upon personal law by judicial actions.

In *Sri Krishna Singh* v. *Mathura Ahir*[64] the Supreme Court held the view that personal law is not law for the purpose of Part III of the Constitution. This case also came in a peculiar circumstance. In this case after the death of Swami Atmavivekanand of '*Sant Math*' Mathura Ahir, his closest disciple was appointed as new Mahant by the '*Bhesh* of *Sant Math*' in the formal Bhandara ceremony according to the wishes of late Atmavivekanand. Srikrishna Singh, son of Atma Vivekanand (in his *Purvashrama*) was in possession of the properties belonging to the math. When the new Mahant claimed the property of *Math*, it was defended by Krishna Singh that the rule that natural son severed his relation with father the moment the latter adopted sanyasa was discriminatory and that a *Shudra* cannot become a Mahant of Sant math. About the first point of defence the court viewed that the said rule was not discriminatory and that even if it was discriminatory since personal law was not law under Art. 13 it could not be quashed. About the second point, the court elaborately dealt with the conventions of

64. AIR 1980 SC 707.

devolution of Mahantship in *Sant Math Sampradaya* and upheld the validity of the appointment. The proposition that personal law was not law under Art. 13 was not essential for the decision of the case. In both *Narasu Appa* and *Krishna Singh* the impugned law or customs were in spirit not violative of Arts 14, 15 and 16. The Court could have reasoned on the basis of right to equality itself, to arrive at similar conclusions. Sincc judiciary was in ambivalence and since the elastic and activist content of right to equality had not emerged as an influencing force the judiciary traversed a narrow path.

In *Gurdial Kaur* v. *Mangal Singh*[65] the High Court of Punjab observed, "If the argument of discrimination based on caste or race could be valid, it would be impossible to have different personal laws in this country and the court will have to go to the length of holding that only one uniform code of laws relating to creatures covering all castes, creeds or communities can be constitutional. To suggest such an argument is to reject it". It is submitted that the reasoning based on right to equality need not have been stretched to such an extreme in spite of its desirability. Unjust, discriminatory and antiliberation principles within each personal law can surely be tackled by application of Part III. As Mohammad Ghouse observes the existence of multifarious personal laws cannot be valid defence when a personal law violates fundamental rights.[66] He considers the observation of Punjab High Court as *obiter dicta*.

Excepting the above three decisions, the approach of the High Courts and that of Supreme Court is generally to apply Part III of the Constitution to test the constitutional validity of the impugned principles of personal laws. The High Court of Madras in *Srinivasa Aiyar v. Saraswathi Ammal*[67] held that the reference in the Entry 5 of the concurrent list to joint Family and Partition (which are institutions of Hindu law and unknown to Muslim personal law) prove that the Constitution did not rule out the validity of the principles under which different personal laws are applied to different religious communities. The court observed, "It is surely an indication that it recognises the classification already in existence that a section of the people...are subject to a system of laws peculiar to them. The reason of that classification is not their religion but that they have all along been preserving their personal law peculiar

65. AIR 1968 Punj. 396 at 398.

66. Mohummad Ghouse. *supra n.* 47 p. 231.

67. AIR 1952 Mad. 193.

to them." Hence the court treated the whole of personal law as 'existing law' or 'law in force' under Art. 372 and Art. 13.

In *Sheokaran Singh v. Daulatram*[68] the High Court of Rajasthan struck down the rule of Damdupat prevalent in Hindu law as violative of Art. 14 of the Constitution. It reasoned that Damdupant was a commercial custom and thus governed by Art. 13.

The Supreme Court was called to decide the question whether personal law of Muslims relating to preemption as law under Art. 13 and whether it was violative of Art. 19 (1) (f), for the first time in *Sant Ram v. Labh Singh*[69] in 1965. The Court answered that the definition of the phrase 'laws in force' is dependent upon the definition of 'law' in Art 13 (3) (b) and that both the definitions control the meaning of Art. 13 (1). As principles relating to preemption were based on customs and usages they were governed by Art. 13 (1). The Court invalidated the custom on the ground that it violated Art. 19 (1) (f) which guaranteed right to acquire, hold and dispose property.

Concerning the statutory personal laws enacted after the commencement of the Constitution, the approach of the judiciary in recent times is to scrutinise them under the light of various provisions of Part III without delving into the technical question whether personal law is law. In *T. Sareetha v. Venkatasubbaiah*[70] the Andhra Pradesh High Court considered Sec. 9 of the Hindu Marriage Act providing for restitution of conjugal rights of the spouses living separately without reasonable justification as violative of personal liberty under Art. 21 of the constitution. The Court viewed that if an unwilling spouse is coerced by State power to cohabit with the other spouse there is violation of right to privacy. In *Harvinder Kaur v. Hermender Singh*[71] the Delhi High Court upheld the constitutional validity of Sec. 9 as a reasonable regulation protecting the institution of marriage in accordance with Art. 21. In *Saroj Rani*[72] case the Supreme Court affirmed the view of Delhi High Court and rejected the view of Chaudhary J. of A. P. High Court. It is to be remembered that the issue of personal law as law did not figure in these cases. That question has become a non-issue in these cases.

68. AIR 1953 Raj.
69. AIR 1965 SC 314.
70 AIR 1983 AP 357.
71. AIR 1984 Del 66.
72. AIR 1984 SC 1562.

About the desirability of applying Part III provisions to purge the personal laws there can hardly be any meaningful objection. The principles of equality, liberty and security have great relevance in a sphere where exploitation and discrimination prevail and the persuasions of love and affection are sometimes banished. The application of Part III will ensure just and fair legal relations in different personal laws. This is much more desirable rather than quarelling on the pedagogic concept of uniform civil code. Once the concepts of justice and liberty are instilled into the realm of personal laws, Uniform Civil Code will be easier to pursue. As Mohammed Ghouse has observed; 'The Fundamental Rights available to a Muslim wife and the compulsions of equality and social justice implicit in those rights warrant the introduction of monogamy, regulated divorce and maintenance of wife after divorce into the Muslim law to save it form being condemned as unconstitutional. The muslims can have no objections to such adaptations as most of them have discarded the license to polygamy and unilateral divorce given to them"[73].

The judicial activism of purging the personal laws under the aegis of Part III has certain advantages. Such an approach is generally free from the defect of playing to the emotional and religious convictions of people.[74] In the backdrop of unjustifiable legislative inertia and hesitation, the activist approach of the judiciary is a ray of hope. Secondly, as the 'purging' approach is from the view point of the policy underlying Part III, the result is also expected to be fair provided that there is no substitution of arbitrariness in personal law by judicial arbitrariness.

Conclusion and a blue print for the future

In India, personal laws are the distinct products of multi-cultural system evolved through generations. Even though the relation between personal law and religion is considerable remote, because of sentimental reverence of people to the 'living law' of tradition, the task of attaining social justice in this sphere is resisted by some orthodox sections of the society directly or indirectly. However, the majority of the population has favourably responded to the introduction of social reforms in their personal law. But the experience of the law maker in the direction

73. See *supra* n. 47 p. 232.
74. Resentment by the Muslim community about *Shah Bano* decision (AIR 1985 SC 955) is unfortunately an exception.

of Uniform Civil Code is that effecting changes even in an incremental manner is very difficult. In fact, Uniform Civil Code in its strict sense may not be so much essential as compared to the need of attaining social justice in each and every enclave of personal law. The intention of the constiution makers in enacting Art. 44 was to orient the state action towards attaining social justice in the familial relations. As the notion of social justice in its broad contours has the same accentuation and insistence, ultimately social justice in each and every sphere will lead to attainment of Uniform Civil Code or a situation nearer to it.

The disappointing factor in this area is the total neglect of the goal by the legislature. In the area of reforming Muslim personal law, no sincere effort is made by the State to adopt the Nehruian two pronnged approach of implementing the law and educating the public opinion in favour of it simultaneously. On the other hand, the recent legislation i. e., Muslim Women (Protection of Rights on) Divorce Act, 1986 has shown the retrograde policy of preferring archaic notions to the secular idea of social justice. It is true that in matters of social morality, the power of the law to bring social changes is limited[75]. But if the legislator positively obstructs the desirable social change it is the betrayal of the confidence reposed in him to strive for social justice.

The analysis made above shows that there is the snag of non-enforceability which hinders the Directive Principles of State Policy in becoming a powerful instrument of social engineering. The judicial process has been influenced to some extent in recent times. Judiciary has demonstrated in several cases that reading the Directive Principles into the elastic veins of Fundamental Rights is the profitable approach in translating the value goals in Part IV interstitially. However, the judical path of attaining social justice in personal laws by application of the fundamental rights under Arts. 14, 15. 19, 21 and 25 (2) (b) of the Constitution is strewn with self-created pitfalls. The unnecessary controversy on the question whether personal law is law for the purpose of Part III diluted the efficacy of judge made reform. However, recent pronouncements of the court (for example, pertaining to the constitutionality of Sec. 9 of Hindu Marriage Act) receive confidence in this regard. The need for judgemade reform on the basis of Fundamental Rights is very much felt to-day in the backdrop of legislative inertia and agonising injustice, exploitation and discrimination in some of the uncodified personal laws.

75. Friedman W., supra n. 6 p.

A blue print for the future in this area consists in a multipronged effort through legislative activism, propaganda for social justice[76] in personal law and increased judicial application of Part III in relation to personal laws. There is no need for amending any provision of Part III relating to religious freedom to protect reforms in personal laws because the relation between personal law and religion is remote and also because no impediment on that ground is experienced by the judiciary or the legislature[77]. Further Art. 25 (2) (b) is quite elastic.

The legal activism in the reform of personal laws should not be a unilateral entersion of one system to others.[78] Some of the just and egalitarian principles of Mohammedan law could be introduced into Hindu and other personal laws and vice versa. For example, in Muslim law there is a principle that the power of any Muslim individual to bequeath his or her property through will is limited to one third of his/her property and the two thirds of the property of the deceased person should devolve according to the rules of intestate succession[79]. This rule has several advantages. First, the kin of the deceased are assured of equal shares and they will be protected against the whims and fancies of the testator. Secondly, the person bequeathing can provide for additional share by his will to any of his legal representatives who has assisted him/her during the old age or to a person whom he thinks as deserving because of economic weakness of that person. Third, the rule protects against bequests of whole property to any person, institution or body affecting the interests of the closest blood relatives of the testator. Finally, the impact of undue influence in the process of making the testament will be considerably limited. Since the rules

76. In Muslim law it is recognised that *Ijma* ie., consensus of the faithful is a source of law Since enlightened and collective opinion of the community has a determining say in providing for adaptation and change, the role of educating public opinion in favour of just and fair principles in family law is essential See Amir Ali, *Mohammadan Law* Also See V. R. Krishna Iyer, *supra*, n. 49 p 196.

77. Tulzapurkar J. is of the opinion that there is the need for constitutional amendment permitting reforms in personal law notwithstanding the guarantee of freedom of religion. See Tulzapurkar, supra n. 47 p. 24. It is submitted, Art. 25 (2) (b) is quite elastic to allow such reforms even if it is considered that personal law is part of the religion. But it is generally accepted that personal law is remotely connected with religion.

78. Prof A. B. Shah is of this opinion in an article as cited by Tulzapurkar J, *supra* n. 47 p. 22.

79. Neil B. B. Baillie, *Digest of Moohummadan Law* p. 625(1957).

of intestate succession are based on humanitarian principles of protecting the interests of dependents and the kith and kin, the reasonable expectation of the latter are also fulfilled. Total exclusion of intestate succession by the will of the bequeathor may work as arbitrary.[80] The rule of limitation on testamentary succession can be adopted in other personal laws subject to modifications. On the whole, the future personal law code should incorporate benevolent principles in various laws of the present. The immediate attention of legal activism should be on reforming the personal laws rather than hurrying for Uniform Civil Code. If at all Uniform Civil Code is going to be enacted it should not be on the basis of half-way-house approach of voluntary Uniform Civil Code[81]. This is for the reason that loopholes, defects and ineffectiveness in social reform legislations not only make the effort futile, but their failure even on technical ground will be a source of discouragement and inhibits future efforts.

From the social change perspective, it is to be noted that Directive Principles are not able to provide equal interest to all the goal values enshrined in Part IV. Further, when popular reception and participation are the important factors for making the reform a success, a well-planned propaganda for educating the public is an imperative need. Then only would it be possible to attain social changes of desired magnitude, direction and pace.

80. According to Julius Stone, the rules of succession should aim towards protecting the family from disintegration. Explaining the English legal developments in 1938 (Inheritance Family Provision Act 1938) which introduced limits on testamentary disposition Prof, Stone observes, "Freedom of testation which favoured family stability when rules of intestacy fell short, might well become dangerous to this interest when the rules on intestasy have been made adequate. The discretion given by the Act to make provision for certain members of the family despite the will, might seen to promote, by restricting testation the same interests as had formerly to be promoted by freedom of testation itself." See Julius Stone, *Social Dimensions of Law and Justice* p. 316 (1966).

81. See Tulzapurkar, *supra* n. 47. for contrary view see V. R. Krishna Iyer *supra* n. 49 p. 197 The idea of introducing voluntary uniform civil codewas mooted in Parliament in 1986.

AN INDUSTRIAL DISASTER : A JUDICIAL RESPONSE

BISHNU PRASAD DWIVEDI*

The industrial development in modern times, has created the problem of ecological imbalance all over the world. Industries in general and hazardours industries in particular have been posing a continuous threat to public health and life. Industrial activity of a society which is also the hallmark of progress poses a cruel dilemma to a modern man. On the one hand, he cannot put a stop to the pace of industrial progress which is an index of development and at the same time, he cannot ignore the implications of such development on the life and liberty of the people.[1] The situation is further exacerbated when the courts treading their traditional path are unable to adequately compensate the accident victims. The failure of the various principles of the law of torts, namely, negligence, nuisance, trespass and strict liability[2] to measure up to the complex situation is more due to the attitude of the judges in squarely facing the situation than the failure of the system[3] or the principles which they have to apply. An attempt is made in this paper to evaluate the modern response to the industrial disasters which have hardly any parallel in recent history.

In early English common law a person was responsible, without proof of fault, for harm caused by his activity. Whereas in the eighteenth century, English law was modified by making proof of fault a prerequisite to liability, in the mid-ninteenth century the principle of

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1. For example, *R. L and E. Kendra, Dehradun* v. *State of U. P.*, AIR 1987 S. C. 2426, where the mining operation was stopped by an order of the court.

2. Winfield and Jolowicz on Tort, Tenth Edn., Sweet & Maxwell, 1975, p. 386, Allen, David, Structured Settlement, (1988) 104 L. Q. R. 448, Similar observations were made by Bhagwati, J., in *M. C. Mehta* v. *Union of India*, AIR 1987 S. C. 1086.

3. According to one view, the system based on the principle of absolute liability is inadequate to compensate victims and an ad-hoc arrangement, depending upon the needs of claimant, would be better, *see*, in the United Kingdom, Sec 6, Administration of Justice Act, 1982, in the North America, it is known as structured settlement, *see* Allen, David, *ibid*, note 2, Morris, Clarence, Hazardous Enterprises and Risk Bearing Capacity, 61 *Yale L., J.* 1172, *at* 1176.

strict liability gave room to "no fault" theory as evolved in the famous case of *Rylands* v; *Fletcher*[4]. The celebrated rule of Blackburn, J., laid down, "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape"[5]. However, in the House of Lords, Lord Cairns added that it was the "non-natural" use of the land which was the basis of liability.[6] This phrase indeed opened up a loophole for escaping the liability. It must be noted in this regard that this principle was evolved in a specific situation, particularly for protecting the proprietory interests of adjoining landowners[7] and it was not related to problems of industrial growth.[8] Further the rule of absolute[9] liability was gradually subjected to a number of exceptions.[10] The expressions, "escape"[11], "non-natural use"[12] and "dangerous things"[13] received novel interpretations at the hands of the English courts. In fact, even building a factory for the manufacture of explosives was considered as a "natural use" of the land.[14] The judicial delineation of liability ultimately led to a situation that actions for claims against personal injuries as a result of industrial activities were put out of the purview of strict liability rule[15]. Even in

4. L. R. 3 H. L 330.
5. *Eletcher* v. *Rylands* (1866) L. R. 1 Ex. 265, *at* 279.
6. *Ibid*, note, 4, *at* 338-40.
7. *Read.* v *J., Lyons & Co.* (1947) A. C. 156 (H. L.), *at* 173, *per* Lord Macmillan, Taylor, T. H , The Restriction of Strict Liability, (1949) 10 *M. L. R.* 396, *at* 400, 402, Winfield and Jolowiex on Tort, *ibid* note 2, *at* 363, 364.
8. Fridman, G. H. L., The Rise and Fall of Rylands v. Fletcher 34 *Can. Bar. Rev.* 810
9. Some writers are of the view that the use of the term "absolute liability" is erroneous because, the liability may be strict but not absolute, *see*, Winfield, The Myth of Absolute Liability, 1926) 42 *L. Q. R.* 37, *at* 51; Morris, Clarence, *ibid*, note. 3.
10. For exceptions, *see*, Winfield and Jolowiez on Tort, *ibid*, note 2, *at* 370-377.
11. *Id.*
12. Newark, F. H., Non-natural User and Rylands v. Fletcher, (1961) 24 *M. L. R.* 557.
13. Stallybrass, W. T. S., Dangerous Things and the Non-Natural User of Land, (1929) 3 *Camb. L. J.* 376.
14. *Read's* case, *ibid*, note 7, *at* 174, *see* also, *British Calanese Ltd.*, v. *A. H, Hunt Ltd*, (1969) 1 W. L. R. 959.
15. *Id.*

the narrow ambit the rule gave rise to inconsistent results.[16] The courts gradually lapsed into "no fault no liability" rule.[17] It is interesting to notice that even in the cases decided on the basis of the above rule, the courts provided justification under the law of negligence.[18] Thus the decline of the rule in *Rylands* v. *Fletcher* left the individual injured in industrial activities without adequate protection.[19] We may therefore conclude that these common law concepts could hardly handle the problems of modern industrial activities particularly those connected with the manufacture of toxic materials. It is at this stage the British Parliament stepped in and enacted statutory liabilities for meeting environmental hazards.[20] In India, the common law principles were generally followed.

On 2nd December, 1984, due to the leakage of methyl isocyanate (MIC) from Union Carbide factory at Bhopal more than two thousand persons lost their lives and over two lakhs people suffered injuries of various kinds. The aftermath of the World's worst industrial disaster shook the complacency of the people all over the world and industries have started installing more efficacious mechanisms for preventing the recurrence of disasters of such magnitude.[21] On the legal front a spate of claims petitions of victims and their dependants seeking adequate compensation cropped up. A suit filed in the American court was dismissed for want of convenient forum.[22] The matter then came up

16. Blackburn, W. Erskine, The Rule in Rylands v. Fletcher, (1961) 4 *Can. Bas J.* 39, *at* 49.
17. Winfield, *ibid*, note 2, *at* 361.
18. *Read's* case, *ibid*, note 7, *per* Lord Macmillan, *Perry* v. *Kendricks Transport Ltd.* (1956) 1 W. L. R. 85, in these cases the requirement of the duty of care was same as in *Donoghue* v. *Stevenson* (1932) A. C. 562, *see*, Fridman, *ibid*, note 8, Blackburn, *ibid*, note 16, Newark, F. H., The Boundaries of Nuisance, (1949) 65 *L. Q. R.* 480, *at* 490.
19. Winfield, *ibid*, note 2, *at*, 380.
20. For example, The Nuclear Installations Act, 1965.
21. In the United States, a change, in the accident response mechanism, took place after the Bhopal tragedy. The Environmental Protection Agency initiated new programmes to deal with accidents of a similar nature, *see*, the *Time of India*, New Delhi, August 3, 1988, II, *at*, 8.
22. The New York Distict judge, John F. Keenon dismissed the suit, by his order dated May 12, 1985, on the grounds of *forum non-conveniens*. The Court of Appeals dismissed the appeals against the above order and upheld that the claims should be decided by the Indian court under the Indian law.

before Bhopal District court. However, in the meantime the Supreme Court had the occasion to consider the principle of liability in a case of accident due to leakage of oleum gas in Delhi.[23] It was a matter brought before the court by the Legal Aid and Advice Board and Delhi Bar Association for the award of compensation to the victims of gas disaster. The issue of violation of the fundamental right to life and personal liberty of the victims was raised before the court. It may be noticed in this connection that a new development in personal liberty concept has taken place and the court has not hesitated to extend the idea for protecting the right to congenial environment, sanitation and public health.[24] It is indeed a remarkable development that the highest court of the land has utilized the constitutional litigation for compensating the accident victims but for which innovation the victims would have languished in the corridors of courts for generations. Following the *Bandhua Mukti Morcha*[25] case, the court pointed out that where there was a violation of a fundamental or *other legal right* of a person who by reason of poverty or socially or economically disadvantaged position could not approach a court of law for justice, it would be open to any public spirited individual or social action group to take up the issue and this could be done not only by filing a regular writ petition but also by addressing a letter to the court.[26] It was also observed that such letter could be addressed to the whole court or any individual judge.[27] This practice of entertaining letters as writ petitions was initiated by the Supreme Court a decade ago and is popularly known as "Public Interest Litigation". Thus, in the instant case, the petition by a lawyer on behalf of gas victims was admitted by the court under article 32. The court, thus, extended the scope of Public Interest Litigation to include the violation of any legal right. It is submitted, with respect, that the extraordinary procedure of accessibility to justice should

23. *M. C. Mehta* v. *Union of India*, AIR 1987 S. C. 1086, there was a leakage of oleum gas on 4th and 6th December, 1985, from one of the units of Shriram Foods and Fertilizers Industries, as a result, several persons were affected.

24. *Ibid*, note 1, *see* also, *T. Damodhar Rao* v. *S. O. Municipal Corpn., Hyderabad*, AIR 1987 A P. 171, *L. K. Koolwal* v. *State* AIR 1988 Raj. 2.

25. *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 S. C. 802

26. *M. C, Mehta's* case, *ibid*, note 23, *at*, 1089.

27. *Id*, similar observation was made by Bhagwati, J., in the *Bandhua Mukti Morcha* case, but two out of three judges were of the view that such letter might be addressed to the whole court. Here Bhagwati, J., got an opportunity to sustain his view for five judges bench.

be invoked only in exceptional cases, otherwise the Supreme Court may be swamped with all kinds of litigations under the guise of Constitutional litigation. Of course, we are in full agreement with the solicitude shown by the Supreme Court in *M. C. Mehta's* case by holding that there was a violation of article 21 of the Constitution.

Another significant question raised in *M. C. Mehta's* case namely, the availability of compensation claims under the fundamental right in article 21 was whether a private company could be subjected to the limitations of fundamental rights? This right was available only against "State" as defined in article 12. However, an enterprise which was an agent or instrument of the State, was included in the expression, "other authorities"[28]. Indeed, it depends upon the functions performed by the enterprise. In the matter of hazardous enterprises, the court observed, that, the functional test would be determined on two conditions. First, the potentiality of the enterprise to adversely affect the health and safety of the community. And second, the governmental control on all such activities of the enterprise which could jeopardise public interest.[29] Though, the court did not adjudicate on the compensation claim, it admitted the petition under article 32 on the ground that a private enterprise could be included in the expression, "other authorities" under certain circumstances. Looking to the positive concept of personal liberty and violation of the right of weaker sections, it may be concluded that the private action may also attract judicial intervention. The ultimate responsibility lies on the State to protect fundamental rights and who the violator is, would lose relevance.

The court could not find an answer in *M. C. Mehta's* case to the main issue of compensation under the existing law and it led to the evolution of new principle of liability. It cannot be disputed now that judicial activism is an essential feature of a modern State where upholding of 'rule of law' is entrusted to an independent judiciary. In India, the scope of judicial review is very extensive and perhaps widest[30] in the world and the recent judicial trend has proved it to be true. One significant point which needs to be noticed in the present context is that cases based on environmental pollution, ecological degradation and care of public health require special kind of scientific expertise as an essential input to assist the judicial law-making. In many cases the court

28. *Ajai Hasia* v. *Khalid Mujib*, AIR 1981 S. C. 487.

29. *M. C. Mehta's* case, *ibid*, note 23, *at* 1096.

30. *Union of India* v. *Raghubir Singh* (1989) 2 S. C. C. 754, *at* 766.

may be helpless and is unable to decide the issue for want of scientific and technical knowledge[31] and the ends of justice would be defeated. In the *Bandhua Mukti Morcha*[32] case the court appointed enquiry commissions for ascertaining various facts.[33] This power of the court was extended in the instant case so as to include the appointment of committees of scientists for the purpose of providing research assistance.[34] This indeed is a laudable step in the right direction.

The court, laid down, in *M. C. Mehta's* case, a new principle of absolute liability consistent with the constitutional norms.[35] Bhagwati, C. J., stated that, "where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compen sate all those who are affected by the accident."[36] To remove any doubt the court upheld the principle of absolute liability, which even the English courts had not done. The basis of this liability was the "absolute and non-delegable" duty of such enterprise towards the community to ensure that no harm is caused to anyone on account of hazardous or inherently dangerous nature of its activity.[37] This new principle of strict and absolute liability does not make any distinction, as to victims whether they are the employees or not, whether, they were within the premises or outside. All victims are eligible to claim under the rule.

The application of the rule is general and wider than the hitherto known principles of tortious liability. However, the rule may be invoked in special situation. An enterprise would be "hazardous" or inherently dangerous only if it posed a potential threat to the health and safety of

31. *See, Vincent* v. *Union of India*, AIR 1987 S. C. 990 and *Shivarao* v. *Union of India*, AIR 1988 S. C. 952, where, the court declined to decide the issues raised before it for want of technical knowledge.

32. *Ibid*, note 25.

33. For another study of this practice, *see*, Dwivedi, B. P., Bonded Labour and Judicial Process (1988) C. U. L. R. 391, *at* 394.

34. *M. C. Mehta's* case, *ibid*, note 23 the court appointed a number of expert com mittees and relied on those reports.

35. *Id., at* 1098.

36. *Id.*, at 1099.

37. *Id.*

the persons.[38] It was again necessary for the application of the rule that the enterprise was carrying on such activities "for it's profit."[39] A non-profitable industry cannot be held liable under this rule. However, the defences available under the principles of *Rylands* v. *Fletcher* or the law of negligence were excluded.[40] The cases which cannot be brought under the new principle would still be governed by the rule of *Rylands* v. *Fletcher*. We submit that the application of the *Ryland's* rule was discarded by the court on account of the extraordinary situation and, thus, the new rule cannot be extended to all accident cases.

The new principle is the classical exposition of the social justice ideal which will go a long way in ameliorating the conditions of the hapless. The court's role as a fountainhead of justice has been swayed by the poverty of the defendants. The measure of compensation has also been correlated to the magnitude and capacity of the enterprise. The court laid down that in the case of larger and more prosperous enterprises, the amount of compensation should be greater.[41] This pronouncement is a radical departure from the common law "no-fault" principle, where the liability depends upon the entitlements of the plaintiff at the law rather than their needs. Generally, the poverty, of the parties, is not taken into consideration by the court. But now it is an important factor taken into account by the court. There is one hitch which needs to be noticed in this context. A big business enterprise may be able to shift the cost of compensation on to consumers.[42] The economics of this liability in operation would affect pricing of goods. Thus the cost of compensation is distributed among the public at large, ultimately affecting the poor people also. This should be prevented by creating a permanent fund for the payment of compensation. If it is not a business enterprise it may control this cost by getting liability insurance. Looking to the human right jurisprudence we also suggest that the term "any person" in the new principle should not include a business enterprise and limited to living persons only. Such cases may well be covered under the principles of liability depending upon faults.

38. *Id.*

39. *Id.*, the use of the expression, "for his own purposes" in the *Rylands* principle was similar to this.

40. *Id.*

41. *M. C. Mehta's* case, *ibid*, note 23, *at* 1099-1100, *see* also, *Union Carbide's* case, *infra*, note 48, *at* 46.

42. In the United States the problem of consumers interest often arises in such cases, *see*, Morris, Clarence, *ibid*, note 3, *at* 1176.

The other problem facing the judiciary in relation to accident victims is the grant of actual relief to the claimants. In the instant case the court did not award compensation in the writ proceeding. It laid down the principle of liability and left the issue of compensation to be decided by proper court. However, by a case to case determination, it has been established now that the court has the power to award compensation for the violation of personal liberty in its writ jurisdiction as well.[43] Though we feel that the court should have decided about the compensation issue in *M. C. Mehta's* case, we are not undermining the importance and usefulness of the new principle of liability laid down in that case.

The other landmark decision which we would like to point out in the present context is that of *Union Carbide Corporation* v. *Union of India*.[44] In this case the Supreme Court considered the compensation claims on behalf of the victims of Bhopal Tragedy. Just after the judgment in *M. C. Mehta's* case the compensation claims of the victims of Bhopal tragedy came before the court. On behalf of the victims, a suit was filed by the Central Government.[45] The Bhopal court followed *M. C. Mehta's* principle and passed an order against the Union Carbide Corporation for depositing Rs. 350 crore as interim compensation. On appeal the Madhya Pradesh High court followed the new principle of liability as laid down in *M. C. Mehta's* case but reduced the interim compensation to Rs. 250 crore. When the matter came up before the Supreme Court it passed a final order of settlement comprising all the claims, civil and criminal and quantified it at 470 million dollars.[46] The settlement order faced severe criticism, the jurists, lawyers, public as also mass media questioned even the credibility of the judicial process.[47] The main ground

43. *See, Rudal Sah* v. *State of Bihar*, AIR 1983 S. C. 1086, *Bhim Singh v. State of J. & K*, AIR 1986 S. C. 494, *Sebastian M. Hongray* v. *Union of India*, AIR 1984 S. C. 1026. *Peoples Union for Democratic Rights* v. *State of Bihar*, AIR 1987 S. C 355. *A. S. Mittal* v. *State of U. P.*, AIR 1989 S. C. 1570.

44. (1989) 1 S. C. C. 674.

45. The Central Government was authorised to file suits and claims on behalf of the victims by the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. Initially enormous claims were filed in different courts. To consolidate all those claims for disposal this Act was passed.

46. *Ibid*, note 44, how the court reached the settlement and quantified it to the tune of 470 million dollars are out of the scope of the present paper.

47. For a discussion and comment on the settlement, *See* Baxi, Upendra, "Revictimising the Bhopal Victims", *LEJ* 34 march, 1989.

of attack was that the court has discarded the *M. C. Mehta* principle of absolute liability. We submit that there is no substance in this criticism. The basic consideration motivating the conclusion of the settlement was the compelling need for urgent relief. In the opinion of the court the High Court rightly followed the *M. C. Mehta* principle.[48] Pathak. C. J., observed that the new principle was the emerging postulate of tortious liability whose principal focus was "the social limits on economic adventurism"[49]. It being a settlement order and due to the urgency of the matter, the court did not pronounce on the principle of liability. It should be noted that the court never disputed the *Mehta* principle.[50] Moreover, the consent order is not a law declared by the Supreme Court under article 141. In subsequent cases the courts are not bound to follow the settlement order and to infer any principle from it.[51] The other cause for despair was the justness of the amount. In all fairness to the court it should be observed that the amount of damages was higher than the amount generally awarded in such cases of tortious liability. No amount could be said to be just, equitable or reasonable especially in the context of compensation awarded by courts in Western countries. However, the calculation of the amount does not affect the principle of liability. The door of the court is still open for relevant information by the victims.[52] If as a result of the settlement order any serious miscarriage of justice has been occasioned, violating the Constitutional and legal rights of the persons, it will be still possible to approach the Supreme Court for undoing any such injustice.[53]

We conclude that the principle of strict and absolute liability is applicable only to particular situations. It does not abolish other principles of tortious liability. The discussion also justifies the conclu-

48 *Union Carbide Corporation* v. *Union of India* (1989) 3 S. C. C. 38, *at* 46, the reasons for the settlement order which was delivered by the court about three months later.

49. *Id.*, *at* 50.

50. Though the court was not bound by its own previous decision, it did not overturn the *M. C. Mehta* principle but followed the precedent. For a discussion on precedent, *see*, the *Raghubir Singh* case, *idid*, note 30, *at* 769.

51, *Delhi Municipal Corporation* v. *Gurnam Kaur*, AIR 1989, S. C. 38.

52. *Ibid*, note 48, *at* 51-52, this view is consistent with Sec 4 of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.

53. *Id.*, *at* 52, the same view was upheld in *A. R. Antulay* v. *R. S Nayak*, AIR 1988 S. C. 1504.

sion that there are some industries which are not "hazardous" or "inherently dangerous" that cannot attract the application of new principle. The courts in India should follow the above principle and make necessary discrimination regarding the enterprises. Of course when the rule is applied, the liability, indeed, will be absolute. In cases where the defendant is not a private enterprise but the State, the compensation claims may be covered under articles 21 and 32. In such cases, while awarding the compensation to the victims, it is suggested that the same principle of absolute liabilty should be followed. Looking to the urgency and complexity of the matter a seperate Environmental Court should be established for deciding such claims. A national policy should be evolved to protect national interests from such ultrahazardous pursuits of economic gains.

BOOK REVIEW

Criminal Law By P. S. A. Pillai, 7th Edition, Tripathi, 1988, Price Rs. 95.

CRIMINAL law, unlike civil law, has a thematic unity. Crime is a breach of a duty or an obligation contrary to a statute made punishable by a statute. This is a narrowly defined concept. This underlies all the crimes and offences made punishable by different kinds of statutes. It is, therefore, not only possible but highly desirable that the general principles of criminal liability should be brought out for study so that such a study could form the foundation of the knowledge of criminal law as applicable to diverse and particular offences. This is much more instructive and illuminative than reading a mere commentary on the specific sections of the Indian Penal Code or some other penal statute.

It is, therefore, refreshing to see that the author has divided the treatment of criminal law in this book into two parts, namely the general part and specific offences. He has thus followed the illustrious example of the famous work of Glanville Williams in his "Textbook of Criminal Law" which also devotes the first part to the general considerations. The author has tried to compress within the limits of 763 pages a general part comprising 264 pages and the second part devoted to specific offences in the rest of the book. An outline of the criminal appeals and appreciation of evidence is also given in the last chapter of the book.

The author is particular to seize upon the latest Supreme Court decisions to enlighten his readers. He has also dealt with the basic English decisions since the general principles of *mens rea* are similar in the English Common Law and the Indian law. Therefore, though there are no common law differences in India and whether they exist in England has been debated, the general principles of criminal liability are the guide to understand the scope of specific offences and their applicability.

It is, therefore, with the intention of making this good book still better that the following suggestions are made :—

In Chapter 22 of "Abetment" only the general law of abetment is discussed. But recently the special law, namely S. 309 of the IPC relating to attempt to commit suicide has assumed prominence, particularly because the Criminal Law (Second Amendment) Act 1983 has inserted S. 113A in the Indian Evidence Act. It says that :—

> When the question is whether the commission of suicide by a woman has been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

The Parliament thus anticipated to punish the abettor of suicide whether attempt to commit suicide is an offence or not and thus presumed that S. 309 to IPC was valid. Since then it has been held by a High Court (probably Bombay) that S. 309 is unconstitutional because a person had the right to end his or her life just as he or she had the right to live by virtue of Article 21 of the Constitution and, therefore, attempt to commit suicide is not an offence at all. Another High Court (probably Andhra Pradesh) has taken a contrary view that S. 309 is constitutional. On principle, it is arguable that abetment can be committed of an offence even though the person committing the offence could not be held guilty of it. This is the subject-matter of S. 108 and the Explanation to it. On this principle it is arguable that even if it is assumed that attempt to commit suicide itself is not an offence because it is an exercise of a constitutional right, the abetment to commit suicide could still be an offence because the abetment illegally drove the wife to commit suicide which she would not have committed but for the abetment.

Similarly, the principle of S. 90 of IPC that consent given under fear of "injury" (injury being defined in S. 44 of IPC as any harm whatever-illegally caused to any person) is not a valid consent needs to be developed in interpreting S. 375 which defines rape. The second clause of S. 375 makes sexual intercourse with a women without her consent a rape. If "consent" is construed by reading S. 44 with S. 90 the scope of the causes invalidating consent will become much wider. This needs to be done because the third clause of S. 375 vitiates the consent only when it has been obtained by putting the women or any person in whom she is interested in fear of death or of hurt. If the second clause of S. 375 is broadened with the help of S. 90 read with S. 44 then it would not be necessary to comply with the third clause which is quite narrow.

In considering *mens rea* in statutory offences, it deserves to be pointed out to the credit of Indian law that the definition of consent in S. 90 which read with S. 44 of IPC and S. 114-A Evidence Act is to govern

the meaning of S. 375 is entirely factual. That is to say, a consent is a fact or it is not a fact. This is to be contrasted with the English law in which a reasonable belief by the accused that the woman was consenting when he committed sexual intercourse with her, even if the belief was wrong or negligent, does not amount to committing of the offence of rape. This was so held in the notorious decision of the House of Lords in *Morgan's*[1] case in 1976. Even though there was an outcry against the *Morgan* decision in the newspapers, the English Parliament gave a statutory recognition to the *Morgan* principle. The Indian Penal Code is definitely more just to woman in this respect than the English law.

Another controversy is, whether economic pressure brought on a woman to secure her consent to sexual intercourse invalidates her consent. Glanville Williams[2] at page 509 of his book referred to above says :—

"Economic pressure in insufficient. 'My poverty, but not my will, consents' is a distinction unknown to the law". With due respect to the learned author, the following argument against his view was made by the reviewer in his book[3] "Woman and the New Law" (1984), pages 67-68 :—

> "The general statement that economic pressure is insufficient to vitiate consent cannot pass muster. Again, we have to see whether economic pressure amounts to a threat of injury or not (injury is defined in S. 44 of IPC). For instance, if a woman is threatened with dismissal from her job we have to see whether the dismisal would be legal or illegal. If she has no right to hold the job and the employer has a right to dismiss her either as a mere discharge or a punishment for some wrong done by her then the dismissal would not be illegal and would not then be an injury within the meaning of Sections 44 and 43 of IPC. On the other hand, if she has a right to hold the job and the dismissal would be illegal then it would be an injury and would vitiate consent given by her under such a threat."

One would like the learned author to highlight the somewhat radical changes made in the law by the Criminal Law (Amendment) Act 1982, and the Criminal Law (Second Amendment) Act 1983 regarding offences,

1. (1976) AC 182.
2. Glanville William, *Textbook of Crimind Law*, 1978, 509.
3. V. S. Desh pande, *Women and the New Law*, 1984, 67-68.

particularly rape, against women. The decision of the Supreme Court in *B. B. Hirjibhai* v. *State of Gujarat*[4] AIR 1983 SC 753 which anticipated these amendments also deserves to be mentioned as a turning point in the law of rape.

Some notice should also be taken in a further edition of the book of the grave problem of law and order created by terrorist activities. On the one hand, a terrorist is entitled to the latitude which is given to every accused, on the other hand, there are special features of terrorism such as intimidation of witnesses and a fear reprisal which makes obtaining of evidence against them almost impossible. How is justice to be done ? Can the problem be met within the ambit of the established and basic principles of criminal liability or has an exception to be made to these principles to meet special circumstances ?

The learned author in this book has succeeded in the following achivements for which he deserves commendation. Firstly, he has combined the statutory provisions with discussions of principles. Secondly, he has selected the important decisions laying down the principles in preference to other decisions. Thirdly, he has kept the discussions within the allotted space. Fourthly, it is very creditable that so much important discussions have been achieved, so that in a handy paperback offered at an expremely reasonable price, one can get the knowledge of the principles of criminal law in some depth.

On the whole, this is an excellent book not only for the students but also for others who are interested in understanding the basic principles which are the soul of criminal law and thus to be well grounded in it. It deserves to be read widely by all.

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4. A. I. B. 1983 S. C. 753.

Sociology For Law Students. Oomen, T. K. and Venugopal, C. N. Eastern Book Company, Lucknow, 1988, pages 467

'SOCIOLOGY for law students' is the first work in pre-law education series. It is to serve as a text book for students of five year integrated legal education scheme. Whereas the author T. K. Oomen and C. N. Venugopal, claim a comprehenslve range including East and West themes as well as Indian Sociology, also meant for students of professional courses (let us say for social work, law, engineering, tourism, business management, library science and medicine etc.). Further, they claim it to be distinct from usual 'academic text books in sociology'. Thus, they venture to write a text book in pursuance of a project of the National Law School of India and the Bar Council of India Trust.

No doubt, sociology is a relevant subject to the students of professional courses but there should be a sound approach to make it relevant. Use of sociology should be the integral part of the elements of *applied sociology* which is an academic branch of sociology distinct from *social work*. For instance, the students of pre-law should be given to understand culture and social norm, social power and legitimacy, social sanction and control alongwith the processes of social inequality, social justice, social change and social planning with a com-prehension of social agents and agencies involved in this process. The text book under review has either nothing or very little to offer to the students of professional courses on these issues. The *Introduction*, written by N. R. M. Menon, the Secretary of the Bar Council of IndiaTrust , is the best and useful part of the text book for law students.

The text book begins with *theories of society*, a good start to acquaint students with theoretical standpoints in sociology. The chapter is innovative and up-to-date. The theories have been explained in simple and lucid manner. The students would certainly be inspired with the contents of this chapter : functionalism, marxism, interactionism and ethnomethodology. *Scientific Method and Social Research* is a capsule containing the useful information on social research. What constitutes scientific method has not been explained. What it does, is described. Chapter 5 *Types of Human Collectivities* is an exercise in obsolesence. A good discourse on *social organization* would have met the requirements of collectivities and social order. Chapters 5 and 6 are fragments without any kind of conceptial framework as if, only terms are defined from a sociological dictionary. On page 95 the sub-heading mobilization and legitimation and on page 96 state and social change are really innovative but the matter underneath is insufficient. No justice has been done to such challenging conceptual issues. Nevertheless the authors deserve

our appreciation for mentioning them in a text book of modern sociology. They may be pioneers in doing so. They should have incorporated a full chapter, on 'law, legitimation and the state'. They have added a chapter on *Law and Society* in Indian context. The content of the chapter shows the economy of labour of the authors. Valuable materials have been published during the eighties on law and society and law in the third world. English translations of legal researches done in non-English speaking countries are also available. The suggested reading at the end of the chapter could be made richer.

After the scraps of concepts in general sociology, the authors have entered the realm of Indian sociology with a lot of platitude and data based trivialism. For instance, chapter 18 on *Religious Pluralism* begins with the famous misquotation of Marx : It (religion) is the opium of the people. The actual context of the quotation is as follows :

> Religious suffering is at the same time an expression of real suffering and protest against real suffering. Religion is the sight of the oppressed creatures, the sentiment of a heartless world, and the soul of soulless conditions. It is the opium of the people[1].

Marx regarded Christian Protestant ethic as a promoter of capitalism in North America in his *On the Jewish Question* (1844). The marxian concept of religion needs revision with responsibility. The authors have simply described the various religions in India, *pluralism* (if it means anything more than sheer enumeration) as a sociological concept has not been worked out. The same is true about the chapter on *Linguistic Diversity* but the last pages of the chapter are relevant. One of the analytical problems of Indian Sociology is how to study this vast and diversified society. A way of resolving the problem is to divide India into tribal, rural and urban. There is a chapter on *Urban, Peasant and Tribal Communities* confined to classification supported by quotations, and one such quote is..'the Hindu peasentry is intensive agriculture with the help of ploughs drawn by bullocks and buffaloes'[2]. This is an instance of crude platitude. The chapter is more methodological discourse than a description of Indian social reality. The chapter on *Women and Society* is non-problematic. It simply deals with certain statistical calculations about women. About *Social Movements* (chapter, 23) the author holds that the separatist and sub-nationalistic movements today are 'a corollary to the nationalist movement'[3]. Corollary

1. Marx, *Early Writings*, 43-44.
2. *Sociology*, at 347.
3. *Id.* at 408.

means, in good English, a consequence or a results. The author did not work out the point in any kind of argument. Sociology is not surrealistic discipline. It seems a conceptional failure of colonial nationalism and freedom movement.

The last chapter is one Social Deviance (in India). Instead of saying there *were* certain tribes scheduled as criminal tribes in India, the author writes : 'The Indian lower castes are often believed to be crime-prone'[4]. The statement remains un-substantiated. There is conceptual confusion between social deviance and crime on the one hand, on the other, tribe, caste, elite, folk are in a mesh-work of crimes.

The text book may be weak in its non-approach and conceptual framework but it certainly contains information from a new angle. The matter is arranged in a proper form. Style is free from jargons. In terms of information and description, Part II is better than Part I. The professional course student are serious-minded, and a text book of this nature may compel them to read more books on the subject in order to become 'outward looking' (Introduction XI). Inspite of high appreciation for contribution the learned authors have made, one cannot avoid the feeling that they should have taken the task more seriously. N. R. M. Menon is correct in his assessment that 'this book is one small step' towards change initiated in legal education (XV).

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4. *Id.* at 417.

Political Theory and Organization, for Law Students, L. S. Rathore and S. A. H. Haqqi Eastern Book Company, Lucknow 1989, pp.+424; Price Rs. 50.00.

THIS book has been written especially for the prospective first-year law students of five-year degree course. It is a project of the National Law School of India University in association with the Bar Council of India Trust. As one would expect in a text, various topics of political theory and organization are approached in the spirit of basic openness and objectivity; and, consequently the book is both thought-provoking and useful. In the Preface, it is stated that the book intends to be a narration "in a clear and lucid style, so that the readers may understand them easily." That it is. As a lucid *tour d' horizon* of political theories and principles of political organization, it will be of immense value for the 1st year Law students struggling to come to grips with the discipline.

In fact, the subject matter of political science falls into two categories-normative, prescriptive and value-oriented and descriptive-analytical, fact-oriented aud empirical. In its former aspect it builds theories and lays down different values, norms, rules, etc. of political behaviour (both of men and institutions); and in the latter, it analyses those institutions and organizations that give effect to or aspire to give effect to—those norms and values. One is political theory, and the other is political organization. Law is related to both.

Law is a code of conduct, Without it, there is no order. A system of ordered relationship is the primary condition of human life at every level. Law, therefore, is the central theme both of political theory and political organization. Derived from the Greek word 'polis' (meaning city-state), politics or political science* means the knowledge or the science of the state. It is a systematic study of political institutions and political activities proceses, and, thus, deals with rules and norms of behaviour in an organized political life.[1]

To gauge the nexus of political science and law, we can take a hurried tour through the history of the western and eastern political theory.

We may start the tour with Plato. His philosopher-king in *The Republic* was supposed to rule by his knowledge of the 'Eternal Good'; and, law was outlawed. However, law does make a recovery in *The Laws*, but only as a concession to human frality. For Aristotle, the state comes into existence for the sake of life and continues to exist for the

1. I am taking Politics and Political Science as synonymous.

sake of good life. This moral function of the state is attained through the rule of law. Aristotle defines law as 'creason, unaffected by desire' Both Plato and Aristotle treate 'polity' as a unique institution having moral connotations; and value, rules or law served the need of an organized moral community.

In the middle ages the concept of moral values were replaced by such metaphysical and theological norms as Divine Law, Natural law and Eternal law. This is because in the early centuries of medieval Europe the sacred aspect of life was deemed to be superior to anything earthly. The speculation was primarily deductive; it was a system of thought that required 'belief' rather than 'reason'.

Soon changes began to appear by the end of the middle ages. The new direction was carried to a great extent by Marsiglio of Padua inasmuch as he was the first to view political activity from a secular angle. The end of Middle Ages saw the emergence of the twin movement-the Renaissance and the Reformation, and the western world ushered in the modern age with its attributes of scientific spirit an insistence on individualism and sovereign state.

It was during the transitional period (end of the middle Age and the beginning of the modern Age) that Machiavelli, known as the child of the Renaissance, appeared on the scene. His thinking had a bearing on the emergence of modern politics. He felt the urgency of a strong political system (and a strong Prince) to maintain stability and persistence of political power. Thus, the ethical-moral and theological-metaphysical political science was converted into power-oriented policy-science.

The Machiavellian idea of power grew into the concept of sovereignty in Bodin, Hobbes and later on in Bentham and Austin. With the conceptual clarity of 'sovereignty', the idea of identifying politics *only with the State* began. As a result, law no more remained a metaphysical (ethical, theological, normative) concept; but became something positive-the command of the sovereign power.

As the centuries advanced, the concept of sovereignty was widened to include the concept of absolute sovereignty (as enunciated by Bodin, Hobbes and Austin, and in its metaphysical form by Hegel) and popular sovereignty. The idea of popular sovereignty was based on the assumption that it is the people who are the sovereign and the ruler/government is only their representative. This liberal view of sovereignty, and with it the concept of democracy and constitutional and limited Government, was enunciated by Locke. In Rousseau's General Will there is a strange combination of absolute and popular sovereignty. Liberal ideas reached

full flowering in the Nineteenth Century in the theories of J. S. Mill and T. H. Green.

Liberalism enunciated the theory of the negative state and negative freedom in the beginning; and, as such the role of law was restricted to the minimum. However, with the onset of the Industrial Revolution and the growth of science and technology in the nineteenth century there was need of a change in the classical liberalism at least in the following three directions : (1) The negative concept of liberty to be replaced by the positive concept; (2) the theory of negative functions of the state to be replaced by the positive functions; and (3) a new relationship to be established between the citizens and the state.

All this presupposed an extended role of the law. Law had to have the task of social engineering. Thus, the early liberal concept of the police-state developed into the concept of the welfare state in the twentieth century.

However, with the growth of liberalism, the undercurrent of the concept of absolute sovereignty was simmering; and it came to the surface in different forms in the theory of General Will (Rousseau), and in the conception of state as "the march of God on Earth" (Hegel). This tendency, as Hobhous says, prepared the ground for the emergence of Fascist and Nazi totalitarian in the post-first world war era.

Along with liberal and absolute theories of the state, socialist/ Marxist theories also emerged in the Nineteenth Century and agained momentum in the twentieth. Marxists believe that since law is the projection of the interests of the predominant economic class in society, it is unable to dispense justice. To obtain justice, there is need to establish economic equality—in other words, a classless and a stateless society.

And, this brings us to the problem of defining the relationship between justice, law and the state.

As a matter of fact, law seeks to render justice, and, justice depends on a scale of social values. In a liberal democratic state, justice is characterized by an emphasis on personal liberty and rights and equality of opportunity. In a totalitarian state, justice is equated in preserving the existence and furthering the will of the state. In a socialist state, justice depends on egalitarian principle (mainly economic equality).

Thus, the basic postulates of justice are different according to different values. However, one element is common in all that is *justice is fairness* (although fairness has different standards); and fairness is rendered through law, rules and regulations.

Another problem. What is the role of power in rendering justice ? In other words, what is the relationship between law, power and justice ?

With the coming of the twentieth century, the notions of 'state' and 'sovereignty' were replaced by that of political system' and 'power', these notions were initiated by Max Weber. He postulated that association should be called political "if and in so far as the *enforcement of its order* is carried out continually within a given territorial area by the application and threat of physical force on the part of the administrative staff[2]. "Thus, although Weber emphasised the territorial aspect of of political association, relationship of authority or rule or order was also an essential characteristic of a political association. Harold Lasswell defines political science as "an empirical discipline, (as) the study of the shaping and sharing of power "and" a political act (as) one performed in power perspective."[3] This definition makes the phenomena of control the central concern of politics. Control (shaping power) may be exercised through domination or through cooperation (a subtle form of power). It is control exercised through law which links up the two poles of freedom and authority.

Authority is a particular form of power which orders or articulates the actions of political actors. In other words, legitimate power is authority. Weber suggests that political system may claim legitimacy on three grounds-tradition, charismatic leadership and legality. The legitimacy of authority is ultimately a matter of belief concerning the rightfulness of the institutional system through which authority is exercised. The three contemporary concepts of power, legitimacy and authority are interlinked; and different emphasis on either of these elements demarcates one ideology from the other. A democratic system values legal-rational basis of authority, while a totalitarian system may rely more on tradition and leadership.

In Eastern political theory the key concept dominating the ancient speculation was the idea of 'dharma'. The science of state was known by terms like *Rajya dharma*, *Dand Niti*, *Niti Shashtra* and *Artha shastra*, It is interesting to note that all these terms prescribed rules of right

2. Here, 'law' seems to be not much different from the traditional juridical concept of law as the command of the sovereign power inasmuch as enforcement of *order* is equal to enforcement of law. (In the above q otation emphasis is aded). See, May Wehen, "Politics as Vocation", in Gerth and Mills, *Forom Max Wehen*, New Yark, 1946

3. See, Harold D. Lasswell, *The Analysis of Political Behavtour*, London, Routledge & Kegan Paul Ltd., 1948; and Harold Lasswell & Abnaham Kaplan, *Power & Society*, New Haven, Yale University Press, 1990.

conduct and as such were co-terminous with the concept of 'law'. The force of sanction behind the state (*Raja-dharma*) involved *Dand Niti*. The rules of behaviour regarding social, political, and economic relationships were rooted in *Dand Niti*. *Nitishashtra*—the science of wisdom and right conduct—became the source of policy—making and descision—making. *Artha shashtra* meant in narrow sense the science of wealth or money; but in the broader sense it meant the science that dealt with acquisition, protection and governance of territory.

In fact, ancient Indian political theory was the outcome of Indian philosophy; and, the chief mark of Indian philosophy in general was its emphasis upon the spiritual. Materialism undoubtedly had its day (for example Charvak), but its influence on philosophy has been negligible. As such, political theory was also dominated by the concept of *dharma*. *Dharma* included in its fold duty, law and right (both in the sense of rightful claim and right as opposed to wrong).

The vedic literature emphasised on the fundamental aims of the state as peace, order, security and justice. The King was the upholder of law, order and morality. In the post-vedic literature, political theory was more pronounced. The epics, *Dharmasutras*, *Smrities* and *Sutras* described the conduct of life among Arayans and their social-political organizations and religious functions and obligations.

The key-note of Islam was equality, solidarity, brotherhood and freedom. It was another version of righteousness. The Islamic law, as embodied in *Shariat*, recognized no distinction on the basis of birth, caste, creed, status, education, race, nationality, religion, etc. Thus, the early Islamic state was based on the principles of democracy.

However, the democratic tone of Islamic political theory underwent a sea-change in the middle ages. By the time India came under the domain of Delhi Sultanats, the state became a theocratic Islamic state. All the powers-executive, legislative and judicial-were vested in the King. The concept of absolute Kingship continued under the Mughals. *Vox Populi* had no existence. However, Akbar developed certain principles of national secular-welfare state. The duty of the state was not to rule, but to guide.

But, all said and done, Indian philosophy and its corollary political theory had lost its earlier dynamic spirit and the depth of its ideas in the Middle Ages. By the seventeenth century India had become the victim of British power, which sapped whatever little was left of her past glory.

However, the coming of British brought revival in education and such movements as *Brahmo Samaj* and *Arya Samaj* heralded the Indian Renaissance in the nineteenth century. Then came the National Movement culminating in the Indian Independence.

The Indian Renaissance sprung forth the spirit of nationalism and various western ideologies that flourished in the 19th and the 20th centuries had a unique character of their own. Liberalism, extremism, Hindu revivalism, communism and socialism—all had one point in common; and that was to win self-government.

In the welter of these ideologies, Gandhism arose with its own majesty. The cardinal principles of Gandhism are truth, non-violence and self-government; and, on these precepts arose the edifice of *Sarvodaya*, emphasising self-rule and selfresraint.

In concluding the tour of the Western and Eastern political theory, we may return to the starting point by way of emphasising the nexus of law and political science/political theory. It is manifest from the above that different shades of political theories gave different concepts of law—moral, theological metaphysical, positive, scientific, etc.-and conceived it (law) as the essence of an organized life being the code of conduct of human behaviour. Thus, for a student of law, political theory and political organization become an area of chief interest.

This book is second in the chain of pre-law education series; and as a text book for the students of law has been able to fulfill the all-important function of explaining logically the link between political science and law. It not only explains in a lucid style the conceptions of state and government, sovereignty, natural law and various western and eastern ideologies, but also analyses with clarity various aspects of political organization as the forms of Government, its organs and classification along with the theories of representation and public opinion.

Thus, although the book is essentially a students text, it is well-researched. It is informative and factually sound.

But there are certain gaps as well.

First, there is neglect of those theories and concepts that arose in the post World-War period as a result of behavioural revolution. For example, there is no mention of 'political system' or of 'a-political politics.' It is also silent about the connected themes as power, influence, authority and legitimacy. All these have a bearing on rule-making, rule-executing and rule-adjudicating; and are thus closely connected with the discipline of law.

Second, the conception of Justice-social, economic and legal also does not find a place in the volume. This omission becomes conspicuous, because the concept of justice is not only the core of political science, but the dispensation of justice is the basic function of law.

To conclude, We may inclined to think that *Political Theory And Organization* does too much and too little. It does too much, because it deals with lucidity all the themes of traditional political theory and organization that are interlinked with law. It does too little because it does not include recent political theories and processes in its fold.

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Society and the Criminal, Vth ed. (1989) By Jehangir M. J. Sethna, N. M. Tripathi Private Ltd., Bombay, pp. 407. Price Rs. 100.

THE original book published in 1951 by Prof. Sethna was indeed a landmark in Indian criminological literature since there was very little of such literature at that time. The revised editions of the book are a definite pointer to its popularity through the last four decades.

The book is divided into three parts with an 'introduction' in the first twenty pages. The first part discusses the inter-relation between society and man, the state and the individual, the nature and utility of law, the definition of criminal and the types and classes of criminals.

Part II of the book deals with such difficult problems as causes of crime and remedies, the objectives of punishment and the suitability of the Indian prison system for the purpose for which it exists.

Part III of the work is devoted to the study of juvenile delinquency, its causes and prevention, the role of juvenile legislation and various institutions which are concerned with the prevention of juvenile delinquency and treatment of delinquents.

The author has risen above the criminologists of the present day, more particularly of the West, whose approach is characterised by objectivity and inductive reasoning. This is not to say, however, that the work under review is based entirely on subjective speculations. In fact, a highly idealistic and philosophical approach seems to have been combined with such objectivity as is readily discernible in this difficult branch of knowledge. This approach of the author is well-borne out by the following lines :—

The object of this work being to dive deep into the problems of crime and to suggest theories and methods both of dealing with the delinquent and of preventing delinquency itself, the topics embraced are diverse and relate to different branches of human knowledge-theology, ethics, psychology, the philosophy of education, literature, history, politics, economics, art, music, science, medicine, genetics....[1]

The highly idealistic approach of the author becomes evident when he appeals for co-operation between law and science, between judges and lawyers, police officers and probation officers, between medical men, psychiatrists and psychologists. With the same fervour

1. J. M. J. Sethna, *Society and the Criminal*, Fifth Ed., 16, 1989.

he lays stress on cultural and compulsory moral education, as being the backbone of an ideal educational system.[2]

Again, the author feels that judges, lawyers, probation officers, teachers, and the officers in Children's Home should be persons well-trained in psychology, sociology and allied social studies. To the author, the study of law should not be a mere positive study; it should be a normative study and should motivate students, lawyers and officers to do research and find out better principles which would be more in consonance with the higher laws of true justice.[3] The idea is indeed novel, but one does not know as to when and how such an ideal may be achieved.

An important suggestion by the author for achieving greater approximation to justice in criminal cases is that of the appointment of public defenders, parallel to the existing institution of public prosecutors. The author feels that the existing help rendered by the state and legal aid societies is hardly adequate to meet the situation.[4]

Chapter V of the work which deals with meaning, nature and the volume of crime appears to have left out from its purview much of what ought to have been included. Almost total absence of statistical data defies explanation.

Chapter VI dealing with remedies for crime is indeed a comprehensive study of practically all possible factors that may directly or indirectly contribute to crime, but a student of our universities will perhaps be disappointed if he is looking for a systematic examination of the existing theories on the causes of crime and relatively more important criminogenic factors. The chapter, otherwise, makes an interesting study of experiences and wisdom of a large number of workers in the field of criminology and that of the author himself.

In Chapter VII, the author discusses at great length the purposes, modes and utility of punishment along with a short account of the history of punishment from ancient times. The corporal and capital punishment besides imprisonment as modes of punishment have been elaborately dealt with and the author has concluded the chapter by emphasizing on individualization in the treatment of offenders, compensation by the offender to his victim and finally on the importance of reformation.[5]

2. *Ibid.*, at vii, Foreword to the first edition.
3. *Ibid.*, at 51.
4. *Ibid.*
5. *Id.* at 249.

A study of the prison system in India and elsewhere made in Chapter VIII of the book will be rewarding to the readers. The chapter contains a lucid description of the prison systems of England, United States, Soviet Russia and Japan besides that of India. The advantages and disadvantages of imprisonment have found adequate place in the Chapter. The author has recommended hard labour of an elevating type-productive for the state and useful to the prisoners. His emphasis on moral and cultural education in the prisons also deserves attention.

Rest of the Chapters, namely Chapters IX to XI are entirely devoted to a study of juvenile delinquency, its causes and prevention, and of the various institutions for the purpose of prevention of juvenile delinquency and the treatment of juvenile delinquents. The legislative frame-work discussed by the author has become partly outdated in view of the enactment of the Juvenile Justice Act, 1986 by the Central legislature.

What makes the book a refreshing study is the simple and lucid style that prevades the writing and the indomitable courage and conviction with which the author has made his suggestions for reform inspite of his awareness of the realities of existing situation in India.

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Bills of Lading in International Law and Practice, T. K. Thommen, Lucknow : Eastern Book Company (1985) pp. XIII+96. Rs. 80.00

A bill of lading is a written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. It is a written memorandum, signed by the shipowner in his capacity of carrier, acknowledging the receipt on board the ship of merchant's goods which he undertakes to deliver at a designated place to the consignee. The memorandum has usually three functions—it serves as an evidence of contract for carriage of goods, as a receipt for the goods shipped containing the terms on which they have been received; and as a document of title for the goods specified therein. The contract of the shipowner in the bill of lading is that they will deliver the goods at their destination "in like good order and condition", in which they were at the time of shipping. Development of the bill of lading, itself a creature of commercial necessity, has been steadily in the direction of increasing its utility. The international movement towards standardization of the contract of carriage have in common the objective of making the bill of lading a more efficient and effective commercial instrument. However, in the complexity of the conflict of laws the problems are often increased because of the contractual and proprietary aspects of the bill of lading as well as because of its characteristic as an acknowledgment of the receipt of goods delivered by the shipper to the carrier.

It was at one time known as a "bill of loading". The expression was perhaps first used in 1599 A. D., but the phrase "*chartre be freight ou endenture*" seems to have been made in 1375 A. D. With the development of trade, it became recognized as a negotiable instrument in which the shippers, the carriers and the consignees became increasingly interested. Subsequently, it became the customary practice to show on the bills of lading the terms of the contract for the delivery of goods and its receipt by the ship, and from time new conditions were in contracting the carrier out of liability for some kind of loss or damage to the goods. This gave rise to great diversity between conditions on which goods were carried by sea and considerable uncertainty about the liability which were still attached to the carrier.

The Bills of Lading Act, 1856 and the Carriage of Goods by Sea Act, 1952 are the two principal Indian enactments affecting the contract of affreightment. The Act of 1856 enacted a year after the British Bills of Lading Act, 1855 was placed on the statute-book. Prior to the British legislation on bills of lading, the transferee of a bill of lading did not acquire any right to sue for a breach of the contract in his own name

and was not liable to be sued upon the contract. The (Indian) Bills of Lading Act, which closely follows the language of its British predecessor, was placed by the Indian legislature with the same object in view. So far the admiralty jurisdiction is concerned, the Colonial Courts of Admiralty Act, 1890, passed by the British Parliament, amended the law regarding the exercise of admiralty jurisdiction in British Dominions and elsewhere outside the United Kingdom. On the basis of the Act of 1890 the High Court in Calcutta became the Collonial Court of admiralty. By the provisions contained in section 2, of the Colonial Courts of Admiralty (India) Act, 1891, the High Courts of Bomaby, Calcutta and Madras were expressly declared to be colonial courts of admiralty to exercise jurisdiction over the maritime matters. The jurisdiction was continued by section 106 of the Government of India Act, 1915, and by section 223 of the Government of India Act, 1935. This jurisdiction is further continued by Articles 225 and 372 of the Indian Constitution.

The passing of the (Indian) Carriage of Goods by Sea Act, 1925 was the outcome of the policy recognized by the International Law Committee in Brussels, held in 1922 for the purpose of framing uniform rules declaring the minimum rights, liabilities and immunities of a common carrier which should be attached to all bills of lading. The provisions of this Act of 1925 closely follows its British ounterpart with necessary modifications. It consists of seven sections and a Schedule. The Schedule to the Indian Act is the same as that of the British Act of 1924. It is still based on the British Act of 1924 embodying the Hague Rules as they stood prior to the adoption of the Visby Rules, although the British Parliament repealed the 1924 Act by the Carriage of Goods by Sea Act, 1971 and re-enacted the Hague Rules as amended on the basis of the Visby Rules.

Now Dr. Justice T. Kochu Thommen[1] has presented a concise treatment on international law and practice on bills of lading. It contains the fifth series of Public Law Lectures delivered by the author on 26-28 March 1984 in the Department of Law, the University of Cochin. It is written exclusively within the world of international regulation and comparative study of state practices on the subject-matter. The book under review presents an analytical examination of the provisions of international instruments like the Hague, Visby and the Hamburg Rules as well as the general practice of maritime states con-

1. Dr. Justice Thommen is an eminent Indian scholar of international law and has got recognition for his excellent contribution, *International Legislation on Shipping*, which is published by the United Nations in 1968.

cerning bills of lading and their relationship with charter parties. Some of the private international law issues relating to it have been examined by the author.

The principle that a carrier cannot stipulate exemption from certain minimum liabilities and responsibilities was not internationally accepted before the Hague Rules of 1924. Notwithstanding the prescription of these minimum liabilities and responsibilities, the Rules have not succeeded in striking a fair and equitables balance between the conflicting interests of shipowners and shippers To some extent the tilt in the Hague Rules in favour of the shipowners has been corrected by the Visby Rules of 1968. Nevertheless the cargo interests legitimately feel that the Hague-Visby Rules do not ensure equal bargaining position for them. Dr. Justice Thommen points out that the Hamburg Rules adopted by the UN Convention on the carriage of Goods by Sea, 1978 are, from the point of view of the cargo owners and in the larger interests of international trade, a considerable improvement on the Hague-Visby Rules, particularly in regard to the prescription of the minimum liabilities of a carrier of goods by sea and the applicable law and the competent forum. The author points out that neither the Visby Rules nor the Hamburg Rules have been adopted in India.

Chapter I on the nature and functions of bill of lading begins with a good analysis of the distination between the "shipped" and the "received for shipment" bills of lading. The master of the ship in England, until 1977, had no authority to issue bill of lading for goods which were not shipped while the US Pomorene Act of 1916 had placed the holder of the bill of lading in a stronger position. However, the Hambnrg Rules provide, in both the situations, that bills of lading constitutes *prima facie* evidence that the goods are in the custody of the carrier for the purpose of carriage. Having observed the municipal laws of Czechoslovakia, France, the GDR, Italy, Poland, the UK, the USA, and the USSR on the subject the author points out that the carrier had no obligation under the Hague Rules to show both the number of packages, pieces, quantity and the weight of the goods. But the Humburg Rules provides that bills of lading must include the particulars regarding the general nature of the goods, the identification marks, the number of the packages, pieces, the weight of the goods or their quantity alongwith an express statement as to the "apparent conditions of the goods". So far as the nature of bill of lading as evidence of the terms of contract is concerned, the author has mentioned that the freedom of contract in case of bill of lading, unlike in the case of charter parties, is curtailed to the extend of the restriction imposed under the Hague

Rules or other mandatory rules of law. However, the author has only given a sweeping reference to the clauses concerning jurisdiction, responsibilities, deviation, demise clause, arbitration clause, and etc. He has not discussed these aspects in detail, nor any examination of municipal laws has been made at this place. Though some private international law questions of contract have been eliminated in the bills of lading by the Hague Rules and national laws of leading maritime states, difficulties still exist. It gives rise to peculier problems attributable to its transferability and to attempts by carrier and shipper to stipulate an exclusive form which will be binding on the ultimate transferee although he was not a party to the original contract of carriage. Essential to the bill of lading's function as a document of title is the doctrine that title to goods covered by such a bill is merged or embodied in the document. In the bill's proprietary aspect, the main problem is whether a documentary transaction in which a property interest in goods is created should be governed by either the *lexsitus* of the good or the of documents in which title to goods is embodied. The solution to this problem is of considerable importance to those involved in international commercial transactions.

Chapter II deals with three issues relating to charter-party and bill of lading; shipper's contraet where he is not the charterer; and incorporation of charterparty in bill of lading. Thus it devotes to the theme of bill of lading for goods in chartered ships. When the charterer himself is not the shipper, he usually enters into sub-contract of carriage with other shippers. Here the charterparty operates either as a demise charter or other than by demise. Quite often Liner Companies charter ships from other shipowners and most of their bills of lading contain demise clause to avoid that liability. To bind a shipper, who is not a charterer, by the stipulations of the charterparty, it is essential that the charterparty is expressly incorporated in bill of lading; otherwise they cannot become terms of the contract contained in bill of lading, nor can they be enforced by or against the shipper, consignee or endorsee. Since the Hague Rules did not apply to charterparty and remained silent on the question of incorporation of the charterparty in bill of lading, no uniform practice can be observed in the state behaviour. The position clarified by the Humburg Rules in favour of the cargo interest is noteworthy.

The first three paragraphs of Chapter III have been repeated to support the theme which the author has tried to develop at other places in this book. Besides the reference of the nature and definition of bill of lading, liability of carriers in case of a "shipped" and "received for shipment" bill of landing, definition of shipper and consignee under the

Hamburg Rules alongwith the reference of the UN Convention of International Multimodel Transport of Goods (1980). Chapter III addresses to some of those issues where the Hamburg Rules are improvement upon the Hague-Visby Rules. It is important to note here the author's treatment of the problem concerning the commencement and termination of the carrier's liability as well as the liability of the "carrier" and "actual carrier". The new definition of contract of carriage by sea covers all obligations arising from the time of taking charge of the goods at the port of loading until they are delivered at the port of discharge. The Hamburg Rules have stipulated that the carrier is not absolved of his liability as a carrier by reason of the "actual carrier" performing the whole or part of the carriage. Where the contract of carriage provides explicitly that a specified part of the carriage covered by the contract shall be performed by a named person other than the carrier, the carrier may by specific provision in the contract exempt himself from liability with respect to that part of the carriage performed bp the other person.

Chapter IV, dealing with "International Unification", is broadly divided into three major parts : application of the Hague—Visby Rules; application of the Hamburg Rules and the competent forum; and, proper law and forum outside the ambit of the international convention. The provisions of the Hague Rules have been incorporated in the municipal laws by several states in a form which is at variance with the Hague Rules as a result the rules are not uniformly applied to bill of lading. Thus, conflicts arise due to divergent interpretation of the uniform rules by national courts without regard to their fundamental objective. At this place, the author has examined in detail the state practice of 17 countries, while making a sweeping reference of India, Burma, Denmark, Finland, Pakistan, the South Africa, and Sweden. One can easily notice that the author has not discussed the Indian law on the subject. He has indicated that, subject to public policy and the mandatory provisions of municipal laws, parties to a contract of carriage are generally free to stipulate the applicable law. In cases where the applicable law is not stipulated by the parties, the different courts adopt different criteria by applying either the law of the place of contract, the law of the flag or the law of the common nationality or the system of law which according to them is most reasonably connected with the contract, and perhaps offers the most satisfactory solution. The author has rightly concluded that although a large number of states have enacted laws on the basis of the Hague or the Hague—Visby Rules, the Brussels Convention of 1924 has not been implemented in many of the states. The lack of uniformity in incorporating the provisions of the Convention in municipal laws has resulted in conflicts and divergences. The amendment of the Hague Rules by the Visby Rules have not corrected the position. The Hamburg Rules, which are far better than the Hague—Visby Rules both in regard to the applicable law and the competent forum, are of much wider application and the proper courts are specified with reference to the demands of justice, business efficacy and balance of convenience.

The book under review provides a useful introduction to an important and complex branch of the law. The growing importance of the bills of lading in recent years is one of the phenomena of our times. Of course, it is not an isolated phenomenon but part of the larger canvass of maritime law and the carriage of goods by sea. For some strange reason, this whole field is regarded as esoteric and the pecualiar domain of the specialist—perhaps parts of it are. The subject matter of the book is consequently of concern to every one. This is a scholarly work of high standard.

The only criticism which can be brought against this book is that the author has not given separate or independent treatment to the state practice of India. No attempt has been made to discuss the cases on the Bills of Lading Act, 1856 and the Carriage of Goods by Sea Act, 1925. The Supreme Court of India and the High Courts of Bombay, Calcutta, Kerala, Madras, and Saurashtra have made important decisions which can be considered as reflecting Indian practice on bills of lading and the contract of affreightment, but they do not find any place in the book. Moreover, one may also be disappointed to note that the cases like *the President of India v. Metcalfe Shipping Co. Ltd.* and *Glyn Mills and Co. v. East and West India Dock Co.* have got references only at two places in the footnotes. Further, the reader can easily find a few printing mistakes at page 12 of the book.

The chief merit of the book, however, lies in the skill employed in examining some of the issues in such a manner that they create interest in the reader and provoke thinking on his part. The learned author has himself so much absorbed the problem relating to state practice and international law of bills of lading that he has been able to express it with remarkable clarity and completeness. Among the special features of the book are the detailed analysis about the applicability of the Hamburg Rules and the competent forum. While the state practices and conflict of law problems will be of particular interest to readers, the treatment of theme relating to proper law and forum outside the ambit of the international convention is noteworthy, where it is addressed to the questions of law stipulated by the parties, applicable law in the

absence of stipulation and the choice of forum. The author concludes that it would be of immense advantage to international trade if the Hamburg Rules are in their entirety promptly incorporated in national legislations. The book is very instructive and useful to both students and practitioners of law. They will find this work extremely valuable and as affording great help to them in shipping law.

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Agreements For Arms Control : A Critical Survey, Jozef London : Taylor and Francis Published for the Stockholm International Peace Research Institute (1982), 387+xvi pp.

THE approach of this book is clearly indicated in its sub-title : *A Critical Analysis* of existing arms control agreements is presented for the purpose of illustrating the inherent weaknesses within the present system of arms control and arms limitation experiments. Included within the scope of the author's analysis is current negotiations, especially those within the framework of the United Nations. This excellent book was published by SIPRI on the occasion of the 1982 United Nations General Assembly Special Session on Disarmament. But, tragically, the problems discussed were not resolved. Still, this book remains relevant, and will remain equally timely, throughout the remainder of the present century. Yet, this text demonstrates a slightly modified thrust from the series of scholarly volumes produced by SIPRI, during the past several years,[1] in that bilateral treaties and multilateral conventions are examined for the purpose of detecting weaknesses in terms of their effectiveness (or lack of effectiveness) in controlling the arms race. Prior SIPRI studies have taken a more positive approach and have rendered major contributions to the study of armaments.[2] However, this volume represents a major advance by critically evaluating those international "agreements freely arrived at in time of peace among sovereign states, through a process of formal intergovernmental negotiation, and providing for mutual rights and obligations."[3] In a larger sense, the aim of these negotiators was to "produce an international climate conducive to disarmament."[4]

Emphasis is placed on recent negotiations in terms of those arms control agreements that have entered into force during the recent past. Although the significant experiments of the League of Nations and the early post-war efforts of the United Natons are covered, this publication

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1. E. g., A. Westing, Warfare in a Fragile World : Military Impact of the Human Environment (1980); Gormley, Book Review, 17 Willamette L. Rev. 239 (1980).
2. This phrase is taken from the title of the Yearbooks, World Armaments and Disarmament. See e. g., World Armaments and Disarmament : SIPRI Yearbooks 1968-1979 : Cumulative Index (1980) for additional listings of the topices discussed in the book under review, in conjunction with notes 30 and 54, infra.
3. J. Goldblat, Agreements for Arms Control : A Critical Survey xv (1982) (hereinafter cited as Agreements).
4. Id.

is concerned with post World War Two agreements. Of course, scholars should not lose sight of the herculean efforts of statesmen throughout the the interwar period, as they desperately sought to avoid the impeding conflict. In terms of arms control and the prevention of war, the foundation was laid for the Nuremberg Judgments.[5] In a narrower sense, some humanitarian laws, of warfare were adopted, such as the 1925 Geneva *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.*[6] This convention had a high degree of compliance, as, for example, during World War II, and it is a grevious loss for mankind that its prohibitions are presently being violated.

In looking back at the programmes of the League of Nations, the 1932 First World Disarmament Conference not only produced limited though significant results, but it raised basic issues that continue to plague current attempts to at least begin the first essential stages toward arms control. For instance, verification to treaty commitments and the possible imposition of sanctions against violators were examined by the League, Indeed, moral disarmament was employed as an umbrella concept, and as Dr. Goldblat concludes : "Much can be learned from the record of its deliberations, which includes the most thorough examination of the technical, economic, legal and moral aspects of general disarmament ever made. Many ideas put forward at the League of Nations have been revived in recent years, and a number of points made then remain topical now."[7] Unlike the United Nations Charter, the League Covenant contained provisions that required the reduction and limitation of armaments. A different emphasis is to be found in the U. N. Charter.

Chapter II, *Early United Nations Arms Control Activities,*[8] considers the early confrontations between the U. S. and USSR, particularly as attempts were made to control potential atomic warfare. As far back as the Baruch Plan, offered at the first meeting of the U. N. General Assembly, serious proposals were offered for the creation of an international development authority. Yet the two superpowers could not reach

5. E. g., Paris (Brian-Kellogg Pact) (entered into force 1929), reproduced id. at 136-37.
6. Text reproduced, Agreements, supra note 3, at 135-36.
7. Id at 11. A similar conclusion, concerning the value of League efforts, was reached in W. Gormley, The Implementation of the United Nations Human Rights Covenants : Contemporary Legal Precedent and Future Procedural Remedies (Unpublished thesis, Victoria University of Manchester, (1972).
8. Agreements supra not 3, at 12-23.

agreement, as concerned either the regulation of atomic warfare or the peaceful uses of atomic energy, The farsighted proposals of President Eisenhower, contained in his Atoms for Peace, designed to promote disarmament by an indirect approach, sought to utilize atomic power for peaceful purposes. On the positive side, his proposal led to the establishment of the International Atomic Energy Ageney (IAEA) in 1956. This agency exercises the major role in supervising compliance with the Treaty on the Non-Proliferation of Nuclear Weapons.[9]

The lack of basic agreement was also reflected in attempts to regulate conventional armaments, as can be seen from the early meetings of the U. N. Disarmament Commission. As such, this portion of the book reexamines the U, S. and Soviet approaches, traces of which are still evident today as the necessity to eliminate the threat of nuclear war becomes unchallengable. Significantly, serious programmes were offered by all of the major powers in 1954. While it is impractical to review the series of detailed plans considered by the United Nations, it must be noted that considerable experience was gained, which may still be of value if present day negotiators seek realistic solutions, particularly as concerns nuclear disarmament.

Since 1963 a number of arms control agreements have been reached. Yet, basic problems remain unresolved, e. g. verification of weapons stockpiles, the acceptance of compulsory jurisdiction of the International Court of Justice, and subsequently, the establishment of a United Nations peace observation corps[10] (or at a later stage a peace keeping force). Rather than adopt comprehensive disarmament solutions, U. N. members have only been willing to surrender limited portions of state sovereignty by accepting partial measures of disarmament—the subject matter of the third chapter.

Chapter III, *A Review of the Obligations In the Arms Control Agreements,*[11] is the most significant portion of the book, for the reason that a highly critical evaluaation of the main provisions contained in the series of treaties is presented. Hence, a systematic analysis is given of each major arms control agreement in terms of seven precise points of reference :

9. Id. at 15. Convention reproduced id. at 172-74. See also, SIPRI, Internationalization to Prevent the Spread of Nuclear Weapons (1980); and The NPT : The Main Political Barrier to Nuclear Weapon Proliferation (181); Gormley, Book Review, 12 Georia J. Int'l and Comp. L. 459 (1983).
10. Agreements, supra note 3, at 22-23.
11. Id. at 24-29.

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10. Agreements, supra note 3, at 22-23.
11. Id. at 24-29.

(a) restrictions on nuclear weapon testing; (b) strategic arms limitation; (c) the non-proliferation of nuclear weapons; (d) the prohibition of non-nuclear weapons of mass destruction; (e) the demilitarization, denuclearization and other measures of restraint in certain environments or geographic areas; (f) the prevention of war; and (g) the humanitarian laws of war.[12]

The purpose of the seven point analysis is to demonstrate the inherent weaness in specific treaties and supporting organizational structures; and, secondly, to detect violations. The aim is to arrive at some tentative conclusions as to their effectiveness. Here, then, the approach of the legal scientist has been adopted, in order to demonstrate how international law and politics function, as contrasted with the more traditional practice of examining the language of treaty texts and official pronouncements of governments. As such, the manner in which the law functions becomes the primary criterion for detecting the future thrust of the arms race. For example, the number of explosions and extent of nuclear testing, regardless of the provision of the Partial Test Ban Treaty, are indicated.[13] Obviously, a full review of the numerous multilateral conventions is necessarily beyond the scope of this review, but a typical illustration is the sharp criticism directed against the SALT II agreement,[14] because, of the continued arms build up that is permitted. Moreover, not all weapons systems are included within the scope of SALT I and II (or even the suggested SALT III). As Dr. Goldblat concludes :

> It is even more disturbing that with the high number of warheads permitted on balistic missiles and with the high number of cruise missiles permitted per bomber, the total figure for US and Soviet missile re-entry vehicles and bomber weapons—an important measure of strategic power—may rise in the period from the signing to the expiration of the (SALT II) Treaty by roughly 50-70 per cent.[15]

He further maintains that : "Equally dangerous from the arms control perspective would be the deployment of ground and sea-launched long-range cruise missiles."[16]

12. Id. at 24.
13. See e g., Table 3.1., Nuclear Explrsions, 1945-81, id. at 25.
14. Id. at 33 38.
15. Id at 37. By way of illustration, see also Figure 3.2., The Strategic Nuclear Warhead Inventories of the USA and the USSR, 1972-85, id. at 36.
16. Id.

The *Non-Proliferation of Nuclear Weapons*,[17] along with attempts to utilize nuclear energy for peaceful purposes, without accelerating the arms race, has been an area of primary concern to SIPRI in a series of contemporary studies.[18] That is to say, the control of nuclear power has been of primary concern, lest the spread of nuclear technology enable additional states to join the arms race (or even terrorist groups). The NPT has had some positive effect, even though France and China are not parties. Moreover, the August-September 1980 second NPT review conference failed to reach agreement. Though the short-comings of the NPT system cannot be recounted here, it remains valid to conclude that the NPT remains one of the most significant arms control conventions, in force, for the control of strategic weapons. Similarly, the 1972 Biological Weapons Convention, along with the 1925 Geneva Protocol mentioned above,[19] has been violated by the superpowers. Still, these multinational treaties have, to a significant degree, helped to prevent the acceleration of chemical and biological weaponry. It is indeed regrettable for all of mankind that the single most successful arms control measure has been drastically weakened by U. S. actions in South East Asia and Soviet violations in Cambodia and Afghanistan.[20]

Of growing concern to statesmen seeking to avoid "armageddon" (and to the serious participants at SIPRI symposia) is the safeguard of the environment from mass destruction. The Environmental Modification Convention prohibits "environmental modification techniques", namely, changing the composition or structure of the earth, "including its biots, lithosphere, hydrosphere and atmosphere, or outer space."[21] Previously this newer area of "warfare" has not received as extensive a coverage by SIPRI as the areas mentioned above, but the potential of the ENMOD Convention (along with the outer space treaties, in the reviewer's submission) must not be minimized if mankind is to survive on this planet. But, within this context, the convention "has not banned all environmental modification techniques for hostile purposes."[22] On

17. Id. at 38-46.
18. E. g., SIPRI, Nuclear Energy and Nuclear Weapon Proliferation (1979); Gormley, Book Review, 14 Vand. J. Transnat'l L. 687 (1981). Notes 2 and 9 supra, in connection with notes 30 and 54 infra.
19. Note 6 supra SIPRI, Chemical Weapons : Destruction and Conversion (1980); Gormley Book Review, 14 Vand. J. Transnat'l L. 229 (1981).
20. Agreements, supra note 3, at 51.
21. Id. at 52 ENMOD Convention, reproduced id. at 228-31. See also Table 3.2, Environmental Modification, id. at 52. See generally, A. Westing, supra note 1; and W. Gormley, infra note 26.
22. Agreements, supra note 3, at 52

the positive side, however, "an agreement....bans the use of a specific method of warfare..and it establishes a new humanitarian law of war."[23] New weapons of mass destruction such as radiological weapons, possibly directed from outer space,[24] are in the offing. As a result, they must be regulated by means of additional humanitarian conventions. At the very least, positive international law, stemming from treaty commitments must be implemented and enforced.

Closely aligned to this topic and perhaps even an initial step toward global arms regulation is the *Measures of Restraint in Certain Environments or Geographical Areas.*[25] Outer space is one of the obvious areas in need of immediate protection, as the arms race spreads.[26] However, the four space treaties do not provide the comprehensive system of protection. By way of comparison, the sea-bed has been "covered" to a greater extent, notwithstanding the fact that "the Sea-Bed Treaty has failed to bring about the demilitarization.."[27] required to protect the ocean ecology. SALT II extended the prohibition on military activities conducted upon the ocean floor, but it is limited to fixed nuclear installations or bottom-crawling vehicles specifically designed to use nuclear weapons. "But the Sea-Bed Treaty permits the use of the sea-bed for facilities which service free-swimming nuclear weapon systems."[28] In the reviewer's submission, the recognition by SIPRI of the necessity to protect the ocean ecology, including the sea-bed (inner space) and simultaneously, preserve outer space (including deep space) for the world's people, represents one of the Institute's major insights to legal science.[29] In this context, special consideration is given to the regime in Antarctica, and to hemispheric regions such as Latin America, Europe, and the proposed nuclear free zone in the Indian Ocean. SIPRI has been especially conscious of the military build up—including the production of armanents and possibly even nuclear devices—by the third world states (i.e., LDCs) in the Western Hemisphere, in spite of the growing poverty within this

23. Id. at 53.
24. B. Jasani, Outer Space—Battlefield of the Future? (1978); Gormley, Book Review, 6 Ann. Air and Space L. 654 (1981).
25. Agreements, supra note 3, at 56-73. See e. g., A. Westing, Ch. 2-7, at 44-182 (an analysis of environmental impacts within various geological regimes).
26. See generally, W. Gormley, Human Rights and Environment: The Need For International Cooperation 32-34 (1976).
27. Agreements, supra note 3, at 59.
28. Id.
29. E. g., B Jasani, Outer Space—A New Dimension of the Arms Rece (1982).

region. In fact, present conflicts were anticipated in view of existing sophisticated military establishments,[30]

Of special significance is the 1967 Treaty of Tlatelolco; it "prohibits the testing, use, manufacture, production or acquisition by any means, as well as the receipt, storage, installation, development and any form of possession of nuclear weapons in Latin America."[31] Former colonial powers that still retain some interests in Latin America—i.e. France, The Netherlands, U. S.—are dealt with in the protocols. These states undertake not to introduce nuclear devices into Latin America. Under protocol II nuclear powers agree to respect the denuclearization of Latin America and to refrain from acts that are inconsistent with the Treaty of Tlatelolco.[32] The aim of states parties is to create a nuclear free zone. This zone also extends to vast ocean areas of the high seas, beyond the two hundred mile exclusive economic zones. The majority of Latin American states have ratified.[33] Only Argentina has signed the text but has yet to become a party—a situation that could have proved fatal to the Argentine government, during the recent Falkland's war. There were suggestions that Great Britain was prepared to undertake nuclear strikes against the Argentine mainland if hostilities had taken a disasterous turn. The legal obligations—perhaps as customary international law—against the introduction and explosion of nuclear weapons would have presented grave legal consequences and possibly state responsibility. What remains unclear is the extent to which Argentina could assert legal rights, pursuant to the convention which had been signed but not ratified, in view of state practice in Latin America. On the other hand, there are a few ambiguous points in the treaty, as for instance, explosions for peaceful purposes Additional conflicts will, necessarily, arise over the unusually large areas of the Atlantic and Pacific oceans sought to be included within the nuclear weapon-free zone, if such traditional rights as freedom of the seas and exploitation of the sea-bed are claimed. Thus the Treaty of Tlatelolco (along with other attempts to create nuclear-free zones in the Indian Ocean, Africa, South Asia and the South Pacific) is establishing a precedent for the restriction of nuclear materials and the

30. Latin America, in Agreements, supra note 3, at 63-68, in conjunction with J. Goldblat and V. Millan, Ch 12, Militarization and Arms Control in Latin America, in World Armaments and Disarmament, SIPRI Yearbook 393-425 (1982) (a shocking expose of the accelerating arms race By LDCs).
31. Agreements, supra note 3, at 63.
32. Cf. Robinson, The Treaty of Tlatelolco and the United States: A Latin American Nuclear Free Zone, 64 Am. J. Int'l L. 302 (1970).
33. Only Cuba and Guyana have not signed the treaty.

prohibition against the spread of nuclear weapons. Accordingly, these nuclear-free areas could serve as a first step in preventing further nuclearization.

The European experience is more familiar. The 1975 Final Act of the Conference on Security and Cooperation in Europe has been considered as an initial step toward the creation of confidence building measures. Yet, present negotiations between the superpowers, and their European allies, illustrate all too clearly the shorrtcomings in existing treaty systems, especially as concerns nuclear armaments.

The Prevention of War[34] has resulted in the establishment of rapid means of communication between the capitals of the nuclear powers. "Hot lines" have served a useful purpose, primarily when technical faults in monitoring equipment have indicated adverse activity. Direct communications between heads of governments offer stabilizing influences. These hot line agreements will be further implemented by space communications, as for example through the INTELSAT system. Obviously, the links between Washington and Moscow are of the gravest concern for the moment (at least until Peking is included). Dr. Goldblat very effectively sets forth the problem of an accidental war based upon mechnical failures or communication breakdowns. He maintains, and quite correctly, that

> there have been many false alarms of possible missile attack, caused mainly by misleading or ambiguous information from sensors aboard satellites or from early-warning radars, but also by computer malfunctions or failures in communications equipments; in several cases intercontinental bombers and missiles were ordered to a higher state of alert which lasted long enough to use up a good portion of the time allotted for a decision. Thousands of lesser alarms are caused primarily by atmospheric disruptions. In addition, dozens of accidents have occurred directly involving nuclear weapons....All this creates the risk of an unintended nuclear war breaking out, especially at a time of high international tension....[35]/

The several Nuclear Accident Agreements require that states parties notify each other in the event of an accidental, unauthorized, or any other unexplained incident involving a possible detonation of a nuclear weapon.

34. Agreements, supra note 3, at 73-80.
35. Id. at 74. In this regard, see Table 3.3., Serious Accidents Involving US Nuclear Weapons, 1950-80, id. at 76-79. Regrettably, "Similar information regarding the USSR is not available." Id. at 76.

The final point of analysis, *Humanitarian Law of War*,[36] raises a number of topics discussed earlier in this book, as for example, the 1925 Geneva Protocol. This recognized rubric of international law is evolving at a very slow pace in view of the potential dangers facing mankind from nuclear and outer space warfare. The main thrust of humanitarian laws, that can be traced to the 1868 Declaration of St. Petersburg, deal with conventional warfare, e.g. protection of wounded combatants, civilians, and prisoners of war. While no attempt is being made in this review to minimize the accomplishments that have been achieved in restricting the use of inhumane weapons, it must be conceded that the existing corpus of humanitarian law will be unable to cope with many of the ramifications posed by a nuclear holocaust (or even a "limited nuclear war"). And as the author concludes, there is an additional factor, namely that under the pressure of hostilities "attempts to 'humanize' war may sometimes prove futile."[37]/ The threat posed by weapons of mass destruction must be dealt with by additional multilateral conventions.

The above review of the seven points of treaty analysis leads to the conclusion—as advocated by SIPRI—that peace must be prescribed through effective arms control. From this vantage point, it becomes essential to enforce legal duties that are contained in the series of existing conventions. Accordingly, Chapter IV, *Verification and Enforcement of Arms Control Obligations*[38] comes to grips with the major weakness in the present day implementation of arms control agreements : states parties resist any interference with their exercise of absolute sovereignty and their freedom of action.[39] States parties (and non-signatories) have refused to accept methods of verification and enforcement in the first instance, and they have not fully complied with their existing obligations, as for example, on-the-spot inspections. Indeed, non-compliance with treaty commitments is one of the book's underlying themes. Here, then, is a major contribution by the author, for the reason that a realistic

36. Id. at 81-89. Of the seven topics deal with in Ch. 3, humanitarian law has received the largest share of attention by legal scholars. See e.g., J. Tomain and H. Huong, Bibliography of International Humanitarian Law Applicable To Armed Conflicts (1980); and D. Schindler and J. Toman, The Laws of Armed Conflicts (1981).
37. Agreements, supra note 3, at 89.
38. Id. at 90-111.
39. E.g., Sovereignty Within the Law (A. Larson and C. Jenks eds 1965); and Gomley, The Status of the Awards of International Tribunals : Possible Avoidance Versus Legal Enforcement, 10 Howard L. J. 33 (1964).

approach has been adopted. Moreover, other alternatives are available, primarily the employment of reconnaissance (or remote sensing) satellites.[40] Hence, the employment of national means of verification is one of the methods advocated by SIPRI. It has been applied to the series of U. S.—Soviet strategic arms limitation agreements. Such unilateral verification is the first step toward international supervision and hopefully, at a later stage, cooperation. In the author's opinion, the accuracy of such national means of verification is "rather high."[41] His conclusion is based on the verification provisions in the series of agreements, including SALT I and II, the U. S.—Soviet Threshold Test Ban Treaty, and the 1972 Interim Agreement for the Limitation of Strategic Offensive Arms. Related multilateral agreements, such as those mentioned earlier in this review also contain some verification provisions, though they are not completely satifactory.

The goal sought by Dr. Goldblat is a comprehensive test ban treaty. Within its scope would be a ban on underground testing, an area not covered by existing agreements. To assure compliance with such a ban global network of seismograph stations would be set up to monitor comliance. Approximately fifty telesismic would monitor seismic singals, transmit information, and maintain a data storage bank. Natural phenomenia, such as earthquakes, would also be monitored, thereby producing a valuable spin off for peaceful purposes. A plan of seismographic controls was considered by the parties in the tripartite test ban negotiations, but the U. K. would not agree as to the number of stations placed on its soils. Nonetheless, this plan is still under consideration. But the inherent weaknesses are all too obvious : subsequent on-site inspections would still be required. Of primary importance, the participation of France, India, and China is essential to any such experiment.

Regardless of present difficulties facing negotiators, the consideration of precise proposals to verify and enforce international agreements is indispensable. In the immediate future, the verification process must

40. See Table 4.1., Satellites for Reconnaissance and Early Warning, Launched During 1972-81, in Agreements, supra note 3 at 91; B. Jasa i, supra note 29; Legal Implications of Remote Sensing From Space (N. Matte and H. De-Saussure eds 1976); Gormley, Book Review, 1 Hastings Int'l and Comp. L. Rev. 225 (1977); and Gormeiy, The Protection of the Eath-Space Environment : The Use of Remote Sensing Satellites to Implement Human Rights, to be published by the Indian Y. B. Int'l Aff.

41. Agreements, supra note 3, at 92

remain under the jurisdicition of the major powers. "It is noteworthy that none of the multilateral agreements presently in force provides for access to the territories of the great powers for verification of arms control obligations."[42] Until states parties are willing to cooperate, and indeed collaborate, it will be necessary to rely on satellites for verification. However, the more vital rubric of enforcement must still be resolved, because of the fact that breaches of treaty obligations are an all too frequent occurance. Realistically, international sanctions, pursuant to the U. N. Charter, are limited to precise situations.[43] A number of organizations, such as the IAEA can withdraw their technical assistance from an offending state or even suspend its membership. The 1972 Biological Warfare Convention and the 1977 ENMOD Convention contain undertakings to provide support or assistance to any party, in accordance with the U. N. Charter, and pursuant to Security Council action. Within the context of verification and enforcement, the value of international fact-finding is fundamental.[44] Commissions from the United Nations, its specialized agencies, regional organizations, and even member states can, as a minimum, detect possible violations. As the author indicates, committees of experts may be extremely useful.

The recommendation offered is that "an Iternational Disarmament Organization should be created within the framework of the United Nations."[45] The author has been forced to chose between two alternatives : should there be an enforcement body pursuant to each arms or nuclear control agreement, or is it preferable to establish a single international agency ? At present, a number of independent commissions exist : the author favors a single agency. Both alternatives have obvious advantages. As Dr. Goldblat recognizes : "Comprehensive treatment of verification, on a global scale, to guard against all risks to the security interests of states."[46]

As a long range goal, this reviewer has a considerable degree of sympathy for such an idealistic proposal. As can be appreciated from the current arms build up between the U. S. and USSR, a global comprehensive scheme is mandatory to prevent warfare in outer space or to avoid a nuclear confrontation. In the immediate future, the author

42. Id. at 103.
43. Id. at 106-07. Note 39 supra.
44. Id. at 107-09.
45. Id. at 111.
46. Id. at 110.

realistically concedes : "As long as arms control agreements deal only with partial measures, the establishment of one world-wide organization to deal with both consulative activities and verification operations would be premature."[47] In the reviewer's submission, the distinguished author has presented realistic alternatives : the superpowers (including Communist China) must also seek effective enforcement.

Chapter V, *Arms Control Agreements : Texts and Parties*,[48]/ the longest in the book, reproduces the relevant portions of agreements concluded between 1868 and 1981. Beyond question, this collection of treaty texts, including their subsequent history (e.g., reservations, understandings, denunciations, state succession, etc., by states parties) is especially valuable, for it constitutes a permanent resource for the serious researcher. As is true of such collections of documents, little can be said in a review; nevertheless, this fine collection will remain timely.

Chapter VI, *Status of the Implementation of the Major Multilateral Arms Control Agreements*,[49]/ is an extended appendix, in that the subsequent history of each major agreement is set forth in complete detail. Specifically, the eleven major agreements (previously mentioned in this review) are included. The value of this compilation is considerable to lawyers, especially the reproduction of understandings and reservations. In considering the binding force of each convention, as it applies to a single state party, the position of each state must not be overlooked, because of the impact upon state sovereignty by these sensative multilateral conventions.

The Arms Control Machinery, the topic of Chapter VIII,[50] appears almost to serve as an afterthought, following the extended examination of treaty law. In relatively few pages, the main negotiating bodies of the United Nations (e.g., U. N. Disarmament Commission) are reviewed, and some of their studies briefly noted.

The Summary and Conclusions,[51]/ arrive at a synthesis, not only as concerns the content of this volume but also for the series of recent SIPRI publications. Accordingly, the main conclusions is that continued arms control negotiations are useful, despite the fact that they have been

47 Id. at 111.
48. Id. at 112-302.
49. Id. at 303-43.
50. Id at 344-53.
51. Id. at 354-63.

unable to halt the arms race, whereas unilaterai arms control measures can only be applicable in limited circumstances. Not even nuclear tests have been outlawed. "A reduced threshold test ban would, again, be only a half-measure, but it may constitute significant progress towards a comprehensive ban."[52] Against this background, the goal remains continued negotiations. As concerns nuclear weaponry, chemical weapons, and conventional armaments, it is necessary that the negotiating parties renounce their aspirations for military superiority. One possibility, or at least a first step, is the recognition of nuclear and chemical free zones.

Obviously, the most vital undertaking by states is the control of weapons of mass destruction. Basic to this goal is the regulation of conventional armaments, particularly in the third and fourth worlds, e. g. in Latin America. "For it is precisely the lack of balance in conventional armaments that served as justification (or alibi) for the introduction of nuclear weapons in the areas in question."[53] In this regard, reductions in the level of military expenditures are sought and also greater openness in military matters. Once again, the need for confidence building measures—a constant objective of SIPRI—is reiterated, nothwithstanding the deterioration of pacific settlement and violations of human rights during this decade. Against escalating military expenditures and the projection of the arms race into outer space, there is a growing concern over the arms race. The recommendation offered, therefore, is that an integrated approach to arms control be sought, namely, across-the-board trade offs in all major categories, as discussed above. Verification and supporting enforcement measures are required, at the foundation of world disarmament. That is to say, existing international treaties, especially those of a humanitarian nature, have rendered major contributions toward the safeguard of human beings caught up in modern warfare. Nonetheless, additional far-reaching treaty texts are required to safeguard mankind; consequently, efforts must continue in an attempt to reach a consensus.

May this reviewer, however, raise one pressing issue by way of a further conclusion. This exeellent book necessarily concentrated on states parties to international agreements and resulting multinational structures. As a result, non-signatories, namely France—but particularly China—could not be considered, except in passing. Although the con-

52. Id. at 356.
53. Id. at 358.

frontation between the U. S. and USSR is of primary importance, at least for the moment, the growing strength of Communist China—coupled with its increased aggressive posture—must be taken into account. As SIPRI indicated in its *Yearbook on Armaments and Disarmament*, China now possesses at least one nuclear powered submarine; furthermore, Chinese medium range rockets have the capability of hitting the West Coast of the United States with nuclear warheads.[54] Sad to say subsequent SIPRI publications must at least consider this added factor to the arms race.

W. Paul Gormley**

54. World Armaments and Disarmament: SIPRI Y. B. 1981 264 (1981); Gormley, Book Review, 16 J Int'l L. and Pol. 471, 479 (1982).

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B. N. Rau—Constitutional Adviser (1987) By Justice E. S. Venkataramiah, Indian Law Institute, New Delhi, pp. ii + 34 Price Rs. 20/-.

The Monograph under review is a centennial tribute to one of the architects of the Indian Constitution and a jurist who earned fame all over the common law world. In thirty-four pages, Justice Venkataramiah has sketched the versatile carrear of Sir B. N. Rau. His early life in India and England, entry in the Indian Civil Service, his services as a District and Sessions Judge, as a High Court Judge, as Chairman of many Enquiry Commissions, as Chairman of the Hindu Law Reform Committee, as Prime Minister of Jammu and Kashmir, as Adviser to the Constituent Assembly, as Adviser to the Government of Burma, as a permanent representative of India at the U. N., as a member of the International Law Commission, and finally as a judge of the International Court of Justice, have been briefly discussed. Surely, the achievements of Sir B. N. Rau in almost sixty-seven years of life were phenomenal. The legal world is obliged to Justice E. S. Venkataramiah for drawing attention to the contribution of Sir B. N. Rau. But, at the same time, one feels that Sir B. N. Rau deserves a better treatment, and a full—length study should be made to discuss his contribution. One feels sad that while centennial of politicians in this country are celebrated on a grand scale, no importance is given to the contribution of jurists.

It is necessary that Sir B. N. Rau's contribution in the making of the constitution of India should be adequately recognised. The writer has correctly observed: "If Dr. B. R. Ambedkar was the skilful pilot of the Constitution through all its different stages, Sri B. N. Rau was the person who visualised the plan and laid its foundation."[1] Prime Minister Jawahar Lal Nehru, who happened to be a contemporary of Sir B. N. Rau at the Cambridge University, stated in Lok Sabha, while paying tribute to Sir Rau, that "he might well be called one of the principal architects of our Constitution."[2] His knowledge of Constitutional law had even impressed persons like Justice Frankfurter of the United States, who had once told Sir Girja Shanker Bajpai, Secretary-General, Ministry of External Affairs that "If the President of the United States of America were to ask me to recommend a Judge of our Supreme Court on the strength of his knowledge of the history and working of the American Constitution, B. N. Rau would be the first on my list."[3]

1. Venkataramiah, E. S., B. N. Rau—*Constitutional Adviser*, at 23.
2. *Id.* at 23.
3. *Id* at 19.

The readers will be interested to know that, at the time of the framing of the Constitution, Sir B. N. Rau had made many proposals, which were not accepted, but today we are facing problems concerning those issues. For example, regarding the appointment of the judges of the Supreme Court, Sir B. N. Rau had suggested that they be appointed by the President with the approval of not less than two-thirds of the members of the Council of States.[4] It may be mentioned that the ad-hoc Committee of the Constituent Assembly had also suggested setting up a panel of eleven members to select the judges.[5] The present government is also thinking in this direction. The point to note is that Sir B. N. Rau was not in favour of vesting the power to select the judges in the hands of the executive.

Regarding the appointment of the Governors Sir B. N. Rau had suggested that they be elected by the state legislature according to the system of proportional representation by the single transferable vote. Perhaps, this suggestion was made to keep the Feberal government beyond controversy in the matter of appointment of the Head of the State.[6]

The reviewer is of the opinion that scholars of constitutional law should study the merits of the above and other suggestions made by Sir B. N. Rau in the context of constitutional developments during the last forty years.

Further, Sir B. N. Rau has made immense contribution in the areas of international law and Hindu law. Scholars of these area should assess his contribution.

The publishers have to be congratulated for keeping the printing errors to the minimum. But it is necessary to draw the attention to a blunder on the photo-page, where 'Rau' has been printed as 'Raw'.

Maheshwar Nath Chaturvedi*

4. *Constitutional Adviser*, at 21.
5. *Id* at 21-22.
6. *Id.* at 20-21.

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