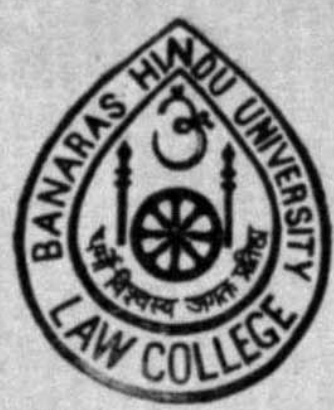

THE BANARAS LAW JOURNAL

Vol. I January 1965 No. 1

EDITORIAL

ANANDJEE — DEAN'S REPORT RESPONSE TO THE BANARAS SCHEME

B. N. SAMPATH — THE JOINT HINDU FAMILY RETROSPECT AND PROSPECT

MAHESH. C. BIJAWAT — INTERNATIONAL DOUBLE TAXATION WITH SPECIAL REFERENCE TO INDIA AND THE UNITED STATES

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M. N. CHATURVEDI — JUDICIAL DELINEATION OF THE WORD 'CIVIL POST' UNDER ARTICLE 311(2) OF THE INDIAN CONSTITUTION

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THE BANARAS LAW JOURNAL

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THE

BANARAS LAW JOURNAL

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EDITORIAL

It has been said :

> "the jurist must study the law teleologically ; he must observe how the elements of law turn out in their respective working ; whether their operation leads to useful or harmful consequences ; to consequences which accord with culture or to those which oppose it : to consequences whereby values are appraised justly or unjustly".

The need of such study in contemporary India is even more. Our system of law and administration of justice presents a panorama which is neither Hindu nor Mulsim nor English. It reflects the impact of several systems of jurisprudence absorbed more with a view to accord with the legal notions and convenience of the rulers than to preserve and promote the cherished values of the community. Indeed, independent India has a body of law and system of administration of justice which was developed in England in the golden era of Benthamite *'laissez faire'* and is, *prima-facie*, not conducive to the attainment of socialistic pattern of society. Lest the very foundations of the rule of law is shaken, it is imperative that the gap between the preferred values of the society and the values being fostered by our laws, is abridged.

Modern India has not been yet able to remould her system of law and administration of justice in a manner best subserving the prevailing social values and in accord with the genius of her people. Indeed, not even an assessment of the impact of the existing laws on the accepted social values has been attempted, far less formulation of emerging social values.

Banaras Law Journal is a humble contribution of the Law College, Banaras Hindu University, in this all important task of legal renaissance.

Banaras has been the centre of learning for several millenia. Scholars of eminence at all times, from all over the country, have striven to establish their merit in this holy city. Even in the sphere of law, Banaras School

of Hindu Law was known for its progressive and, at the same time, balanced views. The Banaras Law Journal, we hope, will rekindle the light and help us on the road to reform and progress.

We are conscious of the short comings of the present issue of the Banaras Law Journal. Nevertheless, we are offering it in the belief that constructive criticism and experience would help us to achieve the goal.

We are grateful to Prime Minister Lal Bahadur Shastri for releasing Banaras Law Journal on this memorable day: the 103rd birthday of Mahamana Madan Mohan Malaviyaji when the Prime Minister is laying the foundation stone of the Law College building. We could not have hoped for a better start.

DEAN'S REPORT

I

THE GOAL OF EXCELLENCE

A. The Context

1. Low Level of Legal Education in India:

It is common place that the standard of legal education in India is exceedingly poor. Whether one looks to the Radhakrishnan Report, or to the Law Commission Report, or to the deliberations of the All-India Law Teacher's Conferences, or to the deliberations of the All-India Law Conferences, or to the proceedings of the various State Lawyers' Conferences, or to the expressions of opinion of eminent judges, lawyers, law teachers and, even politicians, or to the Report of the (Inter University Board) Committee on Legal Education, or to the Lok Sabha and Rajya Sabha debates, the inadequacy of training in law and the low standard of legal education in India is stressed everywhere[1].

2. Consequences of Inadequate Legal Education:

One of the consequences of inadequate legal education is that Indian law graduates have failed to play their full role in the society and shoulder the responsibilities that lie on them. This has, in its turn, resulted in imperfect understanding of the significance of the rule of law, the role of law graduates and the function of law schools.

a. Popular Image of Law:

The popular image of law is not of an instrument to preserve and promote the society's cherished values but of an impediment in the way of attaining a welfare state and of an instrument for destroying preferred values, for protecting the guilty and for harassing the innocent.

1. See also, Carl B. Spaeth: "Draft Memorandum on Indian Legal Education"; Aurthur von Mehren: "Indian Legal Education: A possible programme for its improvement"; and M. Ramaswamy: "A paper on the reorganization of legal eucation in the University of Delhi": Gajendragadkar Committee report on the reorganization of legal education in the University of Delhi, (1964).

b. Popular Image of the Role of Law Graduates:

The role of law graduates has been much misunderstood, criticised and even maligned. *First:* It is assumed that the only role which law graduates are competent to play in the society is that of a professional lawyer. It is seldom realised that law graduates are needed today not only in the traditional profession of law but also for such other diverse careers as industrial and business management, public administration, international assignment, membership of legislative bodies, teaching profession and research in law. *Second:* The professional lawyer is generally indentified with the lawyer who appears in the court. The significance of a lawyer's role in avoiding litigation is seldom, if ever, appreciated. *Third:* Law graduates are considered to be gentlemen at large with no useful and constructive role to play in the society. It has rarely been realised that if we are to have a successful democracy or even to achieve our socio-politico-economic objectives within the framework of our Constitution, the importance of legal education cannot be minimised. Indeed, the need of adequately trained law graduates was, at no time in the history of human civilization, greater than is in the case of a country which has, on independence, adopted parliamentary form of government, guaranteed certain fundamental rights, and pooled all her resources for the economic emancipation of her peoples. They are needed for the all-important task of social engineering and for translating the manifest content of our dreams into reality.

c. Popular Image of the Functions of A Law School:

The popular image of law and the role of law graduates has also affected the conception of the functions of a law shcool. The other day I was talking to a distinguished Professor of one of the natural science subjects. He said, and I quote him:

> "Anandjee, I do not think your College needs a separate building. After all, instructions in law do not extend beyond a period of two to three hours a day. In my opinion, law classes should be held only during summer vacations. This will not only solve the problem of accommodation, because our buildings will be available to you, but also that of appropriate instructional load. Moreover, in the present context of national economy, it will help students, who will be required to pay tuition fee for only 3 months, and the University, which will engage better lawyers, who, because of the High Courts being closed, would be available, on a part-time basis, to impart instructions."

I was not exactly surprised. The true function of a law school has been seldom appreciated in modern India. It has rarely been realised that law schools are not merely concerned with systematic presentation of extant laws or even with their critical evaluation but are also laboratories for training students to study human motivation (in a complex society) and ever changing socio-politico-economic needs of the community, and to assess and recommend a body of law which, while canalizing human behaviour in a manner best subserving the interests of the community, would continually augment the preferred values of the society and raise it to ever increasing heights. It is a place to study a dynamic process seeking to generate dynamism to meet the needs of a dynamic society.

B. Three Assumptions

We believe that (धर्मो विश्वस्य जगत: प्रतिष्ठा) *Dharma* sustains the whole Universe.

We believe that law graduates have to play a significant role in the preservation and promotion of the cherished values of the society.

We believe, that if the rule of law is to be preserved and the law graduates are to play their full role in the siciety, we must provide a system of legal education that will produce men adept in tailoring traditional legal prescriptions to the needs of present-day India and making our law a tool of social engineering.

C. The Decision

We decided, in 1960, that:

> "The Banaras Law School should be a pioneer institution of legal education in India with an excellent team of teachers and a selected student body, stressing individual attention and extensive as well as intensive study and, thereby, carrying further the all important task of educational renaissance in the country in a manner befitting the monumental efforts of the Founder of the University, Mahamana Madan Mohan Malviyaji".

That statement of basic policy reflects both an ambitious goal and a steady determination to attain it.

II

THE PRINCIPAL TASKS

A. The tasks

The policy statement itself explains the nature of the tasks we must face if the goal is to be attained. The principal tasks are in three areas.

First: the teaching staff must be developed and maintained at a high standard of "excellence" in the face of competition with numerous schools which are just as earnestly seeking excellence. *Second:* to have a "select student body", the Law School must attract highly qualified applicants from among the growing number of graduates who, in many cases, need financial assistance to enter a professional school. *Third:* while broadening the base of legal education, training in law must be intensified. Emphasis must be laid on small classes, individual research and frequent informal consultations between students and professors. These require not only physical facilities (such as library, both the books themselves and the space to store and use them, seminar rooms, lecture rooms and, among other things, rooms for members of the teaching staff and research students), but also opportunities for the development of individual potentialities.

The task is stupendous, particularly in the context of the prevailing standards of legal education, available resources, governmental determination of educational priorities and the provisions of the Advocates Act, 1961.

Nevertheless, it is imperative to attain our goal of "excellence", to improve and continue to improve the standard of legal education. Science and Technology may contribute to material comforts and prosperity. Medicine may promote physical well-being. But, none of them, either individually or cumulatively, match the magnificient contribution of humanities in securing human happiness. And, Law stands supreme in promoting the material, physical and spiritual welfare of the individual and the cultural advancement of the community as a whole. It is not without significance that the Hindu Society, which alone has maintained its vitality through the ages, put the study of Dharma Sastra as a pre-requisite for embarking on any career whatsoever.

B. The Efforts

The Banaras Scheme for the improvement of legal education has evolved over the past four years and is still in the process of being perfected. Its development can be traced through the 1961—Dean's Report, 1961—Bhagwati Committee Report, 1962—Dean's Report (for the Visiting Committee of the University Grants Commission), Vice-Chancellor Bhagwati's welcome address to the 1961—All India Law Teachers Conference, 1962—Sinha Committee Report, Vice-Chancellor Bhagwati's inaugural address to the 1962—All India Law Teachers' Conference, 1963—Pettions to the U.P. Bar Council and the Bar Council of India regarding practical training

in law, 1963—Dean's Report, 1963—Memorandum to the University Grants Commission and 1964—Dean's Report, Dean's 1964—letter to the Union Education Minister, Dean's 1964—letter to the Ford Foundation, University Grant's Commission's 1964—visiting Committee Report, Proceedings of the September 1964—meeting of the Faculty of Law and the Ford Foundation's October 1964—letter.

C. The Achievements

1. *Team Of Teachers*

a. *Adequate Size:*

Most, if not all, of the Indian Law Schools are not only under-staffed but also inadequately staffed. There are several reasons for this, *First:* low priority is accorded to legal education by the Universities. *Second:* there is imperfect understanding of the role of law schools. *Third:* the academic responsibilities of law teachers are not fully appreciated. *Fourth:* law schools and law faculties are both single department institutions. *Fifth:* It is generally believed that a practising lawyer can deliver goods better than an academic lawyer.

Our College is perhaps the only institution in the world which had, for some time, classes only on Saturday evenings and Sunday mornings, with the rest of the weekdays being holidays. This was so because we had in those days, only part-time teachers and most of them were practising law at the High Court of Judicature at Allahabad. However, the position has completely changed. Today we have a sanctioned staff of three full time Professors, six Readers, twelve Lecturers and three part-time Lecturers and five Research Assistants. Moreover, the ford foundation has made available to us a sum of $ 1,20,000 to enable us to invite four visiting Professors of Law from abroad.

Determination of adequate size of academic staff depends on evaluation of several factors, e.g., the spectrum of courses of study, the degree of specialized instructions, the method of instructions, the scholarship expected from the staff, the research facilities available, the calibre of teachers, the size of student body, the calibre of students and the physical facilities available. Consequently, it cannot be expressed in terms of a formula. It is heartening to note that, with the growing realization of the need to attain new horizons in the field of legal education the Fourth Plan Policy Committee of the University have requested the University Grants Commission to sanction additional posts of five professors, ten Readers, twenty Lecturers and twenty seven Research Assistants.

b. Competent Staff:

Notwithstanding the fact that during recent years the number of students passing the LL.M. examination has considerably increased, many of these students are not endowed with the basic qualities of a good teacher viz., a burning desire to make good as a law teacher, scholarly habits, impressive personality, initiative and integrity. Generally what is happening is that the cream of the student body is skimmed off for science, medicine, technology and other non-legal courses. Those of the few good students who do come to Law Schools, do not look forward to law teaching as a career: they prefer Union and State services, legal profession or careers in business and industry. Generally speaking, it is the residue of the residue which is proceeding for the LL.M. degree and, hence, the difficulty of finding good teachers from amongst them. Moreover, even the desirable candidates are very often unsuited for the needs of our College because of their specialisation in fields in which we already have teachers. Our policy, therefore, is, while keeping the doors open for suitable LL.M. and Ph.D. candidates, to watch LL.B. students and to "catch them young". Immediate absorption after LL.B. gives them economic security and their lack of specialisation helps us in moulding them to our needs. Their having the basic qualities of a good teacher insures comparatively safe investment.

Simultaneously efforts are being made to improve academic qualifications of teachers. Dr. Dharma Pratap (Oxford) and Dr. Mahesh Chandra Bijawat (Yale) have already returned after successfully completing their post-graduate work and resumed their duties. Sri K. N. Nayak (Yale) is currently abroad working for his research degree. Sarvashri V. K. Bharadwaj, M. N. Chaturvedi and Durga Prasad are enrolled in the Banaras Hindu University and are working for their Ph.D. degrees. Arrangements are being made with foreign Universities for the admission of, and financial aid to, at least one member of the staff every year. The Ford Foundation grant of $ 57,000 would cover the expenses of 9 man-years of foreign training for the members of the teaching staff.

Our scheme contemplates inviting visiting Professors from abroad, preferably in those fields of study where little or no progress has been made in India, assigning to them two or three junior teachers and sending the best of these to work under the visiting Professor in his home University for a period of one to two years. The advantages of this programme are several: (i) presence of foreign talented Professors in the Banaras Law School would encourage sustained academic work; (ii) assigning to them junior teachers would help them to collect and collate Indian materials; (iii) selection of a candidate for training abroad will not only be on the basis of work which the candidate would be expected to pursue in the foreign country, but will be made with the help of the teacher under whom he will work; (iv) our teachers will work on Indian problems with the result that on their return they would be in a position to take full responsibility of the particular field of study; and (v) the programme would promote development of the Faculty on planned lines and help us in making the fullest use of the available resources.

c. Balanced Teaching Load:

The teaching load of law teachers in most of the Indian Universities is the same as of any other teacher in the University. However, there are several reasons because of which, we believe, law teachers should be a class by themselves. *First:* a law teacher, if he is to teach up-to-date law, has to read and digest more material than a teacher in any other faculty of the University. *Second:* The fact that Indian Law Schools have generally not developed the art of legal writing and tradition of legal scholarship makes it necessary that, at least in the transitory stages, law teachers should have adequate time and energy left after the lecture hours for personal academic pursuits. *Third:* unlike teachers in other faculties, overwhelming majority of law teachers have to devote a considerable part of their early life as a teacher in improving their academic qualifications.

The Banaras Hindu University has accepted the principle of having a lower than the usual prescription of teaching load for members of the Law Faculty but, unfortunately, because of financial difficulties, we have not been able to make requisite appointments to implement the decision.

d. Scholarly Work:

Certain decisions of members of the teaching staff of the Banaras Law School are here relevant. They have decided that it shall be an unwritten condition of their employment that they shall each publish one article every year. Further, they would compile lecture materials, legal and nonlegal, for use in the class-rooms. Weekly discussions in the "Current Law" Lecture series and corporate teaching together with teaching of one or two subjects other than the one in which the concerned teacher is specialising, encourages all round broadening of the perspective of teachers and tends to avoid shortcomings of over-specialisation.

e. Teacher Participation In Decision Making And Implementation Processes :

One of the maladies affecting the Indian educational system, to my mind, is the insignificant role played by the majority of staff members in the growth and development of the institution. The Head is all in all. He may be assisted by a few senior teachers on the statutory Board of Studies and the Faculty. However, these bodies are so over-whelmingly composed of outsiders that the role of even the few staff members who happen to be on these bodies, is seldom effective. Typically, the statutory Board of Studies and Faculty lay down the academic policies, define the curriculum of studies, prescribe reading meterials and appoint examiners. Staff members are expected to implement these decisions and give instructions to students with a view to prepare them for the prescribed examinations. Teachers dare not depart from traditions and make innovations lest students fare badly at examinations conducted by men who have not taught the course to the concerned students and they (the concerned teachers) be subjected to explanations. The result is that the creative genius of teachers is stultified. Their constant effort is to conform to "patterns" and to cover the course : not to experiment with new ideas. Further, in the absence of any opportunity to mould the destinies of their institution, they have no sense of "belongingness" to the institution and are passive though emotionally involved spectators, constantly waiting for a change and fervently hoping that the change would somehow help them in realising "accomplishment" which, not infrequently, is confounded with promotion in ranks, augumentation of power and other non-academic gains. It is no wonder that quite a few of the Indian educational institutions are working under great internal pressure and fail to achieve academic distinctions. Moreover, how can a body of men, conditioned to lead the passive role of a follower and observer, be expected to play the creative role of a teacher : to infuse a sense of values into the young mind or to enthuse them with a spirit of dynamism and healthy leadership or to constructively plan for future development ?

A change in decision-making process is not always easy. There is opposition from vested interests. Moreover, if, in the absence of complete and effective change-over, there is danger of stifling free expression of views ; in the absence of adequate commitment, adjustment and sense of responsibility, democratic set-up can be a drag on progressive leadership, Nevertheless, I believe, the change is desirable and should be effected. Of course, just as academic freedom is not a liberty for sloppish work, democracy is

not a license for indiscipline. Indeed, to the extent to which one has opposed a particular decision and yet is called upon to implement it, greater sense of discipline and restraint is required in an institution with broad-based decision-making process.

We trust our teachers. We have faith in their native genious and collective wisom to develop the law school on proper lines. Banaras Law School is perhaps the only institution under any of the Indian Universities which has regular dinner-staff meetings wherein all major policy matters affecting the Institution are discussed and their implementation evaluated. Conscious of the fact that present statutory provisions do not permit all staff members to attend meetings of statutory Board of Studies and Faculty of Law, permanent members of the staff, whether Readers or Lecturers, attend meetings of these bodies by special invitations and participate in the policy formation and decision-making process. The Banaras Hindu University Act provides for the constituton of a Departmental Selection Committee, consisting of the Pro-Vice-Chancellor, the Dean of the Faculty of Law and the next senior teacher, for temporary appointments. Moreover, there are committees consisting exclusively of teachers to select students for admission, advise them on their problems, and also to advise the Principal on administrative problems. The role of individual teachers in the over-all growth and development of the Law School is further made effective by assigning to them such tasks as the organisation of courses, selection of books for library and, among other things, co-ordination of research programme of post-graduate students. Internal assessment is done by teachers teaching the subject. Of course, because of inter-University Regulations, the internal assessment is limited to 50% of the total number of written papers prescribed for an examination. Even so, to further diminish the importance of external assessment and to emphasise the role of staff members, we have set apart 10% marks in each theory paper for award by the concerned teacher on the basis of his impressions of the students' day-to-day progress in the class. Moreover, staff members assess student's day-to-day progress in such classes as language, Legal Writing, Moots and Legal Research. (It may be stated here that internal assessment has tended to be more conservative than external assessment). Our constant effort is to enlarge the area of teacher co-operation and offer them increasing responsibilities and opportunities for playing an effective role in the formulation of policies, and their implementation, for the development of the Law School.

2. *Select Student Body :*

a. The Difficulties :

Minimum academic qualification for admission to the courses of study leading to the LL.B. degree in Banaras Hindu University is, and has always been a Bachelor's degree in Arts, Commerce or Science. Even so, it must be conceded, at the very outset, that the problem of selecting students is exceedingly difficult. There are three major difficulties. *First :* the general standard of students seeking admission to law schools is very low. *Second :* an appreciable number of good students who do come to law schools are really not interested in the study of law courses : their basic aim is the acquisition of LL.B. degree which they think would help them in their promotions. *Third :* another segment of good students who come to law schools and are keen on law studies has not the financial resources to proceed with higher studies in Law.

Sir Henry Maine wrote that legal studies were given the highest priority in Rome because "Law was the doorway to wealth, to fame, to status, to the Council Chamber, nay to the very throne itself". Obviously he was speaking in terms of the utility of the knowledge of law to the individual for success in life. Unfortunately, in this respect, our syllabus of courses fall short of desired levels. The result is that, as a means to economic security and prosperity, our young men prefer Engineering, Technology, Medicine, Science, or even Education and Library Science courses. And, it is only when they have failed to pursue these courses that they come to the study of law.

This is not all. Law students cannot even be selected on the basis of marks obtained. There is quite a good proportion of students who utilise the duration of legal studies as a waiting period either for appearing at various competitive examinations or for getting suitable jobs and the moment get they an appropriate employment they either quit the study or, if they have already completed their courses in Law, forget about it. Further ,since the law classes are held on a part-time basis either in the mornings or evenings, a number of employees offer law courses merely with a hope that the acquisition of the additional degree of LL.B. would, one day, help them in their promotions. Thus, if we are to admit students merely on the basis of marks, it is certain that we would be admitting a number of students who are not really serious about law courses and we

would be eliminating many who, though they have lower percentage of marks, are, nevertheless, serious to study Law[1].

b. The Solution :

We are of the opinion that the presently prescribed entrance requirements should continue and the problem of having a select body of students should be tackled by eliminating the cases of apathy for legal studies. It needs a three-pronged approach : (i) putting legal education on a regular full-time basis and requiring students to work for 40-45 hours a week[2]. This would, it is believed, while giving sufficient time for adequate training in law, eliminate those who join law classes only for the sake of a degree ; (ii) altering the courses of studies in a manner that would insure extensive as well as intensive training in law. This would, it is believed, while raising the standard of legal education, open new job opportunities

1 The impact of this preference cannot be over-emphasised. The position in the 1960's is totally different from that which prevailed, say, in the 1940's. The proportionate increase in the total number of seats in Engineering, Technology, Medicine, Science, Education and Library Science Courses is greater that the proportionate increase in number of students passing qualifying examinations for these courses. As a result of this, students who had no chance of getting admitted in these courses in the 1940's are now able to secure admissions and the standard of the students not admitted to these courses is lower today than it was in the earlier days. Independence, democracy, industrialization, attempts to develop a socialistic pattern of society and generally the changed out-look of 1960's has also affected the intake of a good class of students that were available to us in former days. There used to be a segment of the society which was averse to business and industry or employment in private sector whether as an engineer or administrator or in any other capacity. Youngmen, often brilliant, from these families come to study law. However, today not only the aversion has been whittled down but the needs of economic security compel these students to enter into business and industry or professional employments therein. They are, therefore, no more available to us. Another feature to be noted is that, in early days, because of the comparative high costs, students coming from lower economic brackets, though brilliant in studies, could not afford courses of study in science, medicine and technology. Today, however, there are any number of scholarships for these courses and a student is seldom denied education in these branches because of economic reasons. Thus, even these good students are not now available for Law courses. The standard of students seeking admission to law courses is further affected by the fact that post-graduate study in Science, Education and even in Arts carry not only "certain" and better economic prospects but more scholarships to help the needy students at the post-graduate level. Law courses are conspicuous by the absence of appropriate scholarships.

2 Cf. The Universal practice in Indian Law Schools whereunder instructions in law, using lecture method, are imparted for only 2 to 3 hours a day, either in mornings or in evenings when buildings are not otherwise occupied for imparting instructions in other disciplines, students are not engaged in other courses of study or employment, and practicing-lawyer-teachers are not engaged in court work. Moreover students are seldom, if ever, expected to work in library or at home.

and attract better calibre of students; and (iii) making available sufficient number of scholarships at all levels of legal education. This would enable those deserving students, who are unable to pursue legal studies because of financial reasons, to study law. Of course, if, notwithstanding the rigorous requirements of reorganised courses of study in law, there are more applicants than seats available, aptitude and other tests might usefully be employed to select the best applicants.

Banaras Hindu University has taken concrete steps in these directions.

c. Three-Year-Six-Term LL.B. Degree Course:

With the growing complexities of society, laws are not only multiplying but have also become complex. It is well-nigh impossible today to do full justice to the law courses in two years of full-time instructions, far less to train law graduates for various careers that are open to them. This fact was recognised as early as in 1948 by the Radhakrishnan Commission and, ever since then, there is complete unanimity of the view that a 3-year period is the minimum required. Of course, there is a division of opinion on the question whether the third year should be at the disposal of the University or at the disposal of the Bar Council. However, in our view those who stress that the third year should be at the disposal of the Bar Council, fail to recognise that legal profession is not the only career which is open to a law graduate; and two years' duration is as insufficient to train students for the legal profession as for the other careers.

The Banaras Hindu University has, after a detailed and thorough discussion, on the advice of a committee consisting of:

1. Sri N. H. Bhagwati, Vice-Chancellor, Banaras Hindu University (Chairman)
2. Sri M. C. Mahajan, retired Chief Justice of India,
3. The Hon'ble the Chief Justice of Allahabad High Court,
4. The Advocate-General, Uttar Pradesh,
5. The Dean, Faculty of Law, Agra University,
6. The Dean, Faculty of Law, Aligrarh University,
7. The Dean, Faculty of Law, Allahabad University,
8. The Dean, Faculty of Law, Delhi University,
9. The Dean, Faculty of Law, Gorakhpur University,
10. The Dean, Faculty of Law, Lucknow University,
11. The Dean, Faculty of Law, Rajasthan University,
12. Dr. A. T. Markose, Research Director, Indian Law Institute, and
13. Dean Anandjee, Banaras Hindu University (Convener)

instituted a 3-year 6-term LL.B. degree course and 1-year 2-term LL.M. degree course. The division of the academic year into two terms is a significant step. It has enabled us to provide for extensive as well as intensive study without converting legal studies into a test of memory..

d. Courses of Study:

The problem of courses of study in law is intimately connected with the problem of determining the objective of legal education.

(i) *The Objective of Legal Education:*

The traditional view that University law courses are a part of liberal education, though generally accepted by Indian educationists, is, to our mind, hardly applicable to Indian conditions. At least, it has not been so thus far[1].

There are also people who apparently believe that all those who enter the portals of a Law School take up the legal profession. However,

1 There are several reasons for this.

First: the liberalising effect of legal studies lies in the dynamism of the policy-oriented approach of the Common Law, in particular, in the study of conditions which led to modification and refinement of prevailing legal concepts as well as of processes, by which those modifications and refinements were brought into effect to meet the need of a changing society. We are, however, mostly, if not wholly, concerned in India with statutory law which, by itself, is static. The view that a judge is to interpret the law, and not to legislate, further restricts the scope for policy-oriented approach to our legal problems. The result is that we have, generally speaking, not developed the art of co-ordinating law to the needs of the society and our perspective is unduly restricted.

Further teaching of statutory law, particularly as done in India, tends to avoid not only the surroudning socio-politico-economic background and factual problems but also the evolutionary process of the law. This results in neglecting the study of law as a tool of social engineering and over-emphasising statutory provisions. (To a considerable extent the case-law method offsets this particular draw-back though, of course, it relegates statutory law to a secondary position).

Second: Modern Legal education in India was started by the British, and one doubts, from its nature, that they wanted to add to the number of Ranade, Tilak, Mahatama Gandhi, Moti Lal Nehru, C. R. Das, Bhulbhai Desai and others. If we look into the syllabus of courses of study, it becomes apparent that the purpose of legal education was primarily to acquaint Indians with rules of law which would help the British in the administration of the country. The liberal views of some of our outstanding men were exceptions and, perhaps, not the result of their legal education in Indian Universities. Indeed, a good number of our outstanding leaders who inspired Indian public opinion with liberal ideas, were educated in Great Britain.

Third: the LL.B. degree in India is not merely an academic degree but also an essential pre-requisite for entering the Bar (Cf. England). Indeed, some of the High Courts did not, until recently, require anything other than a LL.B. degree for enrolment.

our investigations reveal that not more than 25% of law graduates stick to the profession. Moreover, our curriculum is hardly designed to train students fully even for the profession of law.

We agree that legal education has a liberalising effect. We also concede that quite a few law graduates join the profession. But we assert that Indian Law Schools have singularly failed both in imparting liberal education and in training students for the legal profession. Further, they have failed to keep pace with changing times[1].

There is another way of looking at the problem. Even though the emphasis has been, and will remain, on preparing our students for the profession of law, it is important to remember that the legal profession is not the only career open to a law graduate. Today, more than ever, law graduates are needed in public services, industry, business, legislative bodies and for research, law teaching and international assignments. However, as already pointed out, syllabi of courses of study of Indian Law Schools do not take notice of these possibilities and do little to train students for diverse careers that are open to law graduates.

It appears to us that, in the present materialistic world, liberal education cannot be the sole objective of law courses in the Universities. The perspective requires re-adjustment. We have as much to do to prepare our students to meet the economic challenge of life that awaits them around the corner as to impart liberal education. Further, a student should be prepared not only for playing a role in the traditional legal profession but also in diverse other fields that are pre-eminently suited to him. Our syllabus of studies should be so framed as to enable our students to make use of their training to a greater extent than has been possible hitherto, and, thereby, to secure economic stability and prosperity. Unless we adopt

1 The syllabus of courses, introduced some 60 years ago, continues, with slight modifications, to be prescribed even today. Neither the method of teaching nor the materials used in the class rooms have undergone any apprecibable change. How can we produce men who are trained in the technique of policy-making decisions, of co-ordinating law in books with law in practice, and of tailoring traditional legal prescriptions to meet the demands of a modern society ? The Austinian concepts of sovereignty, property and contract have no place in the present-day context of modern India. Sir Henry Maine observed that the progress of society was from status to fontract. But we now know that, after reaching a certain stage in the evolution of civilisation, the pendulum has swung back. We are now moving from contract to status. How can a student trained in outmoded and factually untenable legal concepts be expected to meet the problem of modern India and produce a prescription which would be conducive to the attainment of socio-politico-economic objectives of a socialistic pattern of society ?

this perspective, we have a feeling, we can neither attract the best brains to Law Schools nor make appreciable progress in raising the standard of legal education.

(ii) *Function of Law School :*

The stress on career orientation of courses of study should not, however, confound the functions of law schools with those of Commercial Colleges. Besides readily perceivable distinctions, as we have already pointed out, Law Schools are not merely concerned with systematic presentation of extant laws and practices or even with their critical evaluation but are also laboratories for training students to study human motivation (in a complex society) and ever changing socio-politico-economic needs of the community, and to assess and recommend a body of law which, while canalising human behaviour in a manner best subserving the interests of the community, would continually augment the preferred values of the society and raise the society to ever increasing heights.

(iii) *The Syllabus of Study :*

The Banaras Hindu University, after a detailed and thorough investigation, on the advice of the Bhagwati Committee, decided that the courses of studies in Law should be career-oriented.

The Board of studies, in pursuance of the aforesaid decision of the University, prepared a draft syllabus of studies for the 3-years 6-term LL.B. degree course. Copies of this draft were sent to the Judges of the Allahabad High Court, selected Foreign Universities and were handed over to the delegates from almost all Indian Universities who attended the Fifth Conference of Teachers of Law in India at Varanasi in December 1961, for their comments. The response was exceedingly favourable and encouraging. In the light of suggestions received, the Board of studies revised its draft syllabus of studies and forwarded it do the Faculty of Law for necessary action.

These recommendations were considered by a Committee consisting of:

1. The Hon'ble the Chief Justice of India, Chairman,
2. The Hon'ble the Law Minister, Government of India,
3. The Attorney-General of India,
4. The Hon'ble the Chief Justice of Uttar Pradesh,
5. The Advocate General, Uttar Pradesh,
6. Dean G. S. Sharma, Rajasthan University,

7. Dean V. N. Shukla, Lucknow University,
8. Dean V. V. Deshpande, Patna University,
9. Dr. A. T. Markose, Research Director, Indian Law Institute,
10. Dr. M. P. Jain, Reader in Law, Delhi University,
11. Dr. Krishna Rao, Ministry of Foreign Affairs, Government of India,
12. Sri D. L. Mazumdar, Company Law Administrator, Government of India, and
13. Dean Anandjee, Banaras Hindu University (Convener)

and on their advice, the University adopted them. Subsequently,, in the light of practical experience as also with a view to provide for 1-year 2-term LL.M. degree course, they were further streamlined. Today the University has the following courses of study for its LL.B. and LL.M. examinations.

A. Any one of the following groups of papers shall be offered, with the permission of the Dean as Papers IV and V in the Fourth, Fifth and Sixth Terms.

Provided that students wishing to take training in law concurrently with their instructions for the LL.B. Degree shall offer Optional Group I, entitled "Procedure".

GROUP I : *Procedure :*

Paper I : Limitation, Prescription, Court Fees, Stamp Fees, Suits Valuation and Small Causes Court

Paper II : Pleadings, Land Laws, Supreme Court and High Court Rules.

GROUP II : *Mercantile Transactions :*

Paper I : Bailment, Pledge, Guarantee, Sale of Goods and Negotiable Instruments

Paper II : Transport of Goods

GROUP III : *Business Organisation :*

Paper I : Business Organisation I

Paper II : Business Organisation II

GROUP IV : *Statutory Bodies :*

Paper I : Public Corporation

Paper II : Local Self Government with special reference to one of the states in India

GROUP V : *Labour :*

Paper I : Law relating to Labour-Management Relations

THREE YEAR—SIX TERM LL.B. DEGREE

COURSES OF STUDY

LL.B. (Previous)			LL.B. (Intermediate)			LL.B. (Final)		
I Term (Vijaya Dashmi)	II Term (Holi)	THIRTY DAYS' PRACTICAL TRAINING	III Term (Vijaya Dashmi)	IV Term (Holi)	SIXTY DAY'S PRACTICAL TRAINING	V Term (Vijaya Dashmi)	VI Term (Holi)	SIXTY DAYS PRACTICAL TRAINING
1. Constitutional Law-I	1. Constitutional Law-II		1. Public International Law	1. Jurisprudence (1)		1. Legal Concepts	1. Legal Theory	
2. Family Law-I	2. Family Law-II		2. Law of Evidence	2. Administrative Law		2. Interpretation of Statutes and Judicial Process	2. Hindu Jurisprudence	
3. Law of Crimes	3. Law of Civil Procedure		3. Property-I	3. Property-II		3. One of the subjects in group XII	3. One of the subjects in group XII other than the one already offered	
4. Law of Contracts	4. Law of Criminal Procedure		4. One of the optional groups I to XI	4. One of the optional groups I-IX		4. One of the optional groups I-IX other than the ones already offered	4. One of the optional groups I-XI other than the ones already offered	
5. Law of Torts	5. Legal Remedies		5.	5. I-XI other than the one already offered		5.	5.	
6. Legal Method	6. Moot Court		6. Moot Court	6. Legal Writing		6. Research Methodology	6. Drafting of statutes	
7. English	7. English		7. English	7. Hindi				

Note :—Each term shall comprise of 100 working days with atleast 60 lectures per paper.

13. Indian Legal History and Selected portions of English Legal History
14. Any of the papers in Groups I to XI

1 Arrangements are being made to provide for a full paper on Maritime Law.

7. Dean V. N. Shukla, Lucknow University,

[illegible]V : *Statutory Bodies :*
[illegible]aper I : Public Corporation
[illegible]per II : Local Self Government with special reference to one of the states in India

GROUP V : *Labour :*
Paper I : Law relating to Labour-Management Relations
Paper II : Social Security Legislation

GROUP VI : *Taxation :*
Paper I : Law relating to tax on Transactions
Paper II : Law relating to tax on Incomes

GROUP VII : *International Relations :*
Paper I : International Institutions
Paper II : India and International Law

GROUP VIII : *International Trade :*
Paper I : International Trade
Paper II : International Transport of Goods

GROUP IX : *Private International Law :*
Paper I : Private International Law
Paper II : Comparative Law

GROUP X : *Constitutional Law :*
Paper I : Federal Constitutions
Paper II : Constitutional History and Law of England

GROUP XI : *Legislative Process :*
Paper I : Civil and Political Rights
Paper II : Legislative Process in India.

B. Any one of the following papers[1] *shall* be offered, with the permission of the Dean, as paper III in the Fifth and the Sixth Terms.

GROUP XII : *Miscellaneous :*

1. Trusts Charitable Endowment and Wakfs.
2. Comparative Ancient Law
3. Labour Law III-Minimum Standard Statutes
4. Arbitration
5. Copyright, Patents and Trade-mark
6. Taxation III-Law relating to tax on Capital
7. Legal Accounting
8. International Law-III : Neurality and War
9. Insolvency
10. Roman Law
11. Business Organisation-III : Banking
12. Forensic Science
13. Indian Legal History and Selected portions of English Legal History
14. Any of the papers in Groups I to XI

1 Arrangements are being made to provide for a full paper on Maritime Law.

ONE-YEAR TWO-TERM LL.M. DEGREE COURSES OF STUDY

(i) *Written papers :*

A candidate for the LL.M. Degree Examination shall be examined in any one of the following groups of three written papers :

GROUP I : *Constitutional Law :*

Paper I : Constitutional History and Law of India
Paper II : Constitutional Laws of the Commonwealth
Paper III : Constitutional laws of either (a) Europe, or (b) Africa ; or (c) Asia, or (d) United States of America

GROUP II : *Family Law :*

Paper I : Hindu Law
Paper II : Muslim Law
Paper III : Family Law and comparative conflict of laws relating to marriage, matrimonial causes, legitimacy, legitimation, adoption, guardianship and matrimonial property.

GROUP III : *Torts :*

Paper I : General Principles
Paper II : Specific Torts
Paper III : Current Tort Law Problems

GROUP IV : *Crimes :*

Paper I : Criminology & Penology
Paper II : Law of Crimes in India
Paper III : Crimes against Social & Economic Security & Problems of their control.

GROUP V : *International Law :*

Paper I : Law relating to Treaties
Paper II : International Court of Justice
Paper III : Contemporary International Law Problems e.g. :
: Economic uses of Rivers
: Natural resources of the continental shelf and High Seas
: Law of Air and Outer-space
: Nuclear weapons

GROUP VI : *Mercantile Law :*

Paper I : Contracts
Paper II : Insurance

Paper III : Current Mercantile Law Problems e.g. :
: Hire purchase

GROUP VII : *Administrative Law :*

Paper I : Comparative Administrative Law
Paper II : Law relating to Administrative Bodies & Tribunals
Paper III : Current Administrative Law Problems e.g. :
: Confiscatory rules and actions
: Governmental liability in torts and contract
: Licensing Power
: Rule-making Power
: Decision-making
: Control of Administrative discretion
: Governmental Privilege

GROUP VIII : *Business Administration :*

Paper I : Public Control of Private enterprise
Paper II : Company Management
Paper III : Current Problems of the Law relating to Business Organisation and Corporate activity.

GROUP IX : *Labour Management relations :*

Paper I : Government Regulation of Labour Management Relations
Paper II : Law Relating to Employment and Non-Employment
Paper III : Law Relating to terms of employment and conditions of service

GROUP X : *Taxation :*

Paper I : Constitutional & Administrative Law Problems relating to taxation.
Paper II : Tax on Business and Industry.
Paper III : Current taxation problems e.g. :
(*a*) Taxation & Investment
(*b*) Taxation & Economic equality
(*c*) Taxing Procedure
(*d*) Tax Litigation
(*e*) Taxation & Education.

GROUP XI : *Regulated Economy :*

Paper I : Regulation of private enterprise
Paper II : Regulation of Labour Management Relations
Paper III : Regulation of Management and Finance.

GROUP XII : *Judicial Administration :*

Paper I : Law relating to Jurisdiction : the system of Courts and Tribunals in India.

Paper II : Law relating to Procedure and Proof

Paper III : Law relating to Relief.

(*ii*) *Dissertation :*

(*iii*) *Viva-Voce Examination.*

The new courses of studies would restore the importance which rightly belongs to the legal education. It will, it is believed, help such training in law as is needed in the country. Further, the emphasis on career-orientation would prepare our students for gainful employment and in its turn, would attract better calibre of students to law schools

C. Scholarships :

The Banaras Hindu University had, in 1959, two scholarships for such of the B.A., B.Sc., B.Com. merit holders as joined LL.B. Previous classes, and two merit scholarships for students obtaining the highest marks at the LL.B. Previous Examination. Since July 1961, we have two more merit scholarships for students joining the LL.M. classes. In addition, since July 1961, 20% of the students on the rolls of the School can be awarded freeships. Sanction of the University Grants Committee has been received to award 3 Ph.D. scholarships (Rs. 200 each), 6 LL.M. scholarships (Rs. 100 each) and 12 LL.B. Scholarships (Rs. 75 each) with effect from July 1965. These are tremendous improvements over the past but, nevertheless, they are not sufficient. We shall have to make efforts to have more scholarships of adequate value to meet the needs of deserving students at all the levels of legal education. Research Fellowships and financial aid to post-graduate students are absolutely imperative if research in law by competent students is to be encouraged. We have, therefore, requested the University Grants Commission to increase the value of the aforesaid scholarships and sanction additional 5 Ph.D. scholarships (Rs. 300 each) 10 LL.M. Scholarships (Rs. 150 each) and 20 LL.B. scholarships (Rs. 125 each).

3. *Extensive as well as Intensive Training in Law :*

(*a*) *LL.B. Degree Course :*

The curriculum of study and training in law for the new LL.B. degree course is spread over a period of 3 years : each year being divided into two terms of 100 working days. The Ordinances provide for instructions and examinations in 5 theory papers ; one paper on such aspects of legal skill and craftsmanship as Legal Research, Moot Court and Legal Writing ; and in one paper on language. Besides, there is provision for practical training in law under Advocates approved by State Bar Councils for a total period of 150 working days : 30 days at the end of the LL.B. (Previous), 60 days at the end of LL.B. (Intermediate) and 60 days at the end of the LL.B. (Final) Examinations.

(i) *Legal Studies :*

The Contents :

The prescribed courses may broadly be divided into two categories : compulsory and elective. While the aim of the compulsory courses of study is to lay the foundation of a broad-based legal education, that of the elective courses is to prepare the student for his chosen career. Unlike the traditional courses which are statute-oriented, our courses are subject-oriented and enable students to have a wider perspective and whole-some view of the law. Moreover, a student is expected to study not only legal materials but also non-legal materials and evaluate the law in terms of existing socio-politico-economic conditions in the country and preferred values of the society. There is a constant endeavour to emphasise the multi-disciplinary nature of problems that call for legal solution.

The courses of study for English and Hindi have a language bias rather than literature : the primary aim being to improve the legal vocabulary of students.

Teaching Load on Students :

Students are expected to put in 40-45 hours of work every week. Of these, approximately 22 hours are scheduled for instructions in theory papers, two hours for Legal Research/Moot Court/ Legal Writting and one hour for instructions in language : the remaining 15-20 hours are left for work in library.

Method of Instructions :

The Sinha Committee was careful to resolve :

> "that the Faculty of Law, Banaras Hindu University, be requested to bear in mind that the value of syllabus of study is not merely in the content thereof but also in the manner in which students are exposed to the contents of the courses and, accordingly, to make appropriate changes in the method of instruction in order to derive full advantage of the proposed courses of study".

and this is reflected in the innovations that we have made for imparting instructions. While the number of students in the class for compulsory papers does not generally exceed 60, the optional papers are conducted on seminar basis and the number of students attending such classes do not generally exceed 25. Moreover, attempt is being made to supply synopsis of lectures and relevant materials in advance.

We believe that, while every effort should be made to introduce at least a variation of case-method at the advanced stage of the students' stay in the Law School, the method of instruction at the earlier stages should be left to the discretion and genius of the teachers concerned. It must be appreciated that there are not many teachers who can to-day successfully undertake case-method of instructions.

Assessment of Students' Performance :

The Ordinances contemplate 6 University Examinations, one at the end of each term. Only those students who obtain a minimum of 40% marks in each paper, (including those on legal research, Moot Court, Legal Writing and language), are promoted to the next term, though in order to be promoted to the next higher class, a student is required to obtain a minimum of 50% of the aggregate marks. Final assessment is made on the basis of marks obtained in all the 6 term examinations: students obtaining 75% or more marks in the aggregate are declared to have obtained Distinction, those obtaining 65% or more are declared to have passed the LL.B. Examination in the 1st Division and those obtaining 50% or more marks in the aggregate are declared to have passed in the II Division.

The allocation of marks emphasises and insures individual attention : 10% marks in theory, 50% marks in language and 100% marks in training courses are reserved to be awarded on student's day to day performance. Not more than 50% of the theory papers are set and examined by the teachers teaching the concerned courses.

(ii) *Training in Law :*

Law School Training :

Our courses of study provide opportunity to students to develop initiative, research faculties, dialectical abilities and the art of legal writing. The curriculum of instructions in legal research is designed to introduce to the students to the handling of the tools of research in Law. For instance, students are informed of the various types of materials that are used in legal research and the techniques of research. They are told how to use

the library, how to find out relevant statutory and case law materials, how to analyse problems, how and when to use non-legal materials in the determination of legal issues, and, among other things, how to search and utilise relevant articles and case notes. During his stay in the Banaras Law School, every student is expected to argue at least six cases in Moot Courts, write at least twelve judgments and publish at least one case comment. In addition to courses of instructions in Pleadings, Conveyancing and Drafting of Statutes, a course on legal writing has been introduced with a view to perfect the skill and craftsmanship that is expected from a well-trained law graduate. Efforts are also being made to organise a legal aid society where students with the help of faculty members, will be initiated into the technique of interviewing clients, eliciting relevant facts and advising them as to their rights. Investigations are also afoot to ascertain the feasibility of permitting the legal aid society to function in unrepresented municipal offences.[1]

Instructions in Legal Research, Moot Courts and Legal Writing are given in the tutorial classes consisting of 10 to 15 students and student's performance evaluated on day to day progress.

(ii) *Training Under the Advocates Act, 1961 :*

The Ordinances provide for training in law for a period of 30 days at the end of the First Year, 60 days at the end of the Second Year and 60 days at the end of the Third Year. During this period of 150 working days, the student is required to devote his time exclusively with the Advocate under whom he is taking training and, in particular, he is not to attend any classes. This has been made possible by scheduling the period of training at a time when the teaching work in the University remains suspended though the Courts are functioning. During the period of training, the student is required to maintain a diary and record therein chamber and court work assigned to him by the Advocates under whom he is taking training, the actual work done by him and a brief synopsis of the proceedings of the court which he attended. Further, the Advocate under whom the student is taking training, is required to counter-sign the daily recordings of the student in the diary, comment on the work of the student and, at the end of each of the aforesaid periods of training in law, make a detailed evaluation of the progress of the student. The Viva-Voce Examination

1 It is unfortunate that, because of the lack of finances, we have not been able to appoint Instructors in Language with the result that we have had to snspend, for the time being, instructions in language.

in respect of training in law is to be conducted by a Board of two examiners: one being the nominee of the Uttar Pradesh Bar Council and the other being the nominee of the University. Students who complete the aforesaid training in law for a period of 150 days and who pass the Viva-Voce examination thereafter are to be issued a certificate indicating that they have undergone a course of training in law and thereafter passed an examination as aforesaid:

This matter of practical training in law has been approved by the Uttar Pradesh Bar Council and is now before the Bar Council of India.

(*b*) *LL.M. Degree Course:*

The Masters degree is conceived as a bridge between the Bachelor's Degree and the Research Degree in law. Consequently, an attempt has been made to provide opportunity for exhaustive and intensive study of the chosen field of specialisation. Choice of the optional group is dependant on the optional papers taken at the LL.B. level. For instance only those students can offer Constitutional Law at the LL.M. level who have pursued a regular course of study and passed relevant examinations at the LL.B. level in (1) Constitutional Law-1, (2) Constitutional Law-2, (3) Administrative Law, (4) Interpretation of Statutes and Judicial process, (5) Federal Constitutions, (6) Constitutional History and Law of England, (7) Civil and Political Rights, and (8) Legislative Process in India. Such restriction of optionals, while giving ample scope for developing the requisite perspective, it is believed, would avoid unnecessary repetition of courses of study, albiet at "higher level", and enable students to make a comprehensive and critical study of courses prescribed for the LL.M. examination. Further, every LL.M. student is expected to write a dissertation of about 150 pages on an approved topic. This, it is expected, would provide an opportunity to the student to develop not only the skill of analysing legal problems but also the craftsmanship of sustained legal writing. The Viva-Voce Examination is a comprehensive examination and would cover the entire field of specialisation.

4. *Physical Facilities:*

To shoulder the increased responsibilities of a 3-year 6-term LL.B. and 1-year 2-term LL.M. Degree Courses of study, the Banaras Law School needs considerably improved physical facilities and amenities.

(*a*) *Building:*

(i) *School:*

The Banaras Law School, until 1960, was housed in a portion of one of the rooms of the Arts Faculty Building. Its classes were held between 5 and 8 P.M. in the evening and the law collections formed part of the Central University Library. The School has now eight rooms in its exclusive possession. Of course, almost the entire building of the Arts Faculty is available to us from 5 p.m. onwards. This has enabled us to provide a bare minimum of office accommodation to our teachers, shift a part of the Law Library to the Law School and hold some of the classes from 10 A.M.

In relative terms, the improvement is significant. Nevertheless, it is not sufficient to shoulder the responsibilities of the new courses of study and the University is alive to the situation.

A building plot, measuring 950 ft. by 550 ft., has been ear-marked for the Law School. The Master Plan of the building contemplates providing independent rooms to each member of the staff, sufficient number of office space for secretariat assistance, adequate number of class rooms and, among other things, law library which will provide reading space to at least 75% of the contemplated strength of 500 students at a time and store approximately one million volumes.

Because of the paucity of funds, the University has been compelled to phase the building programme and limit the present construction to 35,000 sq. ft. for which the University Grants Commission has sanctioned approximately Rs. 9 lacs. These constructions will no doubt further improve the condition but, even so, are not adequate. We need at least an additional area of 25,000 sq. ft. to complete construction of such portions of the building as would reasonably meet our requirements.

(ii) *Residential Accommodation:*

The Banaras Hindu University, with residential accommodation for over 4,000 students, is the largest residential University in the country. It has sufficient number of seats available for the students of the Law School. Indeed, there is a possibility that the University may assign one of the hostels for the exclusive use of law students. Moreover, the University has sufficient number of quarters, including those that are beingbuilt, to provide residential accommodation to the members of its staff.

(*b*) *Library :*

The Law collection in the library is, judged by Indian standards, good. It comprises of approximately 20,000 volumes, including 50 periodicals. It would, accordingly, compare favourably with law collections of any other University in India. Moreover, the Central Library of the University, with over 400,000 volumes including over 3000 periodicals, is the best among University libraries in India. Even so, like any other Law School Library, ours is inadequate.

We are extremely glad to state that the Ford Foundation has granted us $63,000 for foreign Law books and the University Grants Commission has granted us a total of Rs. 1,00,000/- besides the normal recurring annual grant of Rs. 5100/- for the purchase of Law books during the Third plan period. These would go a long way to meet our urgent requirements.

III

THE ANCILLARY TASKS

Reorganisation of , and reforms in, legal education have increasingly become more difficult. Formerly one had merely to convince the University authorities and, perhaps, the Government of the usefulness of the proposed scheme. Later, the University Grants Commission became almost a decisive decision-making body. Since 1961, the State Bar Councils, the Bar Council of India and the Legal Education Committee of the Bar Council of India have also an important say in the matter. In the over all context of the popular image of law, the role of law graduates and the functions of a law school, it is not easy to push through any scheme for the reform of legal education.

The Banaras Scheme is an apt illustration. The proposal to institute a 3-year 6-term LL.B. degree course, which was first made by the Board of Studies in Law in 1960, was processed through the Faculty of Law, the Bhagwati Committee, the Academic Council and the Executive Council before the Banaras Hindu University accepted the principle of instituting the said course. Thereafter, the syllabus of studies, framed by the Board of Studies in Law, was processed through the Faculty of Law, the Sinha Committee and the Executive Council before the University framed detailed Ordinances. Meanwhile, the Scheme was distributed among the Judges of the Allahabad High Court, delegates attending the 5th All-India Law Teachers' Conference at Varanasi and among some of the Foreign Universities. It was universally acclaimed as a "pioneer effort" "in the right direction" for raising the standard of legal education.

While the University was taking the aforesaid steps for the improvement of legal education, the Parliament of India enacted the Advocates Act, 1961, which prescribed a course of training in law and an examination conducted by the State Bar Council as condition precedent for enrolment of Advocates. Since most of the other Universities in India have only a two year LL.B. Degree Course and even such of the Universities as have three year course have part-time instructions, institution of a 3-year 6-term career-oriented full time course of study for the LL.B. Degree in Banaras Hindu University presented a serious problem. Why would a student spend an additional year for the LL.B. degree at Banaras ? It may be that our courses of study are designed to prepare students not only for the traditional profession of Law but also for the diverse other careers that are open to Law Graduates. But even so, quite a few students join Law schools with a view to enter the profession of law and the question remains : why would these students opt to spend another year in our University ? It may also be that the standard of our proposed LL.B. degree is considerably higher than that of other Indian Universities. But so long as the Bar Council of India recognised a two year LL.B. degree for the purposes of enrolment as an Advocate, why would a student spend a further year at Banaras ?

To overcome this difficulty, the Board of studies made a two-fold suggestion. *First*, students pursuing certain prescribed courses of study may be permitted to undergo training in law under Advocates approved by the State Bar Council for a period of 30 days at the end of the first year, 60 days at the end of the 2nd year and another 60 days at the end of the third year, and the State Bar Councils may be requested to treat the aforesaid training as the "training in law" prescribed by them under section 24(1) (d) of the Advocates Act. *Second*, the Bar Council of India may be requested to declare the concerned students "exempt" from the requirement of section 24(1) (d) under proviso (v) to that clause.

One of the matters referred to the Sinha Committee related to this problem. "The General opinion of the Committee was that the courses of study for the proposed three-year degree was comprehensive and was in the right direction for the improvement of the standard of legal education in this country ; and, unless the Banaras Hindu University, which was making a pioneer effort for raising the standard of legal education was accommodated in a manner so as to ensure that students graduating from Universi-

ties having two years course did not get an advantage over the students of the Banaras Hindu University, the efforts of the Banaras Hindu University would suffer a serious set-back and such a situation would ultimately be detrimental to the raising of standard of legal education in the country".

The Sinha Committee resolved that

> "the State Bar Councils and the Bar Council of India be requested to deem the training in Law instructions given and examinations held by the Banaras Hindu University under the aforesaid scheme for three year LL.B. Degree course as sufficient compliance of the provisions of Section 24(1) (d) read with Section 24(1) (d) (v) of the Advocates Act 1961 and to enrol such students, subject to their fulfilling other requirements, immediately after their graduation and, in particular, without undergoing any further training in Law".

The University, accordingly, took two steps: (1) it requested the Uttar Pradesh Bar Council to treat the University's Scheme of training in Law and examinations in respect thereof as the training in Law and examinations prescribed under section 24(1) (d); and (2) it requested the Bar Council of India to declare students pursuing 3-year 6-term LL.B. degree course and undergoing University prescribed training in law as exempt from the requirements of Section 24(1) (d) of the Advocates Act.

The Uttar Pradesh Bar Council agreed, subject to certain conditions to which the University agreed, to treat our training in law and examinations as those prescribed by them under section 24(1) (d) and also recommended exemption of our students from practical training under Proviso (v) to section 24(1) (d) to the Bar Council of India.

However, the Bar Council of India has not yet disposed of the matter, although it is two years since the petition was made. It discussed the matter at its meetings held on January 26-27, 1963 and on February 23-25; and referred the matter to a specially appointed sub-committee. The Sub-Committee unanimously reported in favour of granting the exemption. Even so the matter was referred by the Bar Council of India to all the State Bar Councils for their opinion and the University was required to make available almost 300 copies of relevant literature for the members of tthe State Bar Councils. We do not know the response of the State Bar Councils but we do know that a majority of members at the Bangalore meeting of the Bar Council of India, held on May 27-30, 1963, were in favour of granting exemption. However, the matter was again postponed, and, at its next meeting, the Bar Council of India referred the matter to the then non-existing Legal

Education Committee. The Legal Education Committee was constituted towards the end of 1963 but early in 1964 the term of elected members of the Bar Council of India expired, necessiating a reconstitution of the Legal Education Committee. We have no knowledge of the present status of our petition. Perhaps it would await their decision on the larger issue of courses of study for the LL.B. degree.

In the meanwhile, the University Grants Commission declined to finance the Scheme during the 3rd plan period. Indeed, it wrote to the Ministry of Education, Government of India and the Ministry wrote to us in July 1963, after the Scheme had been introduced, to drop the Scheme for the time being. Both the University Grants Commission and the Government of India expressed a desire to know the response of the Bar Council of India on the question of exemption of students pursuing 3-year 6-term LL.B. degree course from the practical training required under the Advocates Act, 1961.

In view, however, of the extremely encouraging response to the Banaras Scheme and after prolonged discussions, the Ministry of Education and the University Grants Commission modified their position and made available to the Law College a sanctioned strength of 3 Professors, 6 Readers, 12 Lecturers, 3 part-time lecturers and 5 Research Assistants, besides sanctioning 35000 sq. ft. of construction (costing about Rs. 9 lacs) for the Law College building, Rs. 1 lac for Law books, 3 Ph.D. scholarships (Rs. 200/- p.m. each), 6 LL.M. scholarships (Rs. 100/- p.m. each) and 12 LL.B. scholarships of (Rs. 75/- p.m. each). The Ministry of Education was also pleased to permit us to approach the Ford Foundation for a grant of $ 240,000. which the Foundation has now made available to us.

These funds are sufficient to make a start of the full-fledged operation of the Banaras Scheme. The only thing lacking is the approval of the Bar Council of India. May I take this opportunity to request them to expedite their decision.

IV
CONCLUSION

The policy of excellence is an expensive policy. Moreover, it is a policy which takes time for fruition. The University authorities, the University Grants Commission, the Government of India, the State Bar Councils, the Bar Council of India, the Legal Education Committee of the Bar Council of India, the Ford Foundation and all those who are interested in the development of legal education will not only have to encourage and watch the progress of any scheme for reform of legal education with patience but to affirmatively help the Banaras Law School in carrying out its scheme.

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RESPONSE TO THE BANARAS SCHEME OF LEGAL EDUCATION

The Banaras Scheme, which the Sinha Committee described as "a pioneer effort for raising the standard of legal education" and as one "in the right direction for the improvement of the standards of legal education" in India, was for the first time fully stated in the 1962 Dean's Report submitted to the Visiting Committee of the University Grants Commission and distributed among distinguished men of Law.

The response has been most flattering. Wrote Professor Robert E. Mathews[1] :—

> "Turning now to your new curriculum, let me first say how greatly pleased I am that you have pioneered so boldly in setting up, as I understand it, the first three year fulltime (meaning day classes) curriculum in India...As you know, we in America have had many years of post-law School apprenticing and finally eliminated it some 25 years ago. Under no conditions can it take the place of third year of work in a law school. Thus I should be enthusiastic about this step forward, quite independent of the quality of your curriculum".
>
> "As an aside, I note that the Inter-University Board on legal Education is very critical of the third year apprenticeship and would like it "handed over to the Universities and Colleges", but at the same time seems still of the opinion that the "duration of the course for which the University conducts the examination...should be two years". These opinions confirm my impression that you and your faculty are far ahead of educational opinion on this subject
>
> "...let me add how warmly I endorse your projected establishment of a legal aid clinic for indigent clients. To me this provides superb practical training to students in both interviewing of clients and facing of issues of professional ethics and responsibility. Moreover, it contributes greatly to the welfare of the community and facilitates the achievemet of justice among a class that otherwise can never attain it. I hope very much that this plan can be put into operation".

and, in another letter, added :

> "You were most thoughtful to leave a copy of your report for me. I have read it with much interest and with great respect for your vigor, persistence, and understanding of educational values".

1 Visiting Professor, Indian Law Institute and Legal consultant, Ford Foundation.

> "I am much impressed with your plan for advanced training of members of your staff and I am pleased to see, also, that you have weekly dinner meetings to discuss educational questions. This is surely most desirable in order to keep all your faculty interested and to avoid divisions among them".
>
> "It seems to me that your plan shows great vision and certainly one of the most encouraging trend that has come to my attention since I have been here".

Commented Professor Clyde W. Summers.[1] :

> "It seems to me that you have made great progress in developing the law school and that you have a very large and responsible task. The work of trying to expand the curricula, obtain new faculty people and at the same time get a new building and library must be quite overwhelming. I am sure, however, that you would do a very good job".
>
> "You can certainly make an enormous contribution in the field of legal education in India. It will undoubtedly be a long hard job in building up the kind of law school you want and raising standard to the level which you would desire. However, I am certain that you can do it and it will be a great contribution".

And, observed Professor L.A. Sheridan.[2]

> "I have taken some time to examine your 3-year 6-term LL.B. degree course and I am now offering you my comments...I have been agreeably impressed with the thought that has gone into producing this syllabus...It is a great advance on anything known to me in the Indian subcontinent".
>
> "I am delighted at the list of optional subjects and congratulate you on the inclusion as subjects of academic study many things improperly neglected in institutions which consider themselves more developed than ours in South East Asia".
>
> "I hope that it will be copied in other law schools in India and in Pakistan too, as I am sure that it should form an important part of the inspiration for a general raising of the level of University studies in law in that part of the world".

More recently Dr. Douglas Ensminger wrote :

> "I would like to take this opportunity to tell you how impressed I am with the work you and your faculty are in the process

1 Professor of Law, Yale Law School, New Haven, Conn., U.S.A.

2 Formerly Dean, Faculty of Law, University of Singapore, Singapore and at present Professor of Law, The Queens University of Belfast, Belfast, Northern Ireland.

of carrying out in an effort to modernize and upgrade the work of the Law College at Banaras University. Those of my staff who have visited your College have returned fully impressed by your new teaching programme, and after reading your description of it, I would like to add my own compliments to you for what you are doing. I need not tell how much I admire you, and your Vice-Chancellor, for having the courage to press forward with a far-reaching programme of change in legal education".[1]

Commented Associate Dean Cavers[2] :

"I have learned that, contrary to my pessimistic expectations at the time of my visit to Banaras, the Ford Foundation in India is supporting your application to the Foundation, a development that I believe is almost certain to produce a favourable response in New York. I was delighted by this news. The action is a signal tribute to your enterprise and imaginative planning. I hope, most keenly the U.G.C. will now join the Foundation in providing you with the additional resources that your plans require".

Observed Professor Myres S. McDougal[3] :

"I am delighted with all the good news about the progress you are making in building a truly great modern law school. I have heard from several sources, some having no connection with either Yale or Banaras, that you are doing a wonderful pioneering job. If you can pull it off, you will of course have many imitators in the future".

And, wrote Professor Arthur von Mehren[4] :

"I trust that plans for development at the Banaras Law faculty are proceeding well. I shall follow your efforts with the greatest interest and with the conviction that what you are doing is of high importance not only for your own school, but for legal education throughout India".

Indian reactions have been no less encouraging. The Uttar Pradesh Bar Council was so impressed by the Scheme that it amended its rules in a manner as to deem the training given and examinations held by the Banaras Hindu University as the training given and examinations conducted by them. They further recommended to the Bar Council of

1 Ford Foundation Representative in India New Delhi.
2 Harvard University, Cambridge, Mas. U.S.A.
3 Sterling Professor of Law, Yale University, New Haven, Conn. U.S.A.
4 Professor of Law, Harvard University, Cambridge, Mass. U.S.A.

India that the students of the Banaras Hindu University be declared to be exempt from the requirement of undergoing a course of training in Law and passing the examination in respect thereof.

The Bar Council of India appointed a sub-committee to consider the aforesaid recommendations of the Uttar Pradesh Bar Council. This sub-committee, *inter-alia*, stated :

The Committee unanimously takes the view that the efforts made by the Banaras Hindu University are, to say the least, in the right direction. The study of law contemplated under their syllabus not only keeps pace with the modern trends but the comprehensive and analytical manner in which the syllabus has been worked out gives us an impression that the new venture proposes to prepare the students in the real sense in the Science of Law".

and, recommended the grant of exemption. Eventhough, the Bar Council of India has not, as yet, granted exemption, it needs to be emphasised that every member has expressed appreciation of the scheme though a few of them feel that the Bar Council of India is not competent under the Advocates Act 1961 to grant the requested exemption. The matter is now before the Legal Education Committee. It might be mentioned that former Attorney-General M. C. Seetalvad and Professor G. S. Sharma, who are members of the Legal Education Committee, were also members of the Sinha Committee. The views of Professor Sharma are best expressed in his own words :

"I read in the 'Statesman' today about your three years course. I hasten to congratulate you...Do write to me for any assistance you may require for the excellent and pioneering job you are doing. My hope is that in not too distant a future I may be able to fall in line with you. My effort will continue in the direction of making the scheme an all-India venture".

Recently, the Hon'ble Sri P. B. Gajendragadkar, the Chief Justice of India, commended the scheme and said that he chose Banaras Law School Forum to speak on legal education for the first time as the Chief Justice of India because of the "great experiment in Legal Education" that was being carried on here. These views are now shared by the University Grants Commission. While sanctioning the filling of the posts of 3 Lecturers and 5 Research Assistants, additional 10,000 sq. ft. of construction for the Law College Building and additional Rs. 50,000/- for Law Books, Chairman Kothari considered the Banaras scheme to be a "good scheme" and the Commission sent an Expert Committee to Banaras to further evaluate our

scheme and assess our immediate minimum requirements. This Committee, *inter-alia*, observed :

> "The syllabus attempts to give a new orientation to legal studies which hitherto were designed exclusively for practice at the Bar, even though other incidental uses were found. This new syllabus is likely to have two special advantages. The first is for training personnel e.g. specialised knowledge of taxation, labour laws, co-operation, company laws and in general, for the problems of law relating to planned and regulated economy. As a necessary consequence of this, students taking a law degree with some of the new subjects will have a larger and more varied employment opportunity. These aims are worthy of encouragement".

What is more important, the Committee agreed that there :

> "is the need for giving special encouragement and impetus for the teaching of Law. Until recent years the place given to upgrading of Law Departments in universities was not very high. A number of reports written by responsible bodies in the last few years have rightly emphasised the need for improving teaching and research in Law and as a sequel to improve institutions for the purpose. The aim of the Banaras Hindu University to 'seek excellence' in their Department of Law is worthy of support".

and recommended the filling the posts of 2 Professors and 3 Readers besides awarding of 3 Ph.D. scholarships, 6 LL.M. scholarships and 12 LL.B. scholarships. The University Grants Commission considered the aforesaid report at its meeting held on September 2, 1964, and accepted the recommendations.

These developments have had a tremendous impact on the negotiations which Dean Anandjee was having with the Ford Foundation for further financial assistance to imrpove legal education at the Banaras Hindu University. They have granted a sum of $2,40,000 to the Law College for inviting visiting professors, sending its teachers abroad for training and for the purchase of foreign books.

It is encouraging to note that the Mahajan Committee (Punjab University), Gajendragadkar Committee (Delhi University) and Sinha Committee (Kerala University) have made suggestions analogous to the Banaras scheme for the improvement of legal education.

THE JOINT HINDU FAMILY RETROSPECT AND PROSPECT*

By

B. N. SAMPATH†

I

INTRODUCTION

The Joint Hindu Family[1]; with its restricted and joint ownership, is one of the most cherished institutions of the Hindus. Ever since 1850, however, laws have been enacted which, in general, tend to disrupt the joint family system. The Parliament of independent India, in the very

* The author wishes to acknowledge, with gratitude, the able guidance that he received from his teacher Sri K. Natesan, B.Sc., LL.M., Lecturer in Law, Osmania University, in writing this article.

† B. N. Sampath, B.Sc. B.L. (Mys.), LL.M. (Osm.) Lecturer in Law, Banaras Hindu University ; Mir Hamza Husain Saheb Muslim Law Scholar 1958, University of Mysore ; Formerly of the Bangalore Bar.

1 The most appropriate Sanskrit term for the expression joint Hindu family is *Kutumba*, sometimes also referred to as *Avibhakta Kutumba*. See, for instance, Mitakshara 1, (i) 28, 29 and Dayabhaga 2, 26.

Professor Bhattacharya is of the view that the expression *Kutumba* does not necessarily mean joint Hindu family. He cites the text :

उदारचरितानां तु वसुधैव कुटुम्बकम् ।

to show that the word has been used to express the concept of the world as a family. He further cites the text of Narada :

कुटुम्बं बिभृयाद् भ्रातुर्यो विद्यामधिगच्छतः ।
भागं विद्याधनादस्मात्स लभेताश्रृतोऽपि सन् ।। नारदः 13, 10.

to show that the word *Kutumba* has been used to mean "*wife and children*". See, Bhattacharya K. K., "Joint Hindu Family", Tagore Law Lectures (1884-85), p 33. Even so, merely because a word has been used by certain authors to denote a wider or a narrower concept, it does not necessarily follow that the word has lost its primary meaning.

It may be pointed out that the word *Kula* does not represent the joint Hindu family. First, when two persons are said to belong to the same *Kula* it merely means that both of them are descendants of such ancestors as were members of the same family. It is in this sense that the word *Kula* is used in its compound form *Sakulya*, i.e. the descendants of a common remote ancestor (of course, apart from its technical meaning). Thus, while *Kula* does lay stress on the members having descended from a common remote ancestor, it is quite inadequate to determine the composition of the family. Second, in Bhagavadgita (I, 38-43) the word *Kula* is used in the sense of a race. Third, the Commentaries and Digests never use the word *Kula* to denote joint family.

first decade of its existence, has passed laws which will hasten the process of disintegration. Judicial decisions have played no less an important role in the annihilation of the joint family system. Indeed, if the onslaughts on the institution continue in the same pattern, we can be sure that the institution will be extinct within the next few decades and at the dawn of the twenty-first century, it has to be looked upon as any other institution given to desuetude.

This article attempts to ascertain the nature of joint Hindu family, its evolution and its merits and demerits in contemporary India. We have tried to evaluate the legislative prescriptions and judicial decisions in terms of their impact on the system and in particular how far such impact will be conducive to the needs of our society.

II

EVOLUTION OF JOINT FAMILY SYSTEM

Family is the threshold for the practice of Dharma[1]. Religion and charity begin at home in the cultivation of proper relations in the domestic sphere with parents and children and brothers and sisters. Maximum amount of good to others, truthfulness, compassion, gratitude, devotion and self control are some of the tenets on which is founded the family life. Yet, inspite of the all-pervading importance of the family and notwithstanding the fact that the Hindu Dharmasastra, the epics and the Puranas, which are the standing monuments of Dharma, extol the blessings of family life in abounding terms, the origin and development of family have been shrouded in obscurity. There is no available evidence to reconstruct the past, nor, are we likely to find any such evidence, for family relationship is essentially psychic and in its very nature is not likely to leave any material evidence for the enlightenment of anthropologists thousands of years later. Under these circumstances we can only speculate on the enticing mystery so effectually hidden from us.

1 "Dharma" is one of those Sanskrit words that cannot be exactly rendered into the English language. "Dharma" includes not merely legal duties but also religious, moral and social duties which are to be observed by a Hindu. Indeed, there is no word in Sanskrit which dissociates positive law from religion, ethics and morality. On the other hand, there is no word in the English language which comprehends law religion, ethics and morality. Consequently, the translation of the word "Dharma" in terms of the English word "law", as some of the earlier translators have done is unsatisfactory.

For definition and meaning of "Dharma" see, Kane, P. V. "History of Dharmasastra" Vol. I pages 1-4.

The natural family of parents and children is a biological necessity for nature has implanted instincts which not only draw the sexes together but also strengthen the filial bonds. But the family as an institution, a unit of co-operation and a vehicle for the transmission of property and status, is a later development. The family is a cultural superstructure on a biological foundation. In order to discern the structure of family in the early times, we have to take into consideration the institution of marriage prevailing in those times: marriage is an institution and family is the association that embodies that institution. A society which practises patriarchal form of marriage[1] gives rise to patrilinear families; but a society wherein matriarchy[2] is the rule gives rise to matrilinear families.

Whether the form of family, at the dawn of human civilisation, was patriarchal or matriarchal is a question beset with controversies. Sir Henry Maine believed that Patriarchal form of social life was the original and universal form of social life. The Swiss Jurist Bachofen, on the other hand reached precisely the opposite conclusion. Judging from the material evidence available in this regard we find that, depending solely upon local circumstances, either system may arise and spread out at any level of human civilisation; both may exist side by side[3]; and either may spring from or develop into the other. Further, at a very early period of human civilisation, patriarchal family system rose to ascendancy and was widely prevalent throughout the world.

The patriarchal family resembled a miniature *state*, having at its head the *paterfamilias* who enjoyed vast and exclusive authority over the members and the property of the family. After the death of the *paterfamilias* the patriarchal family either split up, as in Rome, into as many similar patriarchal families as there were sons of the deceased, with each son becoming a *paterfamilias*; or, as in India, continued as such under the leadership of the eldest male member of the family who, not being the father, enjoyed lesser powers than the *paterfamilias*. It is difficult to ascertain the causes that led to the abandonment of the patriarchal family system and the adoption of joint family system in India. It is also not certain when this transformation took place, though there are indications that the

1 Patriarchal form of marriage is one where a man appropriates a woman exclusively and, as a result, the woman and the children come under the *potestas* of the husband.

2 In matriarchy, there is no question of exclusive appropriation of the woman by any man. The head of a matriarchal family is the eldest living female and the lineage is traced through females only.

3 e.g. Malabar where the patriarchal and matriarchal systems co-exist.

joint family system existed in the Vedic period[1] and was the forerunner of the village community.[2]

The Joint Hindu Family comprises all males who are the lineal descendants of a common male ancestor and their wives and unmarried daughters.[3] It includes within its fold illegitimate sons and concubines who enjoy certain limited rights.

The Joint Hindu family resembles a corporation. Additions to and deaths in the family do not alter the character of the family: they merely affect the quantum of interest of the members to be ascertained at the time of partition though so long as the joint family status continues, the

1 An analysis of the Vedic and Brahmana literature leads to the conclusion that the joint family system was prevalent in the Vedic age. See, for instance, Ghurye "Family and Kin" p. 45; Pusalker "The Vedic Age" p 384; Radhakumud Mukerjee "Hindu Civilisation" p. 78. 1st edition. But, See, N. C. Sen Gupta "Evolution of Law, p. 142-143 where Professor N. C. Sen Gupta denies the prevalence of joint family system in the Vedic period. It may, however, be mentioned that although Professor Sen Gupta professes to rely upon both Grihya Sutras as well as Dharma Sutras, he has in fact, founded his theory on passages drawn entirely from Grihya Sutras. In the Grihya Sutras, we find the ideal picture of a householder, whereas in Dharmasutras, we find the wisdom of practicality that is maintained in life. Srauta Sutras, Grihya Sutras and Dharma Sutras are supplementary treatises and all the three are to be taken together to draw a particular conclusion. Consequently a picture of the Vedic family drawn on the basis of the Grihya Sutras only cannot be taken as accurate.

2 Professor Mitra holds the view that:

"In the natural order of things, the patriarchal family consisting of the father and his sons in which the influence of the father was supreme must have preceded the joint family and the village community. Upon the death of the patriarch or the father, the family consisted of brothers and their sons and when they chose to live together, they lived as a joint family. The joint family thus became the second stage of living in groups.....In the infancy of the world when hunting was a man's chief occupation and his wants were few, the families naturally grouped together for their protection from the inroads of their neighbours and hence arose the system of village communities". See, R. C. Mitra "The Law of Joint Property and Partition" P. 22 Tagore Law Lectures 1913 Edn. But, Professor Bhattacharya is of the opinion that the joint family system is posterior to the village communities. See, K. K. Bhattacharya" Joint Hindu Family" P. 72-87 Tagore Law Lectures (1884-85). It is, however, submitted that the institution of joint family and village community system are not inconsistent with each other; both may exist simultaneously. If village community is the outer circle, joint family is the inner circle. It may be, as Professor Bhattacharya asserts, that the proprietorship of the village land vested in the community; but there is nothing to show that the village community encroached upon other rights of the family. For instance, joint families existing in a village community owned all sorts of wealth such as houses, utensils, slaves, cattle etc. which did not vest in the community.

3 Joint family seldom stretches, in modern times, beyond four generations.

members of the family cannot predicate their interest in the joint family property.[1] Every member is entitled to the benefits which the family affluence can provide. The joint Hindu family is often compared to the English joint tenancy. However, beyond an apparent resemblance in the incidents of unity of interest, the right of partition and the rule of survivorship, the joint Hindu family is entirely distinct in character and conception.[2]

III

JOINT FAMILY SYSTEM UNDER MITAKSHARA AND DAYABHAGA SCHOOLS

The two principal schools of Hindu Law, the *Mitakshara* and the *Dayabhaga*, fundamentally differ regarding the principles of inheritance and the joint family system[3]; each of them having a respectable antiquity to support its theory. Vijnaneswara and Jimuthavahana did not propound novel theories: they merely gave crystallized form to the prevailing customs and usages of their times buttressing their stand with the texts of hoary sages of ancient times.

The doctrine of right by birth has been the bone of contention between these two schools. Whereas *Mitakshara* upholds the *janma swatwavād*[4] with great fervour, *Dayabhaga* refutes the same with equal assiduity to establish the theory of *uparama swatwavād*.[5]

The principle of right by birth as understood and applied today is the culminating point of a long process of evolution covering thousands of years. Moreover, the original concepts were on occasions, extended and even distorted to meet local needs, whether of permanent nature or of temporary character. It is, therefore, not surprising that we find innu-

1 *Appovier Vs Ramasubbier. 11 M.I.A. 75, 89.*

2 For a comparison of joint family and joint tenancy of England See J. R. Gharpure 'Hindu Law (4th Edn) P. 186-187.

3 The reason for this divergence is rather difficult to ascertain, particularly because the divergence is not confined to any specific area as in the case of different regional schools under the *Mitakshara* but pervades the entire system. Justice Saradacharan Mitra explains that, on account of the deltaic character of this region and its nearness to the sea, new ideas were brought in every day which together with the admixture of many races and the influence of Buddhism combined to bring about a law of property dissimilar to the one prevailing in the rest of India. See, (1905) XXI Law Quarterly Review P. 380-392 and (1906) XXII P. 50-63 But, P. V. Kane disagrees with this view. According to him the system of law in Bengal is of indigenous growth. See, P. V. Kane 'History of Dharma Sastra' Vol. III, P. 559-560.

4 Acquisition of right by birth.

5 Acquisition of right on the demise of the previous owner.

merable and at times even irreconcilable inconsistencies among, texts of sages. Consequently, we cannot dogmatise any particular proposition relying only upon the text of a sage, however great he may be. A proper appreciation of the text needs study of the text in the context of its background and rationalization in terms of the purpose which the text purported to achieve.

The texts relating to the doctrine of right by birth may be classified into three broad categories[1]:

(1) Texts that definitely establish the absolute dominion of the father over the property in his hands and give him unfettered right of disposition. It is emphatically stated in these texts that the sons have no right in the property in the hands of the father during their father's lifetime.[2] Indeed, Manu's text[3] even denies the right of the son in the property acquired by the son himself.

(2) Texts[4] that concede to the sons certain rights in the property in the hands of the father, such as the right to restrain the dissipating father from alienating the ancestral or even self-acquired immoveable property.

(3) Texts[5] that specifically declare the co-ownership of the father and the son in the property in the hands of the father. According to these texts, a son, as soon as he is born, becomes a co-owner, with his father, of the ancestral property and even acquires some interest in the self-acquired property of the father.

1 Sen Gupta's classic treatment of this topic is of much avail in this connection. See, Sen Gupta's 'The Evolution of Ancient Indian Law' P. 203

2 (a) न जीवति पितरि पुत्रा ऋक्थं भजेरन् । शंक quoted by Smritichandrika,

(b) पितुर्युपरते पुत्रा विभजेयुर्धनं पितुः । अस्वाम्यं हि भवेदेषां निर्दोषे पितरि स्थिते । देवल quoted by Vivada Ratnakara,

(c) ऊर्ध्वं पितुः पुत्रा रिक्थं भजेरन् निवृत्ते रजसि मातुः जीवति चेच्छति च । गौ २८-१-२

(d) भजेरन् पैतृकं रिक्थं अनीशास्ते हि जीवितोः । मनु ९, १०४

(e) अनीश्वराः पितृमन्तः स्थितपितृमातृकाः पुत्राः । अर्थशास्त्र २ पृष्ठ ३१

3 भार्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः । यत् ते समधिगच्छन्ति यस्येते तस्य तद्धनम् । मनुः ८, ४१६.

4 स्थावरं द्विपदं चैव यद्यपि स्वयमार्जितम् । असम्भूय सुतान् सर्व्वान् न दानं न च विक्रयः । ये जाता ये अप्यजाता ये च गर्भे व्यवस्थिताः । वृत्तिं ते अप्यभिकांक्षन्ति वृत्तिलोपो विगर्हितः

5 (a) मणिमुक्त प्रवालानां सर्वस्यैव पिता प्रभुः । स्थावरस्य तु समस्तस्य न पिता न पितामहः ॥

(b) भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा । तत्र स्यात सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः ॥ याज्ञवल्क्यः २, १२२

It is significant that almost all the texts that deny the son any right in the father's property belong to the period of Sutras or earlier and all the texts that lay down the coequal ownership of the father and son belong to the period of Smritis. Manu occupies an anomalous position in the Hindu legal literature. He can be cited both to suport father's absolute powers as also son's co-ownership. This anomaly may be due to the fact that Manu Smriti occupies, in point of time, an intermediate position: it marks off the end of Sutra period and the beginning of the Smriti period. It is plausible that Manu was on the horns of dilemma. He could not abandon the pronouncements of his predecessors, yet he could not overlook the prevailing customs and usages. Perhaps the dilemma was sought to be resolved by stating the norms of the hoary sages of the past but prescribing rules consistent with the spirit of prevailing customs and usages, a practice which brought in inconsistencies in the Manu Smirti.

To sum up, the son was denied any right in the property, at the earliest period. Even in his self acquired property, the son had no right of disposition. This rigid attitude, however, softened gradually and, in later times, we find instances of fathers, in their decrepitude, distributing their property among their sons. Though the sons could not, during this period, claim partition as a matter of right, yet instances[1] of unrighteous sons forcing their fathers to partition the property were not unknown. To begin with, this attitude on the part of the son was met with utmost opprobrium and such sons were subjected to social ostracism e.g. they were deprived of invitation in funeral repasts.[2] However, it is likely that fathers misused their absolute powers to the detriment of their offsprings. It is only on this premise that we can explain the moral precepts limiting fathers' absolute powers which we come across in later times.

It is also likely that the limitations of the moral precepts were exposed by continued misuse of the absolute powers and society reacted by changing its attitude towards a son who claimed partition. At a still later stage, the evil of misuse of absolute powers was sought to be restrained by recognising co-ownership of father and son.

1 न भोजयेत्·····पित्रा वाकामेन विभक्तान् । Gautama XV, 15, 19.

2 Ibid

The conflict between the theory of absolutism of the father and theory of right by birth of the son is, thus, of respectable antiquity. It existed prior to the Smriti period. Vijnaneswara and Jimuthavahana did not, contrary to general assumption, propound novel theories : they merely took sides with the existing theories and paved the way for their general acceptance. The reason why Jimuthavahana reasserted the theory of absolutism of the father is a matter of conjecture.

Vijnaneswara defines *daya*[1] as that wealth which becomes the property of a person 'solely'[2] by reason of his relationship to the owner and classifies it into two categories: (1) *apratibanda daya*;[3] and (2) *sapratibanda daya*.[4] The wealth of a father or paternal grandfather becomes the property of his sons or grandsons by reason of their being his sons or grandsons respectively. This inheritance is not liable to "obstruction" and is, therefore, called *apratibanda daya*. Property devolving upon persons from relations other than lineal ascendants is, on the other hand, liable to "obstruction" and is consequently, known as *sapratibanda daya*.

Inspite of many difficulties,[5] Vijnaneswara establishes that sons and grandsons acquire, by birth, ownership in the property in the hands of

1 तत्र दायशब्देन यद्धनं स्वामिसम्बन्धादेव निमित्तादन्यस्वम्भवति तदुच्यते । स च द्विविधः अप्रतिबन्धः सप्रतिबन्धश्च तत्र पुत्राणां पौत्राणां च पुत्रत्वेन पौत्रत्वेन च पितृधनं पितामहधनं च स्वम्भवतीत्यप्रतिबन्धो दायः । मिताक्षर १, १-२-३

2 The word "solely" is significant since it excludes all other modes of acquisition such as purchase, gift and the like.

3 In the case of *apratibanda daya* the sons, grandsons and great grandsons have a vested right by birth and the existence of the father, grand father, or great grandfather does not in any way hinder or "obstruct" the acquisition of ownership.

4 In *Sapratibanda daya*, on the other hand, the interest of the "dayadas" ripens into a vested right on their surviving the propositus.

5 Writers who opposed Vijnaneswara's theory advanced an objection that ownership is acquired according to Sastras only and that the acquisition of ownership by birth is not mentioned in the text of Gautama:

स्वामिरिक्थक्रयसंविभागपरिग्रहाधिगमेषु ब्राह्मणस्याधिकं लब्धं क्षत्रियस्य विजितम् निर्विष्टं वैश्यशूद्रयोः । गौतम १०,३९,४२.

However, with great erudition, Vijnaneswara argues that property is temporal only and that the acquisition of property is a matter of popular recognition. Further Vijnaneswara says that even in the text of Gautama, "unobstructed heritage" is denominated as inheritance.:

तत्राप्रतिबन्धो दायो रिक्थ क्रयः प्रसिद्धः·····मिताक्षरा १,१,१३.

He also quotes a text of Gautama, (though it is not to be found in the present Gautama, Dharma Sutra) which specifically declares acquisition of ownership by birth:

उत्पत्यैवार्थ स्वामित्वंलभेतेत्याचार्याः । मिताक्षर धृत गौतम वचनं

their father and grand father. It may here be emphasised that Mitakshara mentions only the son and the grandson and does not refer to the great grandson. The omission gives rise to a doubt, particularly in view of the fact Vijnaneswara is explicit in all that he says, as to whether the great grandson gets an interest by birth in the great grand father's property. Mitra-Misra, author of Viramitrodaya elicits the right of the great grandson from the text of Yajnavalkya. However, it may be mentioned that the argument of Mitra-Misra is not very convincing.[1]

There is a catena of cases which lay down that the son acquires a right by birth only in the ancestral property in the hands of the father and that the father has absolute right of disposition over his self acquired property. But this statement of law is not in conformity with ancient texts. Priyanath Sen rightly points out that, according to Smritis, the son acquires interest by birth in the ancestral as well as self acquired property in the hands of the father, though the nature of his interest is different in the two categories of properties.[2] The son can interdict the alienation and enforce partition of the ancestral property even against the will of the father, because the father and the son have similar rights over it.[3] But although the son has an interest in the self acquired property of the father, the son is required to acquiesce in the alienation by the father on account of the dominant position of the father in acquiring that property and of the son being dependant on the father.

The nature of the interest of the son, according to the Smritis, also depends on as to whether the property is moveable or immoveable. The father has an unrestricted right of alienation over his selfacquired moveable

1 Yajnavalkya enjoins the sons and the grandsons to pay the debts of the father who is dead, who has gone abroad or who is afflicted with disease.

पितरिप्रोषिते प्रेते व्यसनाभिप्लुतेऽपि वा । पुत्रपौत्रैः ऋणं देयं निह्नवे साक्षिभावितं । याज्ञवल्क्यः २,५०

And, because Yajnavalkya uses the word in the plural number i.e. "pautrii", Mitra Misra, concludes that the great grandsons are also included. Mitra Misra argues that if Yajnavalkya had really intended to include merely sons and grandsons he would have used the word in dual number and not in plural number. But this argument is hardly convincing. The use of the word in plural number suggests that more than one off-spring in the same generation was sought to be included and not that more than one generation of descendants were being included. There is no reported decision which specifically discusses the right of the great grandson. However, the courts have always recognised the right of the great grandson. The authority is more in judical lore echoing bald statements of certain commentators than in reasoning.

2 Priyanath Sen 'Hindu Jurisprudence' (1909) Tagore Law Lectures P. 129.

3 तत्र स्यात सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः ।

property. But the right to alienate ancestral moveable property is subject to being for proper use. Thus, when the father begins to dissipate or wants to dispose of ancestral moveable property in favour of one son to the exclusion of others, his power[1] of free disposition is fettered. As regards immoveable property, whether self acquired or ancestral, the father cannot alienate the same without the consent of his sons.[2] However, though the son, being a co-owner in the ancestral immoveable property, has the right to enforce partition of the same, he has no such right in the self acquired immoveable property of the father. The Privy Council decision in *Rao Balwant Singh Vs. Rani Kishori*[3] holding that the father could alienate the self acquired immoveable property in any way he liked and that the texts which restricted the rights of the father were only recommendatory, is a clear departure from the strict and wholesome rule of Mitakshara. The imputation that Mitakshara has mixed up precepts of mandatory and recommendatory nature is far from true. Indeed, the reasoning given by the Privy Council is only a self imposed delusion to support their stand.

Jimuthavahana brushes aside the theory of the son's right by birth, stating that texts which declare the co-ownership of father and son are merely recommendatory, and establishes that the son has no right either in the ancestral or self acquired property in the hands of the father. According to him, all heritage is "Sapratibanda" i.e. liable to obstruction. He makes "uparama swatwavad" the bedrock of his doctrine and states that the word "heritage is used to signify wealth in which property dependant on relation to the former owner arises on the demise of that owner".[4]

Although there is straining of language and rather artificial construction, one is deeply impressed by the forensic acumen with which Jimuthavahana explains the texts: भूर्या पितामहोपात्ता and मणिमुक्तप्रवालानाँ to refute the doctrine of right by birth, It is, however, interesting to note that, notwithstanding his denial of son's right by birth, Jimuthavahana did not entirely endorse the view that the father had the absolute right of disposal over the ancestral property. While explaining the text of Vyasa, Jimu-

1 In *Lakshman Dada Nayak Vs. Ramchandra 1876*, 1 Bom 561 (1881), 7.I.A 181,a Hindu father had bequeathed a large amount of ancestral moveable property to one of his undivided sons. The Privy Council held the bequest invalid because the text distinctly prohibited such an unequal distribution.

2 स्थावरं द्विपदं चैव यद्यपि स्वयमार्जितं असम्भूय सुतान् सर्वान् न दानं न च विक्रयः ।

3 25 I. A. 54;

4 ततश्च पूर्वस्वामिसम्बन्धाधीन तत्स्वाम्योपरमे यत्र द्रव्ये स्वत्वं तत्र निरूढो दायशब्दः । दायभाग I. 4-5

thavahana asserts that an alienation of ancestral property which affects the maintenance of the family is not proper.[1] Further, Jimuthavahana did not detail all the circumstances under which it would be proper or improper for the father to dispose off the ancestral property. Nor did he precisely indicate the nature or extent of the son's interest in case of improper alienation or division[2] of ancestral property by the father. He left the consequences of his doctrines to take their own course. It may, however, be emphasized, here, that the doctrine of 'factum valet' was applied by Jimuthavahana only to the alienation of self acquired immoveable property:[3] the sweeping proposition laid down by courts[4] that the Dayabhaga father could alienate both ancestral and self acquired immoveable property is not fully warranted by the texts of Jimuthavahana.[5]

In recent times the Hindu Code Bill of 1948 suggested the abrogation of son's right by birth.[6] The promulgation of such a provision would have caused inestimable damage to the Hindu Society. The strife between

1 Daya Bhaga XXII 23.24.

2 Jimuthavahana grudgingly concedes that the sons have some interest, (although not amounting to a "right") in the ancestral property in the hands of the father. He says "a father can divide his self acquired property among his sons in any way he likes, but, not so in regard to ancestral property because the rights of the father and son are equal in it", quoting Dhareswara and Visnu to support his view. Daya Bhaga II, 15, 16. In this crucial issue the itellectual giant suffers defeat by the theory with which he has so gallantly combated.

The pitfalls of Jimuthavahana's doctrines are, here, apparent. On the one hand, he denies the sons right by birth to preserve the father's absolutism. On the other hand, faced with the facts of life, he denounces the father's right to divide the ancestral property in unequal shares or to alienate the property to the detriment of the family. It is submitted that the difference between Vijnaneswara and Jimuthavahana is merely indicative of the difference in their evaluations of the contemporary needs of the society.

3 Daya Bhaga Chap. II 29, 30.

4 *Rama Koomar Vs. Kishunkunker* (1812) 2. S.D. 42 (52) *Juggo Mohun Vs. Neemo Morton* 90 S.D. quoted in Mayne's Hindu Law p. 451 and 452, Foot Note (1950 Edn.)

5 "The author of Dayabhaga appears to have made a change in the law by laying down that the sons have no right to the ancestral property during the life of their father; but at the same time, he laid down for the protection of the sons, that the father has no power of disposal over the bulk of the ancestral property except for legal necessity, so that the estate taken by the father in the ancestral property is under the Dayabhaga similar to the Hindu widow's estate. But ,by what appears to be an improper application of the doctrine of 'factum valet', our courts of justice have thrown again the sons completely at the mercy of the father"
G.S. Sastry Hindu Law P 129 (Ist Edn.)

6 Sec. 86 of Hindu Code Bill of 1948 "On and after the commencement of this code no right to claim any interest in any property of an ancestor during his life time which is founded on the mere fact that the claimant was born in the family of the ancestor, shall be recognised in any court".

the sons of the first wife on the one side and the rewedded father on the other is a common occurrence in rural India. The abrogation of son's right by birth would have loaded the dice heavily against the sons of the first wife. Moreover, it would have generally given opportunity to capricious and unrighteous fathers to deprive the sons of the funds for their maintenance. The reform contemplated by the framers of the Code did not carry much rationale behind it; at best, it was prompted by their exuberance to do away with all norms of Mitakshara. The mere fact that this doctrine has prevailed for centuries in such a vast area as the subcontinent of India, however, is itself indicative of its inherent merit. It was, therefore, not surprising that the Parliament did not enact all the provisions of the Bill into law. Despite making many inroads[1] into the principles of Mitakshara joint family, the Hindu Sucession Act has left the right by birth theory untouched. Although Sec. 6 of the Hindu Succession Act confers upon the daughter and certain other persons the right to inherit concurrently with the son, the son gets his share as a coparcener and only the interest of the father does not survive to him completely. We hope our Parliament will continue its policy of non interference in this aspect of Mitakshara coparcenary.

IV

THE DOCTRINE OF SURVIVORSHP AND RECENT LEGISLATION

The doctrine of survivorship is another important aspect of Mitakshara coparcenary. So long as a coparcener is alive, he is entitled to enjoy the joint family property as a co-owner and has a right to claim partition of the joint family property. Until the right of partition is exercised, a coparcener has no specific share in the joint family property: his interest fluctuates by births and deaths in the family.[2] When a coparcener in the Mitakshara joint family dies, his interest in the family property lapses. Surviving coperceners are not his heirs. Indeed, he leaves behind nothing to be succeeded; the unascertained share in the joint family property being neither transferable[3] nor heritable and the right to claim partition being a personal right which disappears with the person. The unascertained interest of the deceased coparcener, however, enures to the benefit of surviving coparceners not by succession but by survivorship.

There is agreement among the scholars of Hindu law that neither the Smritis nor the commentaries contain any explicit text on the doctrine

1 See, Sections 6,14, and 30 of Hindu Succession Act 1956.

2 *Appovier vs Ramasubba* 11, M.I.A. 75 (1866)

3 See infra regarding the transferability of the coparcenary interest.

of survivorship. Even the texts of Narada,[1] Manu,[2] and Sankhalikhita[3] do not lay down the principle in express terms. Moreover, such indirect reference as we find in these texts do not cover identical grounds. Professor Bhattacharya is of the opinion that the doctrine of survivorship was imported from English Law.[4]

It appears, on a closer examination, that the doctrine of survivorship is an offshoot of the concept of co-ownership. Each coparcener in the Mitakshara coparcenary is the owner of the entire joint family estate. None of the coparceners, until partition, has any right to any specific property: at best, he may be said to be owner of an undefined interest in the family property which on partition crystallizes into a specific share. The obvious consequence of this joint ownership is that the death of a coparcener does not create a hiatus in the ownership of the joint family property. In other words, death does not render any part of the joint family property ownerless: only a co-owner who could have exercised a similar right with other coparceners is out of the picture. We entirely agree with Priyanath Sen that "the concept of co-ownership readily chimes with the doctrine of survivorship although the doctrine of survivorship is not an inevitable consequence of the concept of co-ownership".[5]

The rule of survivorship is just fair when the survivors are brothers; but it is inequitable when the widow of a coparacencer is excluded by a remote *Sapinda* merely because he was joint with the deceased. The unjust characcer of the doctrine is best illustrated by the case of a coparcenary consisting of two or more brothers, where the brothers die one after another in succession and the joint estate descends to the widow of the last surviving brother as if it were his separate property, of course the estate is subject

1 मृते पत्यौ तु भार्या स्युः अभ्रातृपितृमातृकाः ।
सर्वे सपिण्डाः स्वधनं विभजेयुर्यथांशतः ॥ नारद. Quoted in Smritichandrika P. 707.
भ्रातृणामप्रजाः प्रेयात् कश्चिद्वे प्रवजेत वा ।
विभजेरन् धनं तस्य शेषास्ते स्त्रीधनं विना ॥ मितक्षरधृत नारद वचनं २,२,२७
wherever the exact reference for a text has not been specified, it is either taken from G.N. Jha's 'Sources of Hindu law' or from J. C. Ghose's 'Hindu law'.

2 पिता हरेद पुत्रस्य रिक्थं भ्रातर एव. वा. । मनु ९,१८५

3 स्वर्यातस्य ह्यपुत्रस्य भ्रातृगामि धनं तदभावे पितरौ हरेयाताम् ज्येष्ठा व पत्नी । शंकालिखित

4 "On account of the absence of clear texts, the English judges, observing a tangible analogy between Hindu coparceners and English joint tenants, inevitably extended the incidents of joint tenancy to the legal position of Hindu Coparceners, at least in cases where such extension did not run counter to anything to be found in the original texts". See, K. K. Bhattacharya., Joint Hindu Family, Tagore Law Lectures P. 54 (1884-85)

5 See Priyanath Sen "Hindu Jurisprudence", Tagore Law Lectures (1901) P. 147.

to the right of maintenance of the widows of the other deceased coparceners. But, very frequently this rule of law throws such widows at the mercy of the widow of the last surviving coparcener. Though we have no textual authority for such a state of affairs, yet it is the accepted consequence of the rule of survivorship.

Hindu Women's Rights to Property Act 1937, dealt a severe blow to the doctrine of survivorship. It conferred upon the widow of a deceased coparcener the interest of her husband. Indeed, the widow succeeded to her husband's interest even if the deceased husband left a son as a coparcener. It is, however, important to emphasise that although the statute conferred on the widow certain rights of her deceased husband, it did not treat the widow as a coparcener. A significant question has been raised in this connection: Is the widow entitled to the interest of her husband as it stood at the time of his death or is she entitled to the share to which the husband would have been entitled, had he been alive, at the time of partition? The courts have answered in favour of the latter proposition.[1] It cannot be the former because the rule would be unjust as to the remaining members of the coparcenary.

The Hindu Succession Act, 1956, has given a death blow to the doctrine of survivorship. Indeed, it has given a blow from which it is extremely doubtful if the Mitakshara joint family system would survive. This is not to say that the Parliament has written off the doctrine of survivorship. Sec. 6 of the Hindu Succession Act States:

> "When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparacenary and not in accordance with this Act.
>
> Provided that, if the deceased had left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession as the case may be under this Act and not by survivorship.....".

Thus the Hindu Succession Act attempts to reconcile the incompatible concepts by retaining the doctrine of survivorship and also providing certain female heirs the right to inherit concurrently with male heirs.

1 *Chinniah Chettiar vs. Sivagami Achi* I. L. R. (1945) Mad. 402.

The creation of the right of succession to coparcenary interest, however, tends to destroy the corporate character of the joint family. It may be that Sections 6 and 30 are the only two sections that interfere principally with the coparcenary, but they are loaded with such grave consequences that are themselves sufficient to complete the annihilation of the system in a wealth oriented society. The disruption that is due to economic disadvantage can be understood by an illustration. For instance in a coparcenary of two brothers A and B, A has many daughters and B none. The expenses incurred for the maintenance, marriages etc. of A's daughters will have to be borne by both A and B, as they pertain to joint family purposes. Consequently B has to shoulder a part of the burden of A, a burden which he need not share if he were separate and which he bears as a member of the coparcenary because he has also the right of succeeding to the entire estate by survivorship. There is nothing inequitable or immoral in this right of survivorship. B shared the additional burden during A's life time and after A's death, it is only just that he succeeds to the entire estate. But when the daughters of A take their father's interest as under the Hindu Succession Act, why should B shoulder the burden of A? Is it to be expected that he would willingly share the burden of A, with no hope of ever enjoying the property and with every possibility of witnessing the moiety of the estate being torn asunder and still carrying the burden of the family for the sake of prestige? When moral values have been swept away, it is the material advantages that come to the fore and thereby discourage joint family life.

V

THE RIGHTS AND DUTIES OF THE KARTA AND THE COPARCENERS

The Smritis and commentaries are virtually silent about the rights and duties of coparaceners including that of the Karta[1]; these have been defined and developed by case law. The reason for the absence of such details in the ancient texts is understandable. Since the joint family system was rooted in natural love and affection, spirit of self sacrifice and sympathy for each other's woes, the Karta was assumed to guide the affairs

1 The Word Karta is of recent origin and in Sanskrit means "one who acts, who does something, an agent". Although etymologists do not even hint that the term is connected with the management of joint family, and notwithstanding the fact that Smritis and commentaries use such expressions as "Swami", "Grihin", "Grihpati", "Kutumbin" and "Prabhu" to denote a manager, the Lawyers of the Anglo-Indian Courts have introduced the word to mean the manager of a joint family.

of the family with a view to secure the welfare of all. Moreover, if the towering status of the Karta, an outcome of the respect commanded by the *paterfamilias*, made members submissive to the Karta, the strong public opinion compelled the Karta to act not only in accordance with the positive law but also in accordance with the moral dictates of the time and acceptable ideas of justice. But, as the society progressed, the advancing civilization cast a baneful influence on the cohesive determinants of the joint family system. The security provided by the progressive society fostered the development of individuality and the growth of individuality brought its concomitant twin selfishness which tended to disrupt the joint family system. This incubus accompanying a progressive civilization was absent in the society which prevailed at the time of the Smritis and, consequently, the Smritis merely laid down the broad principles for the governance of the family and left it to the Sadachara to fill up the details. It may be noted that the non-existence of detailed rules dealing with the rights of coparceners did not cause any injustice because, a dissatisfied coparcener had the unfettered right to claim partition. Moreover the wisdom of having detailed rules prescribing the rights and duties of the coparceners is open to question. Are such details conducive to the maintenance of human relations among the coparceners ? Does not the attempt to force Karta to abide by certain rules detract from the cohesive character of the family ? Is it better to preserve a forced truce with highly strung tensions than to claim partition and preserve normal human relations ? Indeed, one wonders if the Smritis were far-sighted enough to appreciate the psychological problem inherent in such details and whether while providing for the partition of estate they intentionally thought to preserve the human relations by not detailing the rights and duties.

The affairs of the family are managed by a coparcener who, as already indicated, is designated as the Karta. The eldest living ascendant, generally, becomes the Karta of a joint family. But there is nothing in the law which prevents the coparceners from chosing any other coparcener, even the junior-most as Karta. Indeed, there are innumerable cases where the members of the older generation have yielded the position of Karta to a junior coparcener. In all such cases, initiative, fitness and efficiency to manage the affairs are the main factors responsible for the appointment.

The Karta is the spokesman of the joint family and his position is akin to the chairmanship of a committee. The relationship between the Karta and other members of the family has no counterpart in the English

jurisprudence. He is neither an agent, nor a trustee, nor a partner; yet he combines in himself some of the qualities of all the aforesaid three relationships. He resembles an agent when he transacts business on behalf of the family, a trustee when he is required to safeguard and account, at times, for the joint family property, and a partner when he is allotted on partition his share as a coparcener.

The Karta is entitled to the possession of the entire joint family property.[1] The exercise of his discretion in its management cannot be questioned by other coparceners. Further, he has wide control over the family income and expenditure and is even competent to allot any property to any member to maintain himself.[2] So far as the family affairs are concerned, his word is final. It might be emphasized that because the institution of Karta implies voluntary abdication of coparceners' right in favour of the Karta, the coparceners cannot depose a Karta, which fact, incidentally, further adds to the power position of the Karta. The absolute and unbridled power of the Karta is, in practice, effectively controlled by coparcener's right to claim partition. The Karta knows that, if he acts arbitrarily or against the express wishes of the coparceners, the ultimate outcome would be partition which would not only terminate his privileged position but adversely affect his personal prestige and social status of the family. In fact, the Karta is *primus inter pares*.

All such acts of the Karta as are within the scope of his legal authority and are for the joint family purposes are binding on the members of coparcenary, even if such coparceners or any of them are minors. This rule, no doubt, exposes the minors to dangers inherent in the situation; but it cannot be helped. It is an inevitable consequence of the corporate character of the joint family. If a minor is permitted to question, on attaining majority, all such acts of the Karta as are not in the best interests of the minor, the day to day administration of the affairs of the family would be paralysed. Even so, the law does, to a certain extent, safeguard the interests of a minor by laying down that only such acts of the Karta as pertain to defined joint family purposes are binding on the minors.

So long as the general welfare of the family determined the actions of the Karta everything went on smoothly. But, with the progress of the society and the self-sufficient community changing to poverty-stricken conditions, the instinct of self-preservation often triumphed over the moral

1 *Bhaskaran vs. Bhaskaran (1908) 31. Mad. 318*
2 *Ramaya vs. Kolanda (1940)* I. L. R. Mad. 322.

duty to act for the welfare of the family and the undutiful Kartas misused their privileged position. Since, apart from partition, Mitakshara did not contemplate any safeguards, the courts entered the arena, reinterpreted the texts and laid down new prescriptions to meet the demands of a changing society.

The law relating to alienation of joint family property has received a good deal of attention and undergone considerable modifications. The alienation of the joint family property has to be considered from three angles: (1) alienation by the whole body of coparceners: (2) alienation by the Karta; and (3) alienation by individual coparceners.

The whole body of coparceners, provided all of them have attained majority and no prospective coparcener is *en ventra sa mere* may alienate the whole or any part of the joint family property. The validity of such transfers is independent of the question of legal necessity[1]: neither the existing coparceners nor those who come into existence after the transaction unless they were *en ventra sa mere* at the time of the transaction can impeach the alienation.

The power of the Karta to alienate the family property is primarily based on the text of Vyasa:

> "even a single coparcener may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family and especially for pious purposes".[2]

Vijnaneswara commenting on this text, expresses the view that it is the *incapacity of other members to give consent.*[3] which empowers the capable coparcener to alienate the family property:

> "While sons and grandsons are minors and *incapable of giving their consent to gift and the like* or while brothers are so and continue unseparated, even one who is capable, may conclude a gift, hypothecation or sale of immovable property if a calamity affecting the whole family requires it or the support of the family renders it necessary or indispensable duties such as the obsequies of the father or the like make it unavoidable"[4]

1 See Hanuman Prasad Pandey's case as to legal necessity. (1856) 6. I. A. 393.

2 एकोपि स्थावरे कुर्यात् दानाधमनविक्रयम् आपत्काले कुटुम्बार्थे धर्मार्थे च विशेषतः ।

3 अनुज्ञादानादवसमर्थेषु

4 अप्राप्तव्यवहारेषु पुत्रेषु पौत्रेषु वा अनुज्ञादानादवसमर्थेषु भ्रातृषु वा तथाविधेष्व विभक्तेष्वपि सकलकुटुम्बव्यापिन्यामापदि तत् पोषणे चावश्यं कर्तव्येषुपितृश्राद्धादिषु स्थावरस्य दानाधमनविक्रयं एकोपि समर्थः कुर्यात् । मिताक्षरा १, १, २८-२९

This puts a double check on the powers of a capable coparcener (who may be conveniently designated as Karta) to alienate the family property. First, the alienation must come within the ambit of 'specified purposes; Second: (by implication) the consent of capable coparceners has to be taken. Some of the earlier decisions have followed Vijnaneswara by advancing the view that the consent of those who are of age cannot be dispensed with, even where the transaction is for the benefit of the family.[1] However, later decisions[2] have emphasised that the power to alienate the family property springs from 'legal necessity' and is independent of the question whether the coparceners are capable of giving consent or not. This line of cases is more in accord with the generality of Vyasa's text as also with the needs of changing society.

Alienation whether involuntary or voluntary of coparcenary interest of an individual coparcener is clearly inconsistent with the very basis of the institution of Mitakshara coparcenary. Even so, the courts are unanimously agreed that a coparcener's interest can be seized in execution of a decree during the coparcener's life time.[3] There is a difference of opinion with regard to the validity of voluntary alienation of coparcenary interest. According to Mitakshara's *Samudayika Swatwavad* every coparcener has got an interest in every parcel of the joint family property and since every coparcener's right is qualified by the existence of similar rights of other coparceners, no coparcener can assert that he is the owner of a particular portion of the property; consequently, he cannot voluntarily transfer any specific portion unless it is alloted to him at a partition. So long as he does not exercise his right of partition he cannot deal with the coparcenary property exclusively.

The Calcutta High Court has consistently applied the rule of Mitakshara by holding that the alienation of coparcenary interest by an individual coparcener is invalid.[4] Though this view of the Calcutta High Court appears to be harsh it is not so in fact. When a person deals with coparcenary property which has been declared by law to be inalienable, certainly he does it at his own peril. It is incumbent on the purchaser

1 *Muthoora vs. Bootun (1869) 13 W. R. 30*

2 *Juggurnath vs. Doobo* (1870) 14 W. R. 80 *Ponnappa vs. Pappuvayyangar* (1882) 4 Mad. 1, 18, (F. B.)

3 *Deen Dayal vs. Jagdeep Narain* (1877) 4, I. A. 247 *Mahabeer Pershad vs. Ramyad* (1874) 12 Beng. L. R. 90. *Suraj bansi vs. Sheo Prasad* (1880) 5, Cal. 148 6 I. A. 88.

4 *Nandaram vs. Hashee Pande* (1823), S.R.P. 23, L. *Sheo Shurrun vs Sheo Sahai* 1826 4. S. R. P. 138 *Jivan vs Ramgovind* (1832) 5. S. R. 163. *Sadabart Prasad vs. Eoolbash Koer* (1869) 3. B. L. R. (F.B.) 36

to enquire properly into the nature of the property sold and he ought to use more caution and circumspection, especially when it is coparcenary property. A qualification has been engrafted to this rigorous rule that if the joint family has benefited by the sale of the property, then, while setting aside the alienation, the court will insist the return of purchase money to the alienee. The Allahabad High Court[1] has adopted the rulings of the Calcutta High Court.

The Madras and the Bombay High Courts[2] have departed from the rule of Mitakshara on the ground of equity and have validated the alienation of coparcenary interest for valuable consideration by individual coparcener. Indeed, it is difficult to understand how equity springs up in favour of a purchaser who intentionally purchases an interest which is inalienable. It appears that these High Courts have given effect to the equity in favour of the purchaser viewing the transaction from the side of the alienor. When the sale is invalidated the property reverts back to the family and it will be enjoyed by the alienor who pocketed the purchase money. Thus, to allow the person who has derived benefit by receiving the purchase money, also to enjoy the property will be palpably repugnant to all canons of equity. Therefore, it is only just that a person who incurred an obligation should not be allowed to escape from its effects merely because his act was *ultravires*. A coparcener's right to demand partition at any time is unquestionable; then, why should he not be compelled to enforce partition and allot that particular portion to the vendee? It is probable that the departure in Madras school was brought about by the influence of Sir Thomas Strange and Colebrooke the ardent admirers of Dayabhaga doctrines. As Priyanath Sen observes[3], this change in law brought about by these High Courts "has lent a helping hand to the diverse influences at work in undermining the integrity of a joint family under the Mitakshara law". It is to be noted, however, that even in Madras and Bombay schools, an alienation of coparcenary interest without consideration is invalid. The alienee, being a volunteer, has no equity in his favour, and it is the payment of consideration that invokes the assistance of equity in validating such alienations.

In Dayabhaga each coparcener holds the property in quasi-severalty. He can, therefore, alienate his undivided interest for or without any consideration and whether by way of transfer *inter vivos* or testamentary disposition. Jimuthavahana, instead of relying on his concept of *Pradesika Swatwavad* which fully supports the alienation of coparcenary interest upholds the validity of such alienations on the authority of Narada.[1] There has been some conflict on the relevancy of the aforesaid text of Narada. It is believed that the text of Narada refers to alienation of property by a divided coparcener. The validity of the alienation of the coparacener's interest in Dayabhaga is, however, fully accepted.

1 *Balgovinddas vs. Narain Lall* (1893) 20 I.A. 166 15 All 339. *Lachman Prasad vs Sarman Singh.* (1917), 44 I. A. 163 39 All 500

2 It is note worthy that this departure in law is contrary to what is laid down in Smriti-chandrika a very high authority in the Madras School.

3 See, Priyanath Sen "Hindu Jurisprudence" T. L. L. (1909) Page 154

A Mitakshara coparcener, we have already seen cannot alienate his interest by way of transfer *inter vivos*. He cannot also make a testamentary disposition of his interest. This is because, essentially the rule of survivorship and the right to devise the undivided coparcenary interest are inconsistent principles. When a Mitakshara coparcener dies, his interest survives to the benefit of other coparceners and the deceased is not left with any such interest in the coparcenary property as can be regulated by his will; the title by survivorship being the prior title takes precedence over the title by devise. The courts have, all along held that a Mitakshara coparcener cannot devise his interest[2]. To circumvent this difficulty, the coparcener had to enforce the partition first and then to dispose of the property in any way he liked[3].

The Hindu Succession Act has abrogated the restriction on the testamentary capacity of a coparcener[4]. According to Sec. 30, any Hindu having an inteerst in Mitakshara joint family, tarwad, tavazhi, illom or kutumba, can dispose of his interest by a testamentary disposition, in accordance with the provisions of the Indian Succession Act. The effect of this section is the abrogation of the doctrine of survivorship at the option of a coparcener. This provision can be usefully availed of by a coparcener, when he wants to deprive any female heir (who is imposed by the Hindu Sucession Act) of her share, by devising his interest in favour of any person he likes. Of course such a female heir cannot be deprived of her maintenance which is safeguarded by the Adoption and Maintenance Act. Even now a minor coparcener has no remedy, because, according to Section 59 of the Indian Sucession Act, a minor cannot make a valid testamentary disposition.

1 Dayabhaga Chap. 2 Para 31.

2 *Vittal Butten vs. Yameneamma* (1874) 8 M. H. C. 6

3 *Indira Bai vs. Venkata Siva Prasad Rao* A. I. R. (1953) Mad. 461 1953 1. M. L. J. 294.

4 Cf. J. D. M. Derrett: Modern Hindu Law P. 377 Para 599.

VI

SELF ACQUISITIONS AND MODERN LEGISLATION

The chronicle of self acquisitions is the history of individual freedom. Very little is known of the property rights of the primitive man. Recorded history, however, reveals that corporate ownership preceded individual ownership. When a person acquired property, he acquired it, at the early stages of civilization, for the family, tribe or group of which he was a member. It is only at later stages that individual ownership in the acquired property began to assert itself. In modern times the individual's rights have practically superseded the corporate rights.

The need to provide motivation and stimulus for individual efforts has, perhaps, been responsible for the recognition of individual ownership. It is interesting to note that warriors, in general, were pioneers in the field of self acquisitions. In the primitive society there was constant strife between neighbouring tribes and the victorious party appropriated the goods and valuables of the vanquished : conquest being one of the earliest modes of acquiring ownership in property. However, the society conceded to the soldiers some rights in the property thus acquired by them, more with a view to appease and keep in good humour those who safeguarded the community against onslaughts of fiery neighbours than at least, at early stages, as a recognition of individual rights in the self acquisitions[1]. And with the gradual development of arts, crafts and industry, the law accomodated for self acquisitions in these fields.

Moreover, in India with the emergence of joint family system[2] wherein the head of the family who was quite often a collateral did not exercise the wide powers of the patriarch and individual rights of the acquirer over his self acquisitions received greater attention. The degree of the recognition of individual rights, however, varied under different systems of jurisprudence. If the western systems of law accepted individual rights to the complete exclusion of corporate rights, the Hindu Jurisprudence did not permit individual rights to gain ascendancy[3]. The corporate nature of the family

1 The self acquisitions were permitted in the form of a boon to the winning warrior. The concessions made by Roman Law in the form of *peculium castrense* and शौर्यधन mentioned in Sanskrit writings bear testimony to this fact.

2 In patriarchal societies the earnings of the sons and other dependants enriched the wealth of the father. We have plenty of evidence as to the prevalence of such a condition for a long time in the Hindu and Roman Societies. See, for instance, the text of Manu : *VIII*, 416.

3 See J. D. Mayne 'Hindu Law' P. 305. Para 242.

arrested the growth of individual ownership, which was circumscribed at every stage by several limitations.

The earliest reference to self-acquisition is to be found in the Dharma-Sutra literature. Gautama, the oldest Sutrakara says :

> "the learned man need not give his self acquired property to his unlearned coparceners, unless he wishes to do so[1]" and he further enjoins : "unlearned coparceners should divide the acquisitions equally"[2].

These texts indicate that the individual's rights over self acquisitions, at least in so far as they related to gains of learning, triumphed over corporate rights at a very early stage of the evolution of the Hindu Society. However, Sutrakaras like Baudhayana and Apasthamba make no reference to self acquisitions. Vasistha actually takes a retrograde step. i.e. the acquirer can only take an extra share, at the time of partition, in the gains of learning[3]. Succeeding generations imposed further restrictions on the right of the ndividual.

The Smritis permitted individual ownership, but did not favour it. However, even their some what liberal rules were severely circumscribed by the narrow interpretations of the commentators ; with the result that there remained little scope for self acquisitions. For instance, even though Viswarupa, the illustrious predecessor of Vijnaneswara read the text of Yajnavalkya : "Whatever is acquired by a coparcener without detriment to the paternal estate, a present from a friend, a gift and the like shall not be shared by other coparceners[4]" to mean that the wealth received from a friend, nuptial gift and the like were indivisible even if acquired to the detriment of the paternal estate *on account of the strength of endeavour in acquiring*[5] and wealth acquired from other sources were indivisible only if acquired without detriment to the father's estate, Vijnaneswara read the words *without detriment to the paternal estate* as qualifying a present from a friend, a nuptial gift and the like[6] and ruled that even a gift from

1 स्वयमार्जितमवैद्येभ्यो वैद्या नाकामो दद्यात् । गौतम २८, २८,

2 अविद्याः समं विभजेरन् । गौतम २८, ३१

3 येन चैषां स्वयमुत्पादितं स्यात् स द्व्यंशमेव दद्यात् । वशिष्ठः

4 पितृद्रव्याविरोधेन यदन्यत् स्वयमार्जितम् । मैत्रमौद्वाहिकं चैव दायादानां न तद्भवेत् । याज्ञवल्कय २, १२८

5 पितृद्रव्योपघातेनापि मैत्राद्यविभाज्यमेव आरम्भ सामर्थ्यात् । विश्वरूप

6 अर्जकएव गृहणीयात् अत्र च पितृद्रव्याविरोधेन यत्किंचित् स्वयमार्जितमिति सर्वशेषः । मिताक्षरा २,४,६,

a friend, nuptial gift and the like, if acquired at the expense of the patrimony were divisible. Consistent with his attempt to limit the scope of the individual ownership he said:

> "What is obtained by simple acceptance without waste of patrimony is liable to partition. If that were not so then the three modes of acquisitions excepted in the text need not have been mentioned".

It is however, clear from the text of Yajnavalkya that the words "Maitra" "Audhvahika" and the like, as pointed out by Jimuthavahana, are illustrative and not exhaustive[1]. The plausible reason for the restrictive interpretation may be that Vijnaneswara, being aware of the repercussions of the property consciousness of individuals was determined to limit the scope for individual ownership by enlarging the ambit of coparcenary property, a theme which pervades the whole of Mitakshara.

Notwithstanding the fact that Mitakshara view was not in consonance with the modern times, early decisions adopted it with the same rigour, perhaps on account of the great deference shown to the authority of Mitakshara. However, the courts, gradually took a lenient view by overlooking the circumstance that the acquirer was maintained and moderately educated at the expense of the patrimony.[2] The Bombay High Court[3] drew a distinction between "special" education and "ordinary" education by holding that only property acquired by a person who had received "special" education from the family was partible: the acquisitions made by a person who had received only "general" education being impartible. The I.C.S. officer's[4] case which was an 'eye opener' to the Legislature led to the passing of the Gains of Learning Act 1930. Sec. 3 of the Act states that

> "Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of (*a*) his learning having been in whole or in part imparted to him by any member living or deceased of his family or with the aid of the joint funds of any member thereof, or (*b*) himself or his family having while

1 शौर्यादि पदं च वाक्येषु प्रदर्शनार्थः। दायभाग *VI.* 1. 39. P. 115

2 *Chellaperumal vs. Veeraperumal* 4 Mad. 554
Dhaunookdharn vs Ganpat (1868) 11. B. L. R. 201
Paulieum vs Paulieum (1876) 4 I. A. 109

3 *Krishnaji vs More Mahdev* 15 Bom. 32
Metharam vs. Rewachand 45 I. A. 41

4 *Gokulchand vs. Hukumchand* 48 I. A. 162.

> he was acquiring his learning, been maintained or supported, wholly or in part by the joint funds of the family or by the funds of any member thereof",

and thus sets at rest the rigorous rule of Mitakshara.

The askance with which Mitakshara viewed self acquisitions is strikingly demonstrated in the restrictions which it imposed on the disposition of self acquisitions. While a person was free to dispose off self acquired movable property, he could not alienate self acquired immovable property save with the consent of his sons. Such immovable property was not coparcenary property: it was the property of the acquirer. Nevertheless the right of alienation of the acquirer was circumscribed. We have already seen that in *Rao Balwant Singh Vs Rani Kishori*[2], the Privy Council interpreted the Mitakshara injunction to be merely recommendatory and permitted alienation of self acquired immovable property without the consent of sons.

Another issue that has come before the courts is whether the gift of self acquisitions by father to his son is self acquired or ancestral property in the hands of the son. Mitakshara lays down:

> "What is obtained through father's favour will be subsequently exempt from partition[3]" and "what is given by father and mother being separated belongs exclusively to him and does not become the property of the son born after partition. By parity of reason what was given to any one before the separation solely appertains to him[4]"

It is clear from these texts that property given by the parents to the son either before or after partition solely belongs to him.

The Calcutta High Court, however, emphasised the rule of Mitakshara literally that self acquisitions should be *acquired without detriment to the paternal estate* and he'd that where property given away formed part of the paternal estate, even if it was acquired by the father himself, it continued to be ancestral property in the hands of the son. It is submitted that this view is irrational. A Hindu is free to dispose off his property in favour of any person he likes; where the donee is a stranger, all agree that the stranger acquires an absolute interest unless it is otherwise restricted by the terms of the transfer. Why should we then say that if the donee is a son,

1 It can be usefully recalled, here, that in 1901 Sir Bashyam introduced the Gains of Learing Bill which was passed by the Council but was later on shelved by the Governor of Madras.

2 25 I. A. 54.

3 Mitakshara I, iv, 28.

4 Ibid I, vi, 14, 15.

he acquires the estate for the benefit of himself and his sons ? After all, if the donor had intended the property to become ancestral property in the hands of the son, there was no need for him to have taken the additional trouble of making a transfer in favour of his son, testamentary or otherwise. The Madras High Court[1] conceded that the father could determine the nature of his self acquisitions but it nevertheless leaned in favour of the ancestral character of such property by asserting that where property is given by a father to his son, in the absence of a clear intention to the contrary, the property would be deemed to be ancestral in the hands of the son. On the other hand the Bombay High Court[2] laid down that unless the terms of the transfer indicated that the son should take the property as ancestral property it would be deemed to be separate property in the hands of the son. The Bombay view, we submit, is more logical and is in consonance with the changing trends of modern law of property.

The Supreme Court, in *Arunachala vs. Muruganatha,*[3] while rejecting the extreme view of the Calcutta High Court, has not adopted either the view of the Madras High Court or that of the Bombay High Court. The Supreme Court declared "that it is well settled that a Mitakshara father has complete powers of disposition over his self acquired property, it must follow as a necessary consequence that the father is quite competent to provide expressly when he makes a gift either that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family. If however there are no clear words describing the kind of interest which the donee is to take, the question would be one of construction and the court would have to collect intention of the donor from the language of the document taken along with the surrounding circumstances in accordance with the well known canons of construction.....As it is open to the father to make a gift or partition of his property as he himself chooses, there is strictly speaking no presumption that he intended either the one or the other"[4]. Thus the decision of the Supreme Court has rendered the determination of the nature of such property a question of fact.

The Hindu Women's Rights to Property Act not only changed the course of the devolution of coparcenary interest in the Mitakshara school but also

1 *Nagalingam vs. Ramchandra* (1901) 24 Mad. 429 ; 11 MLJ 270 ; *Indoji vs. Ramchandra* (1919) 10 M. L. W. 498.

2 *Nanabai vs. Achratbai* (1888) 12 Bom. 122 ; *Jugmohan Das vs. Mangal Das* (1886) 10 Bom. 528.

3 (1953) 40 AIR 495

4 *Ibid.*, p. 500

brought about an important change in the devolution of self acquisitions. Prior to this Act, both according to Mitakshara and Dayabhaga schools a woman took the estate of her deceased husband only in the absence of the son, grandson and great grandson since these persons were the preferential heirs. The Act has conferred on the widow the right to inherit the separate property of her deceased husband concurrently with the son. Similar rights were conferred on the widow of a predeceased son and that of a predeceased grandson[1].

The Hindu Succession Act has brought about a very inequitable change regarding succession to self acquisitions. The schedule to the Act enumerates two classes of heirs who are entitled to succeed to the estate of the deceased[2]. The position accorded to the father is far from justifiable. He has been relegated to the IInd class while many heirs who entertain least affection towards the deceased (for instance grandson's widow) are included in the Ist class. Where there is considerable coparcenary property, the father will not be in a difficult situation, because he takes his share as a coparcener. But what about a senile father who has striven hard through out his life and has spent all his fortune on his son, who amasses wealth and dies intestate ? He has to be a sorry witness to his son's estate being torn asunder by so many heirs and he himself has to be satisfied by the meagre pittance provided by Sec. 22 of the Maintenance Act.[3] Indeed, the Hindu Succession Act is harsh towards the indigent father of an affluent son.

VII

JOINT FAMILY AND DEBTS

No system of law attaches as much importance to the payment of debts as the Hindu Jurispurdence. Indeed, the word ऋण which is employed to describe "debts" is also the expression to designate the obligations which a Hindu incurs by birth[4] and which he must discharge. With the result,

1 See, Sec. 3 Cl(1) of Hindu Women's Rights to Property Act, 1937

2 Class I : Son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son ; Class II (i) father (ii) to.....(ix)

3 "Subject to the provisions of sub-section (2) ,the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.... "Section 22. (1) Section 21 Cl (i) enumerates father as one of the dependants.

4 जायमानो ह वै ब्राह्मणस्त्रि भिर्ऋणैऋणवान् जायते ।
ब्रह्मचर्येण ऋषिभ्यो यज्ञन देवेभ्वः प्रजया पितृभ्यः ॥ Tait. Samhita VI 3, 10, 5.

the significance attached to the fulfilment of spiritual debts has affected even the payment of temporal debts. When a debtor dies without discharging his debts he not only incurs infamy in this world but also commits a sin[1] from which he cannot extricate himself unless some other person repays the debts on his behalf.

Equity demands that a person who takes the estate of another person should also shoulder the liabilities of the previous incumbent, of course, to the extent only of the assets devolving on that person. The Smritis have upheld this equitable principle and since it is the religious duty of a descendant to fulfil the temporal obligations of his ancestors in order to relieve them from the torments of purgatory, it further requires the lineal descendant to pay off the debts of his ancestors[2]. This liability of the descendants[3] is however subject to several qualifications. First: the liability of the descendants is confined only to three generations i.e., son, grandson[4]

1 According to Narada: "If a debtor dies without discharging his debts, the spiritual merit he has accumulated by tending the fire perpetually and other austerities will enure to the benefit of his creditors." Narada I, 9, (S.B.E. Vol. XXXIII). Katyayana goes a step further and says "that the debtor who dies without discharging his debts will be born as a slave, a servant, a woman or a quadruped in the house of his creditors." Katyayana quoted in Vyavahara Mayukha V, iv, 11

2 The categorization of the obligation to pay the debts of another on the basis of religious, moral and legal duties, as attempted by Mayne and followed by others is not very happy. First: it is difficult to keep the categories of religious, moral and legal duties in water-tight compartments. They generally overlap and the Smritis themselves do not maintain this distinction at least in the branch of the law of debts. Second: the religious, moral and legal obligations as mentioned by these writers have always been enforced by ancient courts and tribunals. It will, accordingly, be terminological inexactitude to retain the concepts of moral and religious obligations when they are enforceable in law. Once an obligation is assimilated within the folds of legal liability, it becomes *ipso-facto* legal obligation whatever its primary basis be.

3 The heritable right among descendants in the first place is also confined to three generations: the right to inherit being co-extensive with the duty to perform the sradh and the liability to pay off the debts.

4 The liability of the son and the grandson was not conditional on their inheriting or receiving the assets of the father or the grandfather. The Bombay High Court stuck to this rule of the smritis in several early decisions (See Pranvallabh vs. Deocristin Bom Sel Rep. 4 Hurbojee vs. Hurgovind Bellasis 76. cited by J. D. Mayne p 406 11th edn. Narasinharao vs. Antaji (1862) 2 Bom.62) though other High Courts made an early departure and limited the liability to the extent of the assets received or inherited by the descendant. The conflict was, however, set at rest by the passing of the Hindu Liability for Ancestors' Debts Act VI 1866, which departed from the strict Mitakshara rule.

and great grandson.[1] Second: sons, grandsons and great grandsons, as we have already indicated, inherit the self acquired property of the concerned ancestor subject to the payment of his debts to the extent of inheritance. Further, when there is only ancestral property in which the son, grandson and great grandson have a coparcenary interest, the liability extends to the extent of such coparcenary interest. But, where there is neither self acquired property nor ancestral property in which the son, grandson and great grandson have any interest, the great grandson is under no liability to pay the debts of the ancestor though the son and the grandson continue to be liable. This strict rule of Mitakshara has not been followed in modern times and like great grandsons, they are liable only to the extent of the property they have received from the ancestor[2].

Third: where the son, grandson and great grandson inherit the self acquired property of the ancestor, creditors may proceed against such property to the same extent and subject to the same conditions to which they might have proceeded against the ancestor. However, where the liability has to be tacked on to the coparcenary property different considerations apply. Several sages have indicated that the debts incurred in furtherance of certain purposes[3] such as lust, passion, drinking, gambling etc., need not be paid by the descendants. The text of Usanas[4] sums up compendiously, that the debts incurred for *avyavaharika* purposes need not be paid by the son. This pithy expression *avyavaharika* has been interpreted differently by different commentators. While Vachaspati Misra

1 Smritis do not lay down the liability of the great grandson. in specific terms. In fact the text of Brihaspati "the son of a grandson is not liable" appears to expressly contradict the liability of the great grandson. But Vijnaneswara explains the text by putting the gloss *he is not liable unless he be heir and have assets* and, thereby puts the great grandson under the obligation to pay the debts of the great grandfather albeit to the extent of assets inherited or received. Some writers have attempted to interpret the texts of Narada and Katyayana in favour of the nonliability of the great grandson. They apparently contend that the text of Narada which states that "liability stops from the fourth" excludes the great grandson for he is the fourth from the debtor. But such a construction is not tenable if we take into consideration the subsequent verse of Narada which states "three must be honoured by a man and he must subsist on three that come after him. These ancestors rely for payment of their two fold debts on the fourth in descent"

2 See supra footnotes 3 and 4 p. 60 Supra

3 प्रतिभाव्यं वृथादानमाक्षिकं सौरिकं च यत् । दण्डशुल्कावशेषां च न पुत्रो दातुमर्हति
Manu VIII 159-160
See also, Gautama XII 38, Kautilya III 16, Vas 16.3, Yajnalvalkya II, 47

4 न दातव्यं तु पुत्रेण यच्च न व्यवहारिकम्
Usanas quoted by Vijnaneswara in his commentary on Yaj. II 47

interpreted the term 'avyavaharika' to mean व्यवहार बहिष्कृतं, Aparaditya explained it as यच्च न व्यवहारिकं न न्यायमित्यर्थः। Their explanations are vaguer than the term sought to the explained. Balambhatta was more positive when he understood the expression to mean न कुटुम्बोपयोगित्यर्थः. The Privy Council has accepted the rendering of Colebrooke that *avyavaharika* debts are *debts which are repugnant to good morals.* Of course, it is not always easy to delineate the vague contours of the expression *repugnant to good morals..* The difficulty is increased from the fact that value preferences change in a changing society. Decided cases bear ample testimony to this. Another difficulty arises where the debt is taken for a purpose which is not *avyavaharika* but is applied for a purpose which is *avyavaharika.* In such cases the courts cannot but attach importance to the nature of the liability, whether it is tainted or not at the inception. Judicial lore has given such twists to the expression that the son is made liable to almost all the debts of the father except those that are tainted with illegality or immorality[1].

Fourth: The liability of the descendants to pay the debts of the ancestors is "*absolute*", i.e., it exists even during the life time of the debtor ancestor[2]. The creditors may if they so like, proceed against the descendants subject, of course, to the limitations already indicated. However, this so called "absolute liability" is completely at variance with the traditional law. According to the Smritis and commentaries, the liability of the son to pay off the debts of ancestors did not arise during the life time of the debtor ancestor except where the ancestor had gone abroad or when he was suffering from some incurable disease or when he was extremely old. Asahaya[3] the commentator of Narada Smriti is very clear on this point. He emphasised that *when a debt is contracted by the father, he must repay it.* The Mysore High Court[4] adhered to this rule of the Smritis and refused to follow the decision in *Brijnarayan vs. Mangla Prasad*[5]. But the decision in *Pannalal's* case impliedly overruled Mysore High Court's rulings

1 *Chakkauri Mahton vs. Ganga prasad* (1912) 89 Cal. 862
Venugopala vs. Ramanadhan (1914) 37 Mad 458
Hemraj vs. Khemchand (1943) 71 I.A. 171
Toshanpal Singh vs. District Judge of Agra (1934) 61 I.A. 350

2 The Supreme Court by affirming the propositions laid down in *Brijnarayan's* case in 1952 S.C.R. 544. has reiterated the absolute liability of the son.

3 अत्र येषां पित्रा कृतमृणं स यावज्जीवति तावत् स्वयमेव दद्यात् तस्मात्तु पितुर्युपरते मृते तदृणं तत्पुत्रा एव दद्युः। असहाय

4 *Kala vs. Javara 15 Mysore* 223 (F.B.)

5 51 I.A. 129

and the law in Mysore has been brought in conformity with the law in the rest of India[1].

The acceptance of the "religious obligation" as "legal obligation" has not escaped criticism. It is urged that the doctrine of "Pious obligation"[2] is a fiat of oppression against the son by which the doors are kept wide open for unrighteous fathers to deprive their sons of their ancestral property. It is true that the doctrine while safeguarding the interests of the creditors has placed the interest of the son in the ancestral property at the mercy of the father. But it cannot be helped. It has to be noted that the liability to pay the debts of the ancestor is the correlative of the son's right by birth and just counterbalances that theory. If the son is not required to pay off the debts of the father, then it will perpetuate a systematic fraud wherein the father knowing full well that he can escape with impunity from the consequences of the debts except as to his interest in the family property, will incur debts exposing to the creditor the whole of the joint family property as security and ultimately setting up the claims of the son to assail the position of the creditor. The pious obligation theory sets at naught such designs. Nevertheless the theory has approximated a Mitakshara father to his counterpart in Dayabhaga.

The Hindu Succession Act 1956, raises an interesting problem. Under Sec. 6 of the Act, daughters and other relations of the deceased take the inheritance along with the son and, in particular, the daughter takes a share in the father's interest, including his interest in the ancestral property. When the daughters or other relations are the only heirs inheriting the property, no difficulty arises with respect to the payment of debts, because the persons who take the estate of the deceased have to pay off the debts. But when the survivors are, a daughter and a son, the absence of any provision in the Act, regarding the payment of debts, leads to certain anomalies. On account of the absence of any provision in the Hindu Succession Act as regards the payment of debts, the Hindu law of debts has been left untouched. The problem, we are faced with is, should the creditor first proceed against the property in the hands of the son under the pious obligation rule and then only to proceed against the assets in the hands of the

1 *Hutcha Thimmegowda vs Dyavamma* 54 Mysore 10 (F.B.)

2 The foundation of the pious obligation theory was laid down in Girdhareelal's case and further developed in a catena of cases. The propositions regarding pious obligation and antecedent debt theories as laid down in Brijanarain's case were affirmed by the Supreme Court in *Pannalal vs. Mst. Naraini* (1952) SCR 544

daughters or other heirs in case the assets in the hands of the son are insufficient ? Or is he to proceed against all the heirs at the same time and make them jointly liable ? Although, the former proposition is grossly inequitable, it flows obviously from the pious obligation rule since no other heir is required to pay the debts of the ancestor. Thus, in the present state of law such a conclusion is unavoidable. These undeliberated implications are inevitable concomitants of piecemeal legislation regarding allied topics. We hope, the legislature clarifies the position by incorporating a section regarding the payment of debts.

VIII

PARTITION AND RECENT LEGISLATION

The right to partition, like the right to self acquisitions is an offshoot of the growing pressure of individualism. Partition, according to Mitakshara, is "the allotment of definite shares to individual members of property over which many persons have joint ownership"[1]. This definition emphasises the doctrine of *samudayik swatvavad* or communal ownership. It asumes that the ownership of individual coparceners in a joint family extends to the whole of the joint family property and explains that by partition this state of overlapping ownerships is put to an end, with the result that each coparcener becomes the exclusive owner of the allotted share of the property. Jimuthavahana on the other hand defines partition as "particularizing the ownership of an individual member which ownership appertains to a portion of the joint family property although such portion may not have been defined specifically"[2]. He emphasises the doctrine of *pradesika swatvavad* i.e., the ownership of a coparcener extending over a particular portion of the property although such portion is not ascertained and not available for exclusive enjoyment until partition is effected. It is intersting to note that Nilakantha and Raghunandana, not only do not agree with the definition given by their respective masters, but lean in favour of the definition given by the opposing school. Be it as it may, partition terminates the existing corporate structure of a joint family and signifies the triumph of individualism.

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1 विभागो नाम द्रव्यसमुदायविषयाणामनेकस्वाम्यानां तदेकदेशेषु व्यवस्थापनम् ।
Mitakshara on Yajnavalkaya II 114.

2 एकदेशोपात्तस्यैव भूहिरण्यादावुत्पन्नस्य स्वत्वस्य विनिगमन प्रमाणाभावेन वैशेषिकव्यवहारानर्हतया अव्यवस्थितस्य गुटिकापातादिना व्यंजनं विभागः । दायभाग I, 8-9, P. 8.

In a patriarchal society where the head of the family held an absolute sway, there was no question of members of family claiming partition : of course, on the death of the patriarch, his sons divided the family property among themselves and set up new patriarchal families. However, during the period, when the patriarchal family was heading towards decadence, there were cases when the patriarch, in his old age, apprehending disharmony among his children after his death, distributed his wealth among his sons. We have, for instance, the classic example of Manu dividing *daya* among his sons[1]. Frequent such occurrences gave rise to a convention which prompted the fathers to divide their wealth in their decrepitude, among their sons and in course of time this practice fructified[2] into some sort of interest in the sons ; an interest which was perhaps the beginning of the son's right by birth.

The son's right to claim partition is, however, dependant as much on the son's right by birth as on the general right of the member of the joint family to claim partition of family property. We have already noticed that it is not possible to trace the evolution of the doctrine of son's right by birth with exactitude though there is equally no doubt that the right had become recognised during the Sutra period. Likewise the available materials are too scanty and vague to hazard a history of the evolution of the right of a member of a joint family to claim partition of joint family property though here also we find that the right had been accepted by the Sutrakaras. Indeed, they justified it on the basis of spiritual benefit. Gautama says that "there is augmentation of spritual merit by partition[3]" Manu also sings to the same tune[4]. It is true that the commentators repudiate the idea of augmentation of spiritual merit by partition. Medhatithi, for instance, holds the view that there is neither augmentation of dharma by partition nor incurring of adharma by remaining joint[5]. These seemingly contradictory observations can be

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1 मनुः पुत्रेभ्यो दायं व्यभजत् । तै. संहिता III, 1, 9-4.

2 In the Vedas, (Rigveda I. 10.5) we have an instance of sons dividing the wealth of the aged father. In this case, unlike Manu dividing his wealth among his sons, we find the sons dividing the wealth of their father. From this, we can conclude that some sort of coercion was exercised by the sons. In Gautama Dharma Sutra (XV 15) we have the instance of a son coercing the unwilling father to partition the property,

3 विभागो धर्मवृद्धिः । गौतम २८, ४

4 एवं सह वसेयुर्वा पृथग् वा धर्मकाम्यया ।
पृथग् विवर्धते धर्मः तस्माद धर्म्या पृथक् क्रिया ॥ मनु १,१११

5 न हि विभागाविभागयो र्धर्माधर्म्यतत् स्वरूपेणास्तीत्युक्तं । Medhatithi on Manu 9, 111
9

rationalized on the basis of grudging toleration of the right of the members of the family to claim partition. It is possible that the transformation of patriarchal families into joint Hindu families, the rule of collaterals, the growing development of individualism and consequent stresses in joint Hindu families compelled the Sutrakaras to accept the right of partition as a necessary evil and having accepted it they clothed the right with a religious garb. But even so, it is significant that the institution of partition was socially discouraged. And in so far as sons were concerned Gautama imposed even religious sanction by stating that a son who enforces partition against the will of his father should be excluded from funeral repasts[1]. It is, thus clear that by the end of the Sutra period, the right of the son to claim partition had been recognised though socially exercise of the right was disfavoured.

To begin with partition of movable property alone was permitted: "What is obtained by conducting sacrifices, *land*, conveyance, cooked food, water and women are not to be partitioned among sagotras even up to the thousandth degree"—Usanas[2]. And Manu added: "Divided or undivided, all sapindas stand on an equal footing *in regard to immovable property* and no one among them has the power to give, sell or mortgage it[3]" However, Vijnaneswara restricted the *impartibility of land* to the sons of a Brahmana father from the wives of the Ksatriya and other lower classes[4] and by necessary implication supported partition of immovable property in all other cases. It is possible that during Vijnaneswara's time, the partition of immovable property had become common and consequently, Vijnaneswara put a limited construction on Usanas' text and explained it in the light of the existing circumstances. Be it as it may, one finds it difficult to accept Vijnaneswara's explanation. The text of Usanas says nothing about its application to any particular class. Moreover, Manu's text can only be intelligible on the basis that immovable property was not divided on partition. The use of the expression "separated kinsmen"

1 See Supra foot note 20

2 अविभाज्यं सगोत्राणाम् सहस्र कुलादपि ।
याज्यं क्षेत्रं च पत्रं च कृतान्नमुदकं स्त्रियः । उशानस
quoted by Mitakshara J. C. Ghose Vol II 209

3 विभक्ताविभक्ता वा सपिडाः स्थावरे समाः
एकोह्यनीशः सर्वत्र दानाधमनविक्रयं । मिताक्षरधृतमनुवचनं
quoted in Mitakshara J. C. Ghose Vol II 204

4 तत् ब्राह्मणोत्पन्नक्षत्रियादिपुत्रविषयम् । मिताक्षर
J. C. Ghose Vol II 209.

is exceedingly significant. Because land was "indivisible even to the thousandth degree" and partitions affected only the movable property the landed property continued to be held jointly. Consequently neither the "divided" nor the "undivided" had a right to alienate it. However, Vijnaneswara's interpretation of Usana's text rendered the use of the expression "separated kinsmen" in Manu's text paradoxical. How can the right of enjoyment of immovable property be limited, if on partition that property has become his own? The reason for retaining the land in joint ownership was obvious; agriculture was bound to suffer by division and the cumbrousness ensuing from a partition of landed property was worth avoiding. But this indivisibility of land could not perpetuate, because when the family became unwieldy after several generations, even the jointness in land became nonfeasible. Consequently at some later time members of the family started dividing the immovable property also.

According to Mitakshara, principally there are only three periods of partition; one with the assent of the father, the other when the father dies and the last during the lifetime of the father even against his will. Restrictions such as that the sons should divide the property after the father has lost his sensual desires and the mother is past the age of childbearing, are only recommendatory precepts which indicate the far-sightedness of the sages to provide for the children that may be born after partition. Dayabhaga, in consonance with its doctrine of absolutism of the father accepts only two periods and none else. The father, if he wishes, may divide his property among his sons or when he dies, his sons may divide the property among themselves. He goes a step further to lay down that partition should take place after the demise of the mother, because of the use of the dual number *pitro* in the text which includes mother also[1]. Srikrishna explaining this statement of Dayabhaga says that it is desirable to divide the property after the death of the mother, but the rule is only recommendatory[2]. It is established beyond doubt that sons in Bengal could divide the property even during the life time of the mother.

Mitakshara accepts the right of a son, grandson and by implication of a greatgrandson to claim partition. The Bombay High Court has, however, in comparatively recent times, imposed a restriction: when the father

1 पित्रोरिति द्विचननिर्देशात्सोदरभ्रतॄणाँ पितृधनविभागोपि मातुरभावएव कार्यः । दायभाग II, 5, P. 27.

2 Srikrishna explains कार्यः as प्रशस्तः thereby rendering the rule recommendatory. See Kane "Hisotry of Dharmasastra" Vol III foot note 1065.

is joint with his own father or brothers, the son cannot enforce partition. The restriction, it is submitted, is untenable and springs from a misreading of the texts[1]. Once the doctrine of right by birth is accepted, the right of the son to claim partition obviously flows from it. It is anomalous to envisage that the right is dormant when the father is joint with his father or brothers but springs up when the father separates himself from them. The sages, as we have already seen, saw the logic and even though grudgingly, conceded the right. In modern times, when the Hindu law enactments have decided to break up the joint family system, there appears to be no reason to sustain an illogical rule which aims at sustaining that institution.

An adopted son acquires rights and is subject to obligations in the same manner and to the same extent as a natural son. He can, therefore, claim partition not only from the adoptive father but after his death from other members of the joint family. Where, however, a son is born to the adoptive father after adoption, the adopted son continues to enjoy the right to demand partition though his share is reduced. Of the father's estate he gets one third in Bengal, one fourth in Benares, and one fifth in Bombay and Madras. The provisions of Hindu Adoption and Maintenance Act and Hindu Succession Act have not yet been tested in the courts of law, but it appears that under these statutes an adopted son and an aurasa son are entitled to equal shares[2].

1 *Apaji vs. Ramachandra* (1892) 16 Bom. 29 (F.B.). The misapprehension sprung from the fact that the judges gave an independent construction to para 3 of chapter I, sec V of Mitakshara. The judges took for substantive law what was mentioned in placitum 3, instead of taking into account the cumulative effect of paras 1 to 8. As Telang J. had rightly pointed out in his dissenting judgement that Mitakshara raised an objection in para 3 and answered the same in the subsequent paras. It was the style adopted by these medieval jurists first to propound the hypothetical objections and doubts that might be advanced by the opponents and to answer them subsequently by enunciating their own law. Regarding such a style of narration, if passages are construed disjointly it will lead to odd results.

2 Since there is no specific provision in the Hindu Succession Act 1956 dealing with this question, by implication the disparity between the shares of an adopted son and an afterborn aurasa son is removed. But it may be argued that the provisions of Hindu Succession Act 1956 become operative only on the demise of the father and so, if a partition takes place during the lifetime of the father, the aurasa son gets a dominant share according to the old law. This contention cannot be sustained because of the usage of the expression "all purposes" in Sec 12 of the Hindu Adoption and Maintenance Act 1956. The aforesaid section reads: "An adopted child shall be deemed to be the child of his or her adoptive father or mother *for all purposes*" The expression "all purposes" is wide enough to include the instance where an adopted son and an afterborn aurasa son constitute a coparcenary.

The illegitimate sons of the three higher castes were, under traditional Hindu Law, entitled only to maintenance, though an illegitimate son of a Sudra enjoyed certain rights in respect of deceased father's property. For instance, on the demise of the father, he could claim partition and receive half of the share which he would have received, had he been legitimate[1]. Commentators have not assigned any specific reason for the indulgence shown to illegitimate sons of the Sudras. However, it is possible, that children born of *avruddha stree* were given limited rights in order to provide for a social evil which had become rampant among the Sudras. Be it as it may, the Privy Council and the Supreme Court adhered to the aforesaid rule of Yajnavalkya[2].

The Hindu Succession Act has, perhaps, unintentionally alterred the law relating to illegitimate sons. Under the Act illegitimate sons, even of the Sudras, do not have any right of inheritance[3]. Under these circumstances they can hardly claim a share in the deceased father's property. The question of claiming partition, therefore, does not arise. We do not approve of the present legislative provisions. Quite apart from being unjust to the illegitimate son, it does nothing to solve a social evil which is no less rampant today than it was in the past.

It is interesting to note that the Hindu Marriage Act 1955, departs from the traditional Hindu Law in granting certain rights to specified illegitimate children. Section 16 of the Act which deals with the issues of void and voidable marriages states that when a marriage is annulled by a decree of nullity either under Section 11 or under Section 12, the children born of such unions shall be deemed to be legitimate children of the concerned parties though such children shall have the right of succession to their parents' property only. Obviously these statutorily legitimised children can claim equal shares with other legitimate children. What is more, these statutorily legitimised sons can claim partition of the coparcenary property during the lifetime of the father and make a mockery of the "spiritual basis" of the right by birth theory. But, if the law has gone thus far to provide

1 Yajnavalkya II. 133-134.

2 *Kamulammal vs. Viswanathswami* (1923) 50 I.A. 32; *Guru Narain Das vs. Guru Tahl Das* (1952) S.C. A.I.R. 225

3 As Professor Venkataraman observes in his study of the Act "Illegitimacy is not stated to be a disqualifying factor anywhere in the Act. The disqualification seems however, to be implicit in the Act. It is thus clear that the illegitimate son has lost the rights he had under the general law in regard to his heritable capacity." See, Professor S. Venkataraman "A Study of Hindu Succession Act 1956" II M.L.J. (1956) p. 64.

for cases and in a manner which was never done before, one fails to understand why the rights of children born of *avruddha stree* be now extinguished.

As regards a woman's right to claim partition, Hindu Women's Rights to Property Act 1937 conferred upon the widow of a coparcener the right to inherit her husband's share and consequently the right to enforce partition. According to Hindu Succession Act, a female heir takes an equal share with the male heir in the interest of the deceased[1]. But a curious restriction has been imposed on the female heir's right to claim partition[2]. Section 23 states that the female heir cannot claim partition of the dwelling house of the family unless the male heirs choose to divide it . It is ironical indeed that the legislature, having broken the backbone of the coparcenary by Sec 6, has made a half hearted or faint attempt to save it from disruption by enacting Sec. 23. The section is also not explicit as to the instance where there is only one male heir and whereby there cannot be any partition among male heris.

At a partition, each coparcener is entitled to a share except those that are disqualified. There are texts that exclude certain persons from taking a share at a partition as well as in the inheritance. It is further laid down that such persons are to be given food and raiment by those who take the estate. All the three Sutrakaras Gautama, Baudhayana and Apasthamba mention the disqualifications but the enumeration of Manu and Yajnavalkya is comprehensive[3]. It is interesting to note the rationale behind this rule of exclusion. Baudhayana states that the blind, the idiot and others are disqualified because they are *incapable of transacting legal business*. But this explanation is not appropriate in the case of an impotent or an outcaste coparcener. An outcaste, in fact, is excluded on religious grounds. Some are prone to assign the reason that such persons are excluded because of their incapacity to perform religious rites and cere-

1 Of course the son as a coparcener gets a dominant share.

2 Sec. 23 of Hindu Succession Act "where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house, shall not arise until the male heirs choose to divide their respective shares therein, but the female heir shall be entitled to a right of residence therein :

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

3 अनंशौ क्लीबपतितौ जात्यन्धबधिरौ तथा। उन्मत्तो जडमूकश्च ये च केचिन्नरीन्द्रिया:।

Manu 9, 201. Also See Yajnavalkya 2. 282

monies : "capacity to perform religious rites is coextensive with the capacity to inherit or to claim partition". This view has been rightly rejected by the courts[1]. Apararka correctly explains that "if those who are born blind, deaf, etc., have no right to perform *Ishta* ceremonies on account of want of upanayanam and marriage etc., still they have the right to *Purta* or conservatory works such as digging tanks, wells, etc., like the Sudras". Further, he says that "these are not disqualified because of their incompetence to perform religious works *but because of special texts*"[2].

The Caste Disabilities Removal Act of 1850 removed the disability of an outcaste. Prior to this Act, in accordance with the strict Smriti law, an outcaste forfeited all his rights in the joint family and he was treated as nonexistent. On account of this detterrent rule, rarely conversion to any other religion took place. But the European legislators intending to encourage and facilitate conversion to Christianity promulgated this piece of legislation. It is noteworthy that the culverts of the Hindu religion have been strong enough to sustain such currents.

The Hindu Inheritance (Removal of Disabilities) Act of 1928 abrogated all the grounds of disqualifications except congenital lunacy and idiocy. Undoubtedly the Act is ameliorative because the existing principle of Hindu Law was harsh towards those who had been accursed by nature.

Though the Hindu Succession Act professedly leaves the joint family law untouched, still it has brought about many changes by implication. Regarding inheritance, Hindu Succession Act abrogates all the previous rules of law relating to disqualifications. It disqualifies only the murderer and certain widows[3] who are remarried when the succession opens. Section 28 states that "no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity except as provided by the Act". Consequently even a lunatic or an idiot can inherit under the Act. Now, what is the position of a lunatic or an idiot when the partition takes place during the lifetime of his father ? Hindu Succession Act comes into operation only on the demise of a person ; obvioulsy, when the father is alive, its provisions cannot be invoked. So, in a joint family constituted by a father and his sons, some of whom are idiots or lunatics, the sons who are disabled cannot claim any right in the property in the hands

1 *See Surayya vs. Subbamna (1920) 43.* Mad 4, 14, for the dictum of Sadasiva Aiyar. J.

2 भवतु वा जात्यान्धादीनामुपनयनदारापरिग्रहाभावादिष्टे धर्मे तेषामनधिकार: पूर्ते तु शूद्रादिवदस्यैव····· किंतु वाचनिकमेव

Apararka Vol. II J. C. Ghose P. 299.

3 See Secs 24 and 25 of Hindu Succession Act.

of the father because they are disqualified under the Act of 1928 which stands good as to partition, and since the Hindu Succession Act has no application to joint family and partition. In order to deprive these disabled sons from taking advantage of the Hindu Succession Act, other sons may enforce a partition during their father's life time, thereby excluding the disabled sons. Such an anomalous situation, the legislators might not have contemplated while drafting the Act.

IX

CONCLUSION

The retrospect of the institution of joint family reveals the vicissitudes it had to face from the earliest times. Joint family system succeeded in keeping up the harmony of the Hindu society so long as it was untouched by the vagaries of a complex and advancing civilization. Neither society nor law can be static, they change with the progress of time. Every institution has to face modifications by the impact of changing times and many a time an institution may altogether disappear on account of its non-utility.

Much water has flown down from the days of the Vedas, but the institution of joint family has not undergone substantial change. The hostility of aggressors, the impact of an alien culture and the application of a different set of principles in the administration of law, have not been able to annihilate this hallowed institution. The endurance of the institution for such a length of time and in such a vast subcontinent, is in itself the evidence of its intrinsic merit. While in the western societies when this institution has been wiped out of existence at an early period of human civilization, what is it that has sustained the institution in India ? Apart from the geographical and sociological backgrounds that have nurtured the institution, unquestionably, it is the precepts of Hindu theology and philosophy that have contributed for its permanance in India. Broad mindedness is the bedrock on which the institution rests. Originating in natural love and affection, the institution draws its sustenance from mutual sympathy, spirit of self sacrifice and forbearance. It is these qualities that the Hindu Dharmasastra, the religious and philosophical writings have always tried to inculcate in every human being.[1]

1 Subhashitakara puts it pithily: श्लोकार्धेन प्रवक्ष्यामि यदुक्तं ग्रन्थकोटिभि: । परोपकार: पुण्याय पापाय परपीडनम् "what has been stated in scores of books can be summarised in half a sloka; service to others augments *punya* and injury to others produces sin". Hindu philosophy teems with such passages.

As an obvious offshoot of such a tempo of religious thought, the people grew very conscientious about their duties. It was duty first and duty last, every one strived his best not to swerve from the approved path *swadharma*. Thus, every member of the family was more concerned with his duty, he never cared whether other members worked or not, or the Karta spent more or less. He fulfilled his duties with unflinching determination having always an eye upon the general welfare of the family. Religion always guided him and kept him dissociated from baneful materialism. Thus, the family harmony was never shaken by the solitary misfeasance of an individual member.

Now, what are the causes that have contributed to the undoing of the system in India ? The institution of joint family was eminently suited to primitive as well as agricultural societies. In a primitive society the group living lent strength to face the fiery neighbours and the most ideal group living was the institution of joint family because it bound the members by the tie of kinship. Similarly in an agricultural society, the system assisted in enhancing the agricultural production. The emergence of the early society out of its primitive shell by the establishment of kingdoms and empires which in their turn provided internal and external security and the development of commercial intercourse which depended upon the improvement of communications, afforded opportunities to the members of a community to come in contact with the members of a different community leading altogether a different way of life. Thus, when a member of a joint family went out of the family on a commercial venture and lived amidst others, he would develop more self confidence and would realise that he could lead a happier life without the assistance of the corporate family. When he tasted a new and different life with more material comforts, certainly some dissatisfction would haunt him when he returned to the family fold. Thus, the progressive society gave a fillip to the instinct of individuality which in turn brought with it the parochial nature. And unless the individual was made up of a strong moral fibre, he might not be in a position to suppress the impact; once he gave room to these pernicious tendencies accompanying the spirit of individualism, then he had to dance to that tune. Obviously, his enthusiasm in the routine work slackened and the slightest misgiving prompted him to separate from the family fold.

In spite of these maladjustments brought about by a fast changing civilization, the institution flourished well until the advent of the British regime. The institution suffered much in this period on account of the

of the father because they are disqualified under the Act of 1928 which stands good as to partition, and since the Hindu Succession Act has no application to joint family and partition. In order to deprive these disabled sons from taking advantage of the Hindu Succession Act, other sons may enforce a partition during their father's life time, thereby excluding the disabled sons. Such an anomalous situation, the legislators might not have contemplated while drafting the Act.

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In spite of these maladjustments brought about by a fast changing civilization, the institution flourished well until the advent of the British regime. The institution suffered much in this period on account of the

degeneration of moral values caused by a purely secular education which undermined the Hindu spiritualism in which the institution had its roots and on which its continuance depended. Although the institution received stepmotherly treatment from the judiciary it was the legislature that dealt severe blows and thereby facilitated its disintegration. When the British began to administer law, some amount of foreign influence was instilled into the principles of Hindu Law, though the several charters declared that Hindu law should be administered according to Dharmasastra. These English judges, who were trained in the principles of western Jurisprudence, encouraged individualism, the scaffold with which they had built their legal structure. When any portion of Hindu Law was not accessible to them on account of want of correct translations of Dharmasastraic texts, it was but natural for them to be guided by their own legal concepts which they laid down under the principle of justice, equity and good conscience. Where there were two interpretations one favouring individualism and the other against it, undoubtedly, they would prefer the former. So, it was the judiciary which set the ground for the legislature to continue the onslaughts on the institution. Another important factor that assisted these two agencies in their task, is the English system of education, The introduction of English education gave an impetus to the dissemination of western culture; and the people who were trained in these lines and who were carried away by the glamours of occidental way of life began to shun their own institutions.

Although some of the enactments have brought about radical changes, they are not by themselves the root cause for the complete disintegration of the joint family. The institution could not withstand the stresses and complexities of this century and thereby had already shown signs of decay. Even without the promulgation of many of these statutes, the institution would have disappeared within a few more decades. Today, we find only in rural areas, the traces of the joint famly system and even there it has retained only its outer shell losing all its spirit. When such is the case, the recent legislations have just accelerated the end of the system and the burying pit is set ready for the dying institution.

Although the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Hindu Marriage Act, 1955, the Adoption and Maintenance Act, 1956, brought about some modifications, it is the Hindu Women's Rights to Property Act, 1937 and the Hindu Succession Act, 1956, that have brought about serious changes in the law relating to the joint famly. The 1937 Act gave a death blow to the corporate structure of the family. Until then,

a widow could not have interfered in the affairs of the family except by adopting a son to her husband and then claiming partition through that son. The 1937 Act annulled survivorship when a coparcener left behind a widow. Though the Act conferred upon the widow the right to inherit her husband's interest, still in practice, partition was not resorted to and mutual compromise used to be arrived at between the widow on the one hand and the members of the joint family on the other. Thus the disruption of the family was arrested.

The spine of the tottering institution is broken up by the Hindu Succession Act, 1956, which has opened up succession to a number of heirs. It confers testamentary power to dispose off coparcenary interest which means the abrogation of survivorship at the option of the coparcener. Although Sec. 6 and Sec. 30 are the only two sections that principally interfere with the joint family law, we should note that the grave consequences of these sections are themselves sufficient to complete the annihilation of the institution. At a time when eveything is thought of in terms of material advantages, indeed it gives least stimulus to coparceners to remain joint especially when the interest of their fellow coparcener withers away by the introduction of so many heirs.

Our attempt will be incomplete without the reappraisal of the advantages and the disadvantages of the system. While considering them, we should bear in mind the remarks of Sri Golap Chandra Sarkar. "This institution like every other has its advantages and disadvantages, but its advantages are both spiritual and secular, while its disadvantages are merely secular in character"[1]. No other institution can imbibe the spirit of self sacrifice, service, broad-mindedness, sincerity of purpose and other noble qualities as the joint family can. It is the training ground for youths who are the spokes of the progressive society. The first and the foremost thing that can be discerned in the institution is the unity of purpose, all working for the welfare of family. Unity is strength. It lends asistance to combat with any difficult task, to face any calamity that may betake an individual. The woe of an individual is shared by the whole family and similarly the happiness of an individual is rejoiced in by all. It has many economic advantages; what a member earns, may be in excess of his needs and it can be applied to other needful members. The fragmentation of land can be avoided by living jointly and consequently agriculture is bound to flourish. The institution rears the co-operative spirit and it can be truly

1 Sri G. Sarkar Sastry's Hindu Law Page 114.

said that it has given brith to the socialistic school of thought. It is a grave irony that the polity of the day while encouraging the co-operative system of farming and living on the one hand, is on the other hand breaking up the vestiges of the institution that is the repository of all qualities they want to inculcate in the people. In the western countries, the poor the disabled, and the unemployed have to depend upon the State for their sustenance. But the joint family system renders unnecessary the laws for the maintenance of the poor, the disabled and others. It provides shelter and security to forlorn widows and aged people. To put it in short "in boyhood it is a school, in youth a safety device, and in old age a solace and at all times a venerable institution"[1].

The antagonists of the institution urge that the system rears drones or parasites at the cost of the members who work hard. It is an engine of oppression as regards women who are no better than slaves. It is a fertile source of jealousy and quarrels which hinders economic progress. It curbs the development of individuality. And lastly it is an archaic institution not suited to modern times. Though there is some truth in the last mentioned objection, it is clear that other allegations against the institution emanate from the parochial nature of individual instinct in man. Is it unreasonable or is it rearing parasites to help a forlorn widow, an unemployed brother or an aged uncle ? If we are not prepared to sacrifice so much of material advantage to provide for such members of the family, then the words like sacrifice, patriotism and other allied terms will have no meaning. When materialism transcends a limit beyond which it excludes all human values, then the community that gives room for such a state of affairs is bound to pay heavily for it.

Throughout the article, it has been urged that unrestrained individualism is the incubus that has been baneful to the institution. The west is paying penalty for grooming individualism unrestrictedly. According to their way of life, when an individual weds, he sets up his own family and the aged parents have to lead a secluded life except for occasional visits from their children. In the absence of any help, they have to depend upon the State. An American disgusted by the western pattern of life has remarked cynically "I am born in a hospital, brought up in a boarding, married before a Registrar, living in a hotel and going to die in the Home for the Aged. Where can I find the true cares of family life ?" The only panacea for

1 "Changing view on Marriage and Family" by K. T. Merchant 1935 Edition Page 136.

such evils is group living and the most ideal group living is joint family system. So, the glory of our nation lies in revivifying that ancient institution handed over to us from our great ancestors, with sufficient modifications to suit the hububs of this 'cosmos' age. Rejuvenation of the institution means reorientation of our national policy.

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INTERNATIONAL DOUBLE TAXATION WITH SPECIAL REFERENCE TO INDIA AND THE UNITED STATES

By

MAHESH C. BIJAWAT*

International double taxation arises when taxes of two or more countries overlap in such a manner that persons liable to pay tax in more than one country bear a higher tax burden than if they were subject to one tax jurisdiction only. It has its roots in the sovereign power of every nation to tax any individual or enterprise or property located in its territory. This power to tax is exerted against foreign entities by the State in which they are either resident or doing business, or are even non-resident, without regard to the taxation of the same in the country of domicile or incorporation, thus subjecting the individual or enterprise to the jurisdiction of two tax authorities on the same income.

With the emergence of new and developing countries, with their dependence for economic development on prosperous nations, through capital investments, technological knowledge and other methods, the free world has been divided into two economic camps, namely, the capital importing and the capital exporting countries. The interests of both these groups, namely, the poor and the rich countries, are nearly identical namely, the development of the under-developed nations, though the motives may differ. Yet, despite this common interest, a cause of friction is always present, which at times tends to disrupt the entire work. This disagreement is due to the fact that capital exporting countries feel that since the underdeveloped countries need the capital, they should exempt the profits earned by this capital from tax, with the result that only the former get the right to tax the profits; the capital importing countries argue that since the foreign capital invested earns profit in their countries, they have a right to tax these profits. This difference in the approach often results in the taxation of the same income twice, and thus hampers the free movement of capital and other development aids[1] between the two camps.

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1 These development aids may consist of technical knowledge, patents, formulae, skilled technicians and teachers.

Taking an objective view, the arguments of both parties have an element of truth in them, yet neither can prevail over the other. It is necesary, therefore, to explore a solution which will reconcile both the interests and at the same time avoid the burden of double taxation. The remedies adopted to overcome this difficulty are two, neither of which is complete by itself but each is complementary of the other. The first, a unilateral method, consists in providing, in a nation's tax laws, for exemptions and credits for foreign taxes paid. The second, a bilateral method utilizes treaties and protocols to eliminate causes of international double taxation arising from differences in definitions and administration and to provide for administrative assistance against tax evasion.

India and the United States are in the position of a capital importing and a capital exporting countries respectively and the problem mentioned earlier with regard to the tax relationship between such countries is bound to arise here too. The solution sought by these two countries partake of both the unilateral and the bilateral methods. The latter, a bilateral Income Tax Treaty for the avoidance of double taxation, signed between the two countries in November 1959, has not so far been ratified and so this method is not yet effective.

A treaty of this kind, between a rich and prosperous nation and an underdeveloped one, has many distinctive features which will not be found in the double taxation treaties which the United States has concluded with countries like France and the United Kingdom, which have approximately the same level of development as the United States. The United States-India treaty has been criticised as well as commended in the United States Senate Foreign Relations Committee; criticised, because of some of its peculiar provisions[1], applauded, because it represents a successful attempt by the United States to negotiate a double taxation treaty with an underdeveloped nation[2]. The United States hopes by means of the treaty to

1 For example, the tax sparing provision contained in Article XII of the treaty.

2 Since the flow of income, always, is from the underdeveloped nation to the developed nations, the former feel no necessity for negotiating double taxation treaties with the latter, for whereas without a treaty they can tax all the income arising within their territory, with a treaty in effect, this power will be curbed to a great extent, and they will consequently lose much revenue, without getting, much in return. The United States has successfully negotiated such treaties with Pakistan, Honduras, Israel, United Arab Republic, besides India; but these treaties are not identical with those in effect between the United States and other economically developed countries. The treaty with Pakistan was also criticised in the Senate Foreign Relation Committee, as well as applauded.

encourage private American investment in India, thus relieving the pressure on government aid and loans to the latter country; while India hopes to acquire the capital and technological knowledge from America for improving her economic conditions. This beneficial result is sought to be achieved by this treaty by eliminating the various causes which result in the double taxation of income and by helping to curb fiscal evasion.

This article, aims firstly to analyse briefly the unilateral method adopted by India and the United States to eliminate double taxation and secondly to deal with the bilateral method in some detail as adopted by these countries.

THE UNILATERAL METHOD

Unilateral action by a State to avoid double taxation comprises the procedure for dealing with income of the non-resident owners which arises within its territory, as well as income to its residents which arises from foreign sources.

A country levying tax on its residents has the choice of exempting them on income from foreign sources or of taxing them after allowing a credit against its tax in respect of the tax paid in the foreign country. The first method, called the exemption method, is more complete (from the tax payer's point of view) and less complicated than the tax credit system.

Unilateral relief presupposes action by one country only, without any exchange of information with any other country, without any reciprocal action by that other country, and with only the resources for obtaining information and for enforcement of taxes which its own laws provide.

Both India and the United States have adopted a tax credit system to mitigate the evils of double taxation. This method would naturally be more beneficial in the case of the United States, on account of its nationals investing and receiving a vast amount of income from foreign sources, than in the case of India where the investment of the capital and receipt of income from foreign sources is comparatively small. Yet both these countries, one a rich and the other a poor nation, realise the evils of double taxation and have unilaterally done something about it.

The credit for foreign taxes paid is provided in Section 91 of the Indian Income-tax Act. This provision was originally inserted in 1939 and amended subsequently on a few occasions. It prescribes that any person (which includes a company) who is a resident of India during the taxable year, and who has paid to any country with which India does not have a treaty

for the avoidance of double taxation, he is then entitled to a deduction against his Indian Income tax for an amount calculated on such "doubly taxed income" at the Indian rate of tax or the rate of tax of the foreign country whichever is lower. For example if an Indian Company's income from United States sources is Rs. 10,000/- and the United States tax rate is 50 per cent then the tax on this income will be Rs. 5000/-. Now the same income is also taxable in India as it is earned by an Indian Company; supposing the Indian tax rate is 40 per cent, then the Indian tax on the foreign earned income is Rs. 4000/- ; thus according to the foreign tax deduction allowed by Section 91 the Indian Company will be able to get a tax deduction of Rs. 4000/- on the doubly taxed income i.e., Rs. 10,000/- because the Indian tax rate is lower. If on the other hand, the United States tax rate is 40 per cent while the Indian rate is 60 per cent, then also Rs. 4000/- will be allowed as a deduction, for the foreign tax rate is lower and will thus be taken into account. In the first case, the double taxation relief is not complete as the tax payer does not get a tax deduction for Rs. 1000/-. The credit is not allowed under Section 91 if under the Indian rules the income is "deemed to accrue or arise in India"[1].

Included in the expression "income-tax" in relation to a foreign country are excess profit taxes and business profit taxes levied not only by the Central Government of that country, but by any of its governmental subdivisions or by any local authority.[2] As has been mentioned, a limitation to the amount of foreign tax credit is embodied in Section 91, and this limitation is the lower of the tax rate of India or the foreign country on the income which has been doubly taxed. A limitation is also found in the American tax credit system, which is dealt with in detail later on. There' the amount of credit for any country cannot exceed that proportion of the tax which taxable income from sources within that country bears to the entire taxable income for the same year; this is called the "per country" limitation. The "over-all" limitation, applicable to taxable years begin-

1 The income which is "deemed to accrue or arise" in India, is given in Sec. 9.

2 Section 91, Expln. (iv); in the Indian Income-tax Act of 1922 was replaced by the Income-tax Act of 1961, in September 1961, Expln. (iv) ran as follows:

> "The expression 'income tax' in relation to any country includes any excess profits tax or business profits tax charged on the profits by the Government of that country and *not* by the Government of any part of that country or a local authority in that country".

Thus the 1961 Act has made this change that taxes levied by a governmental subdivision or local authority are now included in the term "income tax", and is subsequeently allowed as a credit.

ning after 1960, specifies that the credit may not exceed the same proportion of the tax, against which the credit is taken as the tax payer's income from sources outside the United States bears to his entire taxable income for the year.

It must be said that the tax credit device does not eliminate double taxation altogether, because of the limitation usually prescribed, and also because of the difference in the definition of important words like "income-tax" and "excess profits tax". Since a credit or deduction is given only for "income-tax" paid, a recurring question is whether a particular tax of a foreign country comes within the definition of "income-tax" or not ?

The "tax credit" method which applies to the nationals of a country only, is not considered by the International Chamber of Commerce to be so complete as the "exemption" method for the prevention of double taxation. The exemption method as we remember, is one in which a national's foreign income is completely exempt from taxation by the home country. In a Brochure[1] on "Unilateral Relief from Double Taxation" in 1951 the Chamber comparing both the exemption and the tax credit methods said:

> "As a method of relieving double taxation, the exemption method is superior to the tax credit system.
>
> It is more complete. It avoids the need to examine how the income from foreign sources has been treated in the foreign country.
>
> The exemption system has not found general acceptance because the tax legislatures aimed primarily at taxing and were not impressed by the fact that the income had already been taxed.....The tax credit method affords a means of giving a partial relief, whereas the exemption method is complete".

And again in February 1955 in its study on the "Exemption v. Tax Credit Method", the International Chamber of Commerce in a resolution criticised the tax credit method in these words:

> "...the system of taxing foreign income and giving a credit for foreign taxes on it often fails to give adequate relief from double taxation owing to the differences in the types of taxes levied in the country of residence and the country of origin, in the bases of assessment to income taxes, and owing to the existence of subordinate taxing authorities in addition to the central government. In any case, the taxation of foreign income, even with deduction by the country of residence of taxes paid on it abroad, nullifies the advantages for private capital of moderate taxes in the country of origin".

1 Brochure 146.

Inspite of the advantages of the exemption method in eliminating double taxation, it is doubtful whether India or any other country will adopt it, because of the large loss of revenue involved in its adoption, due, perhaps, to the fact that income will go completely untaxed under this method. The tax credit method with all its deficiencies is likely to remain the weapon against double taxation, outside of bilateral tax treaties.

The foreign tax credit in the United States Internal Revenue Code, embodied in Section 901, was first inserted in 1918 and this was the earliest differentiation between foreign and domestic income. It works in a somewhat similar way to the Indian tax deduction system, in that the citizens of the United States and domestic corporations may elect to credit the amount of any income, war profits and excess profit taxes paid or accrued to foreign countries against the income taxes due to the United States,[1] and its benefit is considerable. For example assume that the United States tax rate is 50% and the net income before foreign taxes is $ 100 and the foreign tax is 30%. If the foreign taxes of thirty dollars is treated as a deduction (the Internal Revenue Code[2] allows the foreign tax paid to be deducted), the net income becomes $ 70 and the United States tax $ 35, which gives a total of $ 65 in taxes. If, on the other hand, the foreign tax of $ 30 is treated as a credit, the net income remains $ 100, the United States tax is $ 50, but against it is credited the foreign tax of $ 30, so that only $ 20 has to be paid to the United States, which gives a total of $ 50 in taxes. Thus any foreign tax which is less than the United States rate in effect is eliminated as a factor, and double taxation disappears.

To be eligible for the credit a taxpayer must show that the tax he has paid in the foreign country was in the nature of income, war profits or excess profits tax. There is a bewildering array of taxes all over the world and which of these is an "income tax" within the meaning of the foreign tax credit device, is a question very difficult to answer. The Internal Revenue Service[3] has largely used the yardstick of similarity to the United States concept of an income tax, but it has not clearly defined it. In 1943 the Third Circuit Court in *Keasbey and Mattison Co.v. Rothersies*[14] gave a criterion by which a foreign tax should be judged:

1 Treasury Regulations 1. 901-1 (1) & (2)

2 Internal Revenue Code is the American Income Tax Law equivalent to the Indian Income-tax Act.

3 Internal Revenue Service is equivalent to the Indian Central Board of Revenue.

4 133 F. 2d. 897 (3rd Cir.), cert. den. 320 U.S. 739 (1943).

"These commonly accepted criteria... may be easily ascertained .....(A) income tax is a direct tax upon income.....The defined concept of income has been uniformly restricted to a gain realized or a profit derived from capital, labor, or both...It seems logical to conclude that any tax, if it fails to qualify as a tax on income... is subject to the same basic restrictions...(T) axes imposed on... franchises, privileges, etc. are not income taxes, although measured on the basis of income".[1]

This narrow construction of "income tax" was not followed in the 1948 case of *New York and Honduras Resario Mining Co. V. Comm.*,[2] where the taxpayer had contracted to pay Honduras at least five percent of the liquid profits arising from its mining operations. Here the Court held the tax to be "income tax". Many cases have arisen that have come within the concept of income tax. Thus a British tax equal to 5% of profits as a "national defense contribution"[3] : a tax of 6% levied by the Dominican Republic on freight and passenger fares and cargo receipts ;[4] a Japanese tax of 5% on corporations,[5] were all income taxes for the purpose of the credit. On the other hand, a Cuban tax on capital[6] ; a Japanese tax based on per capita basis of juridical persons[7] : and a turnover tax super imposed on the French income tax[8] were not found to be within the United States, concept of the income tax.

The credit includes taxes levied in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country or possession of the United States[9]. In the legislative history of the "in lieu"

1 *Ibid.* at 897

2 168 F. 2d. 745 (2d Cir. 1948).

3 I.T. 1371, 1938-1 CUM. BULL. 192

4 I.T. 3997, 1950-1CUM. BULL. 63.

5 Rev. Rul. 58-548, 2 CUM. BULL. 382.

6 Rev. Rul. 31, 1953-1 CUM. BULL. 225.

7 Rev. Rul. 58-548, *Supra* note 5.

8 I.T. 2070, III-2 CUM. BULL. 250 (1924)

9 Section 903 ; Regs. 1. 903-1 gives a definition of taxes in lieu of income war profits or excess profits taxes :

"(*a*) *In general.* For the purposes of Section 901 through 905, inclusive, and section 164 (*b*) (6), the term "income, war profits, and, excess profits taxes" includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if;

(1) Such country has in force a general income tax law,

(2) The taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and

(3) Such general income tax is not imposed upon the tax-payer thus subject to such substituted tax".

provision, the examples given of a tax "in lieu of" an income tax are taxes measured by gross income, gross sales or the number of units produced[1]. Thus the question arose in *Lanman & Kemp-Barclay & Co. of Colombia*[2] whether a Colombian tax on patrimony was creditable. Colombian law stated that the tax was "an annual tax complementary and accessory to the tax on income, on the patrimony" and further stated that "the tax on income.., and the additional one on patrimony shall be considered one and indivisible"[3]. Taxable patrimony was defined as "the difference between the rights and duties appreciable in money which a tax-payer may have, on the one part, and the debts which burden these rights, plus the capital which the law exempts from tax....."[4] Holding that the characterization of the tax as an indivisible part of the income tax by the Colombian Court was immaterial, the Tax Court stated that a property tax having no relation to income or production was not intended to be within the provision.

There has been substantial criticism of the limited nature of the credit provision[5]. In the House of Representatives version of the 1954 Code, an election to credit either a "principal" tax or income taxes was proposed. A principal tax was defined as a tax which was not an income tax, was selectively applied, and was the principal tax burden of the tax payer in the foreign country. Due to the opposition of business groups who feared that the proposal would narrow the types of taxes creditable as income taxes, this approach was rejected. This proposal, we think, was a very sound one, in that it attempted to recognize that certain taxes levied by foreign countries, though not designated as income taxes, were nevertheless comparable to the income tax levied in the United States in their tax burden. This narrowing of the foreign tax credit to only those which are in the nature of the American income, war profits and excess profits taxes, is a serious defect of the foreign tax credit system in the elimination of double taxation. It is indeed very difficult in many cases to know whether a foreign tax will be allowed as a credit against American tax, until the Internal Revenue Service issues a ruling on the point, and by then it might be too late for an enterprise to pull out of the foreign country because of

1 Musgrave, "Criteria for Foreign Tax Credit" in Taxation and Operations Abroad, 83 (Tax Institute, 1957).

2 26 T.C. 582 (1956)

3 *Id.* at 583

4 *Id.* at 584

5 Barlow and Wender, "Foreign Investment and Taxation", 313 (1955).

the excessive amount of double taxation it is exposed to on account of the limitation imposed by the American foreign tax credit. This shortcoming is also apparent in the Indian Income-tax credit system.

Like its Indian counterpart, the American foreign tax credit is allowed not only against those taxes levied by the Central Government of a foreign country, but also by political subdivision, or any political entity which levies and collects income, war profits and excess profits taxes.[1]

A feature common to both the Indian and the American foreign tax credit is a limitation of some sort or other on the amount of credit allowed. Under the Internal Revenue Code there are two alternative limitations :

1. *Per-Country Limitation.* In general the limitation is applied separately with regard to each foreign country or United States possession. The credit allowed for taxes paid or accrued to such foreign country or possession is restricted to the same proportion of the United States tax against which the credit is taken as the taxpayer's taxable income from sources within such country or possession bears to his entire taxable income for the same taxable year.

2. *Over-All Limitation.* After December 31, 1960, a taxpayer may elect to claim the "over-all limitation". Under that alternative method, the credit with respect to all taxes paid is limited to the same proportion of the United States' tax against which the credit is taken, as the taxpayer's taxable income from all sources without the United States bears to his entire taxable income for the same taxable year[2].

1 Regs. 1. 901-2(b)

2 An example taken from Montgomery's "Federal Taxes" 38th Edition 1961, illustrates the computation of the credit under the two methods where a domestic corporation has branches in countries A, B. and C :

Source of Income	Amount of Income (Loss)	For. Income Tax
United States	$ 190,000	$ None
Country A	$ 100,000	$ 55,000
Country B	50,000	10,000
Country C	(40,000)	None
Taxable income	$ 300,000	65,000
United States Income-tax.....		$/150,500

The effect under either rule is to limit the rate of credit to the average rate of the tax of the United States. The over-all limitation will be preferable to the per-country limitation when the income from one or more foreign countries is subject to a higher rate of tax than the United States rate, while income from some other foreign countries is taxed at a lower rate than the United States rate. The Indian tax credit appears to be limited to the per-country limitation, since an over-all limitation is not mentioned.

Under the American Code, foreign tax credits which are unused and have been disallowed under the limitation can be carried back two years and forward five years.[1] Again, the Indian Income-tax Act and the rules are silent on this point, though it is an important one, for the carry-back or carry-forward of the credit obviously helps in the mitigation of double taxation.

The Internal Revenue Code also provides for cases with respect to to the allowance and the amount of the foreign tax credit, where taxes are

(1) Per Country limitation :		
Country A :		
$ 100,000 (income from Country A)	$ 150,500	$ 50,166
$ 300,000 (entire taxable income)		
Amount available as credit ($ 55,000 or $ 50,166, whichever is less)	$ 50,166	
Country B :		
$ 50,000 (income from Country B)	$ 150,500	$ 25,083
$ 300,000 (entire taxable income)		
Amount allowed as a credit ($ 10,000 or $ 25,083, whichever is less.....	$ 10,000	
Country C :		
Amount allowed as a credit.....	None	
Summary of credits allowed under "per country" limitation		
Country A	$ 50,166	
Country B	$ 10,000	
Country C	None	
Total credit against U.S. tax	$ 60,166	
(2) Over-all limitation :		
$ 110,000 (total income from sources outside the U.S.	$ 150,500	
$ 300,000 (entire taxable income)	$ 55.183	
Total credit against U.S. income tax ($ 65,000, or $ 55,183, whichever is less)		$ 55,183

1 Section 904(C).

paid by a foreign corporation in which a United States corporation has an interest[1], and for taxes paid by a foreign subsidiary of a foreign corporation, in which a United States corporation has an interest[2]. The Revenue Act of 1962 has made a few changes in this tax credit, mainly pertaining to the foreign corporations which are located in a developed country or a less developed country[3]. The Indian Income-tax Act fails to provide a foreign tax credit provision for such cases, though it cannot be doubted that such a provision would be of value in not only eliminating double taxation but also in encouraging investment abroad.

1 Section 902(a)(1) provides that where a domestic corporation (i.e. United States corporation) owns at least 10% of the voting stock of a foreign corporation from which it receives dividends shall to the extent such dividends are paid by such foreign corporation out of "accumulated profits" of a year for which such foreign corporation is not a less developed country corporation, be deemed to have paid the same proportion of any income, war profits, or excess profits taxes paid or deemed to be paid by such foreign corporation to any foreign country on or with respect to such accumulated profits, which the amount of such dividends bears to the amount of such accumulated profits in excess of such income, war profits, and excess profits taxes ; (2) and to the extent such dividends are paid by such foreign corporation out of accumulated profits of a year for which such foreign corporation is a less developed country corporation, be deemed to have paid the same proportion of any income, war profits, or excess profits taxes paid by such other foreign corporation to any foreign country on or with respect to the accumulated profits, which the amount of such dividends bears to the amount of such accumulated profits. "Accumulated profits" means the amount of foreign corporation's gains, profits or income in excess of the income, war profits and excess profits taxes imposed on such gains, profits or income.

2 According to section 902 (*b*) if a United States corporation owns 10% or more of the voting stock of a foreign corporation from which it receives dividends and the foreign corporation owns 50% or more of the voting stock of another foreign corporation, from which it receives dividends in any taxable year, it shall be deemed to have paid the same proportion of any income, war profits, or excess profits taxes paid by such other foreign corporation to any foreign country or to a possession of the United States, on or with respect to the accumulated profits of the corporation from which such dividends were paid which for purposes of applying subsection (*a*)(1), the amount of such dividends bears to the amount of the accumulated profits of such foreign corporation from which such dividends were paid in excess of such income, war profits, and excess profits taxes; and for applying subsection (*a*)(2), the amount of of such dividends bears to the amount of the accumulated profits of such other foreign corporation from which such dividends were paid.

3 Sec. 955 (*c*)(3) defines a "less developed country" as follows —

"....the term 'less developed country' means (in respect of any foreign corporation) any foreign country (other than an area within the Sino-Soviet bloc) or any possession of the United States with respect to which on the the first day of the taxable year, there is in effect an Executive order by the President of the United States designating such country or possession as an economically less developed country...."

It is possible that the American foreign tax credit may encourage other countries to adopt similar source rules as found in the Code for in that case an American corporation or an individual would be able to get the American foreign tax credit for taxes paid to a foreign country which has similar source rules ; for example, if an American corporation doing business in India derives certain income which by American source rules are considered to be from United States sources, while the Indian source rules consider it as Indian income ; in such a case the corporation will not be able to get a credit for taxes paid to India on that income ; this might deter American corporations investing in India. On the other hand, if the source rules of both the countries are similar, then the American corporation would not pay any tax in India, for then the Indian source rules would also place that income as derived from the United States. So the foreign tax credit may indirectly help to bring about a uniformity in source rules all over the world, which would encourage American investment abroad, for then no conflict as to the source of income would arise to deprive an American investor of the foreign tax credit.

A number of criticisms have been levelled against the foreign tax credit, most of which seem to be rather trivial. One is that the credit invites foreign countries to raise their income taxes on American-owned firms to the United States level, since the cost is borne by the United States Treasury and not by the taxpayer. Another is that the credit encourages foreign countries to adopt and rely on income taxes although such a tax may not be appropriate to their economies. Neither of these charges has been proved and it is improbable if any foreign country will raise its taxes or introduce new ones simply to get the benefit of the United States foreign tax credit. However, a problem may arise when the source rules of different countries place the source of income in their territories respectively. For example, if an Indian corporation earns $ 10,000 from doing business in the United States, and the United States source rules place the Income as derived from United States sources and levy a 50% tax on the income, i.e., $ 5,000. On the other hand, the Indian source rules consider the whole income as derived from Indian sources and levy a 60% tax on the income, i.e., $6,000. In such a situation the taxpayer will not get any credit for the United States taxes from India, as the Indian authorities consider the income to be derived from Indian sources ; the result oddly enough will be that the taxpayer who has earned only $10,000 will have to pay $ 11,000 tax to the two countries, and not get a tax

credit at all. So the foreign tax credit is useful so long as the source rules of the countries are somewhat similar.

A criticism which appears to be a valid one is that, the foreign tax credit frustrates the efforts of those countries which eliminate or lower or waive their income taxes in order to encourage foreign investment. Whatever amount of revenue they forego by these tax incentives is picked up by the United States Treasury. An argument against this may be made by saying that the credit was not designed to reduce the tax burden on United States taxpayers to the level chosen by any country, but was adopted to maintain uniformity among United States taxpayers at the level of the United States tax burden ; it was adopted to prevent a lack of uniformity because of high foreign taxes. But whatever the answer, this aspect of the foreign tax credit is in conflict with the United States foreign policy of helping the poor and underdeveloped countries not only by means of aid and loans, but by encouraging them to make an effort on their own behalf. The working of the foreign tax credit is definitely prejudicial to this policy. The underdeveloped countries resent this nullification of their efforts to encourage private American investment.

Whatever the merits and demerits of the foreign tax credit system, Indian or American, there is no doubt that it does help to a great extent in eliminating double taxation. As mentioned earlier, no tax credit can provide complete relief from double taxation (that is possible only through the exemption method). Nevertheless its adoption by some of the nations shows that they are willing to do something unilaterally about eliminating double taxation. Since it is not always possible to negotiate bilateral tax treaties between the countries, the unilateral method is the only one left. The more the number of nations willing to adopt a unilateral method to tackle the evils of double taxation, the easier it will be for capital and skilled personnel to move from one country to another, and thus help not only their home country, but also those countries which need their help desperately.

THE BILATERAL METHOD

The bilateral method, ie. income tax treaties between two countries for the avoidance of double taxation and fiscal evasion, seems at the moment to offer the most practical solution to the problem of double taxation. The typical bilateral income tax treaty serves the purpose of allocating the source of income for certain items and specifies which country has the right to tax a particular type of income. It also generally provides for an

exchange of information so as to prevent fiscal evasion. A multilateral convention among a number of nations would be desirable, but due to the diversity of the tax systems in each country, the bilateral treaty method is preferred and generally adopted. The bilateral convention has the advantage of being readily adaptable to the needs of the contracting parties. It is deemed by some authorities, however, also to have the disadvantge of being likely to lead to great diversity of treatment of taxpayers residing in different countries, because the various tax treaties with different countries would have different provisions regarding the taxation of the taxpayers effected.

One of the early bilateral treaties designed to prevent double taxation, was that of June 21, 1899, between Austria and Prussia.[1] Soon after the First World War, a number of treaties were concluded between the Central European countries, which closely followed the outline and major principles of the Austro-Prussian Agreement of 1899. It was in 1920 that the League of Nations took interest in the problem of double taxation and through its fiscal committee conducted a systematic investigation. The League came up in 1928 with three drafts of model bilateral conventions relating to the avoidance of double taxation and fiscal evasion. These conventions formed the main basis on which many countries concluded bilateral treaties between themselves. Continuing its efforts further, the Mexico Regional Tax Conference of the League in 1943 adopted three model bilateral conventions. The purpose of these conventions is given in the following passage from the commentary :

> "The three conventions prepared in Mexico in July 1943, result from discussions which referred in particular to the tax relations between capital-importing and capital-exporting countries. They tend to assure a reciprocity and equivalence in the sacrifice of revenue implied for each country by the removal of double taxation in their economic and financial intercourse. They suggest convenient rules for the equitable treatment of taxpayers coming under the jurisdiction of both the negotiating states. They are, however, not intended to cover questions of purely internal tax legislation and administration which, except for occasional stipulations as to tax rules, are generally out of tax treaties".

These conventions for the first time recognized the conflict between capital-importing and capital-exporting countries, a problem which tends to grow bigger and bigger as time advances. The Mexico Conference was followed in 1946 by the London Conference, where the model conventions

1 League of Nations Document E. F. 'S 40, F. 15.

adopted at Mexico were revised in the light of new conditions.[1] The United Nations has taken over from where the League left off.[2]

The problem of double taxation has been tackled by two other organisations which have come up with solutions that have influenced the tax treaty making between the nations of the world. The first one is the International Chamber of Commerce,[3] which since its inception has

1 In its report (League of Nations Document C. 37 M. 37, 1946 IIA : Fiscal Committee—Report on the work of the Tenth Session of the Committee held in London from March 20, to March 26, 1946), the Committee expressed itself as follows :—

"It wishes to express its agreement with most of the conclusions which were reached by the experts who met in Mexico city in 1943 and is of the opinion that the Model Conventions prepared by those experts represent a definite improvement on the 1928 Model Conventions. Nevertheless, since membership of the Mexico City and London Meetings differed considerably it is natural that the participants in the London meeting held on various points, different views from those which inspired the Model Conventions prepared in Mexico. The general structure of the Model Conventions drafted at the present session is similar to that of the Mexico Models. A certain number of changes have been made in the wording and some articles have been suppressed because they contained provisions already implied in other clauses. On other points new articles have been added to make use of certain innovations contained in conventions, such as those between the United Kingdon and the United States, concluded since the 1943 meeting. Virtually the only clauses where there is an effective divergence between the views of the 1943 Mexico meeting and those of the 1946 London meeting are those relating to the taxation of interest, dividends, royalties, annuities and pensions....The Committee thinks that the work done both in Mexico and in London could be usefully reviewed and developed by a balanced group of tax administrators and experts in both capital-importing and capital-exporting countries, and from economically advanced and less-advanced countries, when the League's work on international tax problems is taken over by the United Nations".

Such as the changed conditions due to the War, and the expansion of the membership of the League to include many capital importing countries also.

2 The United Nations has been compiling the tax agreements concluded by the nations of the world, and has published them in a book form, 'International Tax Agreements.'

3 Founded in 1919, the International Chamber of Commerce, (henceforth called the ICC) brings together producers and consumers, manufactures and traders, bankers and insurers, carriers and transport users, and legal economic experts from more than 60 countries. Extending across policital frontiers, the ICC enables them to meet and pool their experience and forge a common policy adapted both to national and international requirements.

"More than thirty five active years", it has been written "have brought the ICC world wide recognition as a fully representative body, with realistic and objective method of work. Governments, and inter-governmental agencies increasingly turn to the ICC for advice and guidance about business requirements. The ICC's recommendations have many times been reflected in official decisions closely affecting international trade and ensuring its expansion."

Some forty international technical commissions and committees composed of business men and experts appointed by member countries, with whose activities more than fifty specialised international organisations are associated help to further the ICC's programme of work. This Programme is divided among four main groups :

1. Economic and financial policy ;
2. Production, Distribution, Advertising ;
3. Transport and Communication ;
4. Law and Commercial Practice.

advised and assisted the League of Nations in the matter and is still continuing its efforts in tackling this problem of double taxation. The second is the Organisation for European Economic Co-operation (O.E.E.C.) founded in April 1948,[1] which started a systematic study of double taxation in 1958, and which has since then continued its work by making suggestions for the improvement of various articles in the double taxation treaties between the member countries. Both these organisations have made a valuable contribution towards mitigating or eliminating double taxation.

The United States entered the arena quite late. The imposition of the federal income tax in 1913 opened up the possibility of international double taxation, to curb which the foreign tax credit was introduced in 1918. The United States remained cold to the idea of tax treaties immediately after the first world War. One reason was the country's isolationist attitude. Since the United States did not join the League of Nations, it was felt that binding agreement with any foreign countries may lead to conflict. Another reason was the generally prosperous economic conditions in the early 1920's which made the country apparently satisfied with the status quo.

The depression of 1930's however, made the United States willing to listen to ideas which promised to better the conditions by eliminating barriers to the international flow of goods and by removing obstacles which seemed unfavourable to the nation's economy. In February 1930 a Bill[2] called, "A bill to Reduce International Double Taxation" was introduced

1 The Organisation for European Economic co-operation comprises the following Member countries ; Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourge, the Netherlands, Norway, Protugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom. The organisation came into being with the signing of the Convention for European Economic Co-operation on 16th April 1948, when member Governments pledged themselves to combine their economic strength ,to join together to make the fullest collective use of their individual capacities and potentialities, increase their production, develop and modernize their industrial and agricultural equipment, expand their commerce, reduce progressively barriers to trade among themselves, promote full employment and restore or maintain the stability of their economies and general confidence in their national currencies. Representatives of each of the member Countries meet daily at the O.E.E.C. headquarters in Paris to discuss their economic problems and work out common solutions. The United States and Canada participate in all the work of the Organization as Assoicate Members. Yugoslavia is representated by an observer since 1957, she has taken part fully in the work of the O.E.E.C. European Productivity Agency. Moreover, since July 1959, she has participated on an equal footing with Member countries in the Organization's work on agriculture and food.

2 H. R. 10165, 71 st cong. 2d. sess.

in the House of Representatives, and in the discussions in the House Committee on Ways and Means, on February 18, an analysis of the bill was offered by A. W., Mellon, then Secretary of the Treasury, in these words :—

> "The primary purposes of the bill are : (1) to transfer to other countries a part of the burden of relief now borne by the United States through the provision of the Revenue Act of 1928 for crediting foreign taxes against the Federal Income Tax (2) to free residents and domestic corporations from heavier rates of taxation in foreign countries in respect of interest, dividends and certain other less important items of income through an offer of reciprocal exemption, and thus subject them solely to United States tax ; and (3) to secure for United States citizens and corporations various advantages similar to those which a number of important European Governments have granted their respective taxpayers in reciprocal understandings".[1]

Nothing apparently came of the Bill, but the United States went on to negotiate its first double taxation treaty with France in 1930, which was ratified years later, becoming effective on January 1, 1936.[2] Then came treaties with Sweden[3] in 1940 and Canada[4] in 1942. This programme was continued thereafter and now the United States has income tax treaties for the avoidance of double taxation and fiscal evasion with some twenty one countries[5]. Three treaties have been signed but have yet to be ratified[6]. Most of these treaties are with countries having a level of development similar to the United States, and where the capital flows in both the directions. However, the United States has succeeded in negotiating treaties with at least five underdeveloped countries, namely Honduras, Pakistan, India, United Arab Republic and Israel, of which the treaties with the first two countries are in effect, while those with the remaining three have yet to be ratified.

1 Ibid.

2 The basic Convention was signed on April 27, 1932, and presented in the 72nd Cong. 1st Session., and became effective on January 1, 1936.

3 Signed on March 23, 1939, and became effective from January 1, 1940.

4 The convention was signed at Washington on Dec. 30, 1936, the instruments of ratification were exchanged on June 15, 1942, and it came into force from January 1, 1941.

5 Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Honduras, Ireland, Italy, Japan, Netherlands, Newzealand, Norway, Pakistan, Sweden, Switzerland, Union of South Africa, United Kingdom.

6 Treaties with India, Israel and the United Arab Republic were signed on November 10, 1959, Sept. 30, 1960, and December 21, 1960 respectively.

Concluding such treaties with economically developed countries is not so difficult as is with underdeveloped countries. The latter feel that since the flow of income is at the present from them to the rich nation, there is no point in having treaties with such countries, as a treaty will restrict the country's power to tax the income at the source. The United States has, however, gone forward in its attempt to include these underdeveloped nations in its tax treaty programme, by offering them more concessions and inducements than it offers to the developed countries and thus making it worthwhile for the poor nations to negotiate a double taxation treaty with the United States.

The response has not been very encouraging, but the United States has followed this policy only since 1952, and it is hoped that with the emergence of more new nations in Africa and Asia, more tax treaties between them and the United States will be concluded.

In 1922, India, while a part of the British Empire, enacted in its Income-tax Act, a section (Section 49) allowing for Double Income Tax relief with the United Kingdom. This section granted relief to a person who had paid India Income tax for any year on any part of his income and had also paid United Kingdom income tax for the corresponding year in respect of the same part of his income. This section was deleted in 1947, and after that double taxation relief with the United Kingdom was governed by the Income-tax (Double Taxation Relief) (United Kingdom) Rules, 1948 which were then made under Section 49 A as it then stood[1]. In 1947 another Section 49 AA was introduced in the Indian Income-tax Act in order to provide for avoidance of double taxation (as distinct from the grant of double taxation relief) with Pakistan or the United Kingdom. Under this section the first double taxation treaty made by India for the avoidance of double taxation was made with Pakistan[2].

In 1953 a new section 49A was substituted for the old section.[3] This section[4] empowers the Central Government to make provision by notification in the official Gazette for the granting of relief in respect of double taxation and for the avoidance of double taxation. In exercise of the powers conferred by Section 49A of the (1922 Act)[5] provision was

1 (1922 Act.) Those rules have not application to assessment years subsequent to 1948-49.

2 Agreement for the Avoidance of Double Taxation in India and Pakistan (Notification No. 28, dated 10th December 1947).

3 Secs. 49A and 49AA.

4 Now Sec. 90.

5 The 1922 Act was in effect till September 1961, when it was repealed by the 1961 Income-tax Act.

made for relief against and avoidance of double taxation in relation to the United Kingdom, Aden[1] Ceylon[2], the Dominions[3]. The Rules relating to the United Kingdom are no longer in effect. Recently India has concluded income tax treaties for the avoidance of double taxation with Sweden[4], Denmark[5], Norway[6], Japan[7], West Germany[8], Finland[9], and an agreement with Switzerland[10] limited to profits of enterprises operating aircraft. Thus so far India has treaties with eight countries and rules for relief of double taxation with Aden and the Dominions.

It is indeed an achievement for India to have been able to conclude treaties with so many economically developed and capital-exporting coun-countries. The conflict about the taxation of capital by capital-importing country, in this case India, has been solved amicably by means of these treaties, which in general follow the pattern of the tax treaties concluded by the European countries and the United States, with a change here and there to suit the needs of both contracting States. This desire on India's part to negotiate such treaties is a welcome sign and augurs well for the future in the fight against the evils of double taxation.

The rules with respect of Aden and the Dominions confine relief to the granting of a credit against the tax payable to India for the tax paid to the other country, and do not extend to any other matter[11]. The Pakistan

1 Income tax (Double Taxation Relief) (Aden) Rules, 1953. Notification No. 23 I. T., dated 24th March 1953.

2 Agreement for the Relief from or Avoidance of Double Taxation in India and Ceylon. Notification No. S.R.O. 456, dated 6th February 1957.

3 Income-tax (Double Taxation Relief) (Dominions) Rules, 1956. (Notification No. S. R.O. 1534, dated 23rd June 1956). The Dominions are Kenya, Tanganyika, Zanzibar, Gold Coast, Nigeria, Sierra Leone, Gambia and Mauritius. Since more of these counties have gained their independence and become free nations, it is not clear whether these rules will still apply.

4 Notification No. G.S.R. 112 (23rd January 1959)

5 Notification No. G.S.R. 316 (9th March 1960)

6 Notification No. G.S.R. 367 (23rd March 1960)

7 Notification No. G.S.R. 692 (13th June 1960)

8 Notification No. G.S.R. 1090 (13th September 1960)

9 Notification No. G.S.R. 41 (29th December, 1961)

10 Notification No. G.S.R. 761 (29th August 1958)

11 Under the rules relative to each country, any person whether or not resident in India, is entitled to credit against his Indian Income-tax for any year "or any part of his income", for income tax paid for that year in the other country on "the same part of his income". The quoted phrases make it clear that credit is to be given only for tax on income which has actually been subjected to tax in both countries; any portion of the Aden tax which is attributable to income not subjected to Indian tax is not creditable.

and Ceylon treaties avoid double taxation by allocating the taxing authority between the respective parties and by providing for an abatment of the tax imposed by either country on any income allocated to and taxed by the other.[1] There is no provision for a foreign tax credit except for taxes paid to a third country. The other treaties avoid double taxation by exempting certain classes of income from tax in one of the contracting countries, which is the general pattern of such tax treaties. Some of them also provide for the granting of credit by each country for taxes paid to the other, and contain source rules affecting the operations of these credits[2].

This particular type of credit is given only where the other country grants corresponding credit, and the Indian provisions are designed to complement similar provisions in force in the other countries.

This type of credit is designed so that the two countries concerned grant a combined credit equal to the amount of tax imposed on the doubly taxed income by the country levying the lower tax ; the country of residence grants so much of this combined credit as does not exceed one half of its own tax and the other country grants the balance. This is accomplished as follows : (1) If the tax payer is resident in India, credit is granted by India at the other country's rate of tax, or at half the Indian rate, whichever is lower. (2) If the taxpayer is not resident in India and the other country's rate of tax does not exceed the India rate of tax, credit is granted for the amount by which the Indian rate exceeds the other country's rate of tax.

1 The working of the Pakistan and Ceylon treaties have been apply summarized by Cobb Jr., Brundo and Palkivala in their book "Taxation in India", (World Tax Series) 1960, on page 309, and I am taking the liberty of reproducing what they have written :

" The Pakistan and Ceylon agreements provide for avoidance of double taxation by the grant of an abatement of tax by each country on income which it is agreed shall be taxable only by the other. The procedure are set forth in schedules annexed to the treaties, and are summarized below. While these schedules set forth the percentages of the various types of income which each party is "entitled to charge", the abatement is not made simply by excluding from income taxable by one party the income which is reserved for taxation by the other. Since differences between the respective tax systems may result in differences in the amounts allocated to the respective jurisdictions by the two countires, the abatement calculations are made in such a manner that each country gives abatement only on the amount of income which it allocates to the other, or on the amount which the other allocates to itself ,whichever is lower. This lower figure represents the amount which is actually subjected to double tax ; no abatement is granted by a party to either or these treaties on income which ,although allocated to the other party, is not actually taxed by it. Abatement is given by applying the lower of the average rates of tax applicable in the two countries to the amount actually subjected to double tax." The source rules in a tax treaty are those which specify the source from which an item of income is derived."

2 It should be noted that the Indian statutory credit for foreign taxes (section 91) is not available for taxes paid to any country with which India has a treaty for the relief or avoidance of double taxation.

Negotiations for an Indo-American tax treaty were apparently prompted by this common motive of the contracting parties; America being one of the largest suppliers of economic aid and of private investments to India, wanted a treaty which would make it worthwhile for its nationals to invest in India, without the spectre of double taxation looming in the background; and India too, by means of this treaty wanted to attract private American investments and other beneficial aids.

It is difficult to understand why the ratification of such an important treaty is being delayed; the only reason by the United States might be that it contains at least one novel feature which the United States Senate probably wants to review thoroughly before giving its consent.

It is essential to remember when reviewing a treaty of this kind, i.e. between a developed and an underdeveloped country, that routine tax principles are not the only things which are considered; another factor which greatly influences the formation of such treaty is the foreign policy objectives especially those of the developed countries. The tax principle and the foreign policy objectives may not be in harmony, and it thus becomes a matter of choosing between the two. This conflict is brought into focus in the India-United States treaty by a provision providing for "tax sparing". "Tax sparing" implies giving credit for foreign taxes which an enterprise would have paid were it not for the tax incentive laws of the foreign country, which waives for a limited period the payment of taxes to encourage investment; in other words, it is simply giving credit for taxes not paid. The United States Government feels that a tax treaty should help in improving its relations with the underdeveloped countires and also aid it in its foreign policy objective of making these countries stand on their own feet, so that they may face the challenge of Communism.

With regard to India, the United States has more than an ordinary interest, for being the largest democracy its, collapse would mean the triumph of Communism in Asia. The Under Secretary of State in the Eisenhower administration, Mr. Douglas Dillon, has aptly remarked on this point in the hearings on the India Treaty, before the Senate Foreign Relations Committee on June 28, 1960:

> "I am sure that you (Senators) will agree with me that the success of the Indian experiment—an experiment towards economic progress in a free and open society—is of vital concern to us, particularly when many countries of Asia and Africa are watching closely the relative efforts of India and Communist China. India is one of the few less developed countries in which conditions are particularly favourable for economic growth. We are supporting there a greater concentration of effort in economic assistance for these countries and are seeking to supplement this governmental effort by private means wherever possible".

Whatever may be the motives of the United States in extending aid to India, there is no doubt of the fact that with her help India has progressed tremendously, and this treaty will aid further in this direction.

Pakistan was the first Asian country to sign an income tax treaty with the United States in July 1957. Most of its provisions have been adopted in the India-United States, treaty but the Pakistanis gave up more and got less. One of the main provisions of that treaty, the "tax sparing" feature, on the basis of which Pakistan had shown its willingness to negotiate the treaty, and give concessions[1] was dropped when the treaty become effective on January 1, 1959. It must be said, however, that this was not the fault of the United States Government, though this provision was severely criticized in the Senate Foreign Relation Committee, for by the time the treaty was ratified, the Pakistan tax incentive law, which was the subject of the tax sparing provision, had lapsed and so the issue was moot. This situation is not likely to arise in the case of the Indian treaty, as the incentive laws in the Income-tax Act, which are embodied in the Article on "tax sparing" in the treaty, will continue for sometime. One author has rightly remarked about the Indian Treaty:

> "As was to be expected in the light of the Pakistan experience, the Indians were shrewder bargainers. They got more and gave up less".[2].

The aforesaid analysis of the problems raised by International Double Taxation, brings out the fact that neither the tax credit method, nor the tax treaty approach can completely eliminate double taxation, but if both these methods are adopted by the nations of the world, then, there is a likelihood of the spectre of international double taxation vanishing once and for all.

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1 Mr. Dan T. Smith, Deputy Secretary of the Treasury, speaking before the Senate Foreign Relations Committee on the Pakistan treaty, on July 30, 1957, remarked:

> "Now it was our concession on the tax sparing provision in the negotiations that served as the balancing item for their (Pakistani) concessions...."

2 Kust, "Tax Treaties with the Under-industrialized Countries", Tax Executive 175.

INDUSTRIAL TRIBUNALS' INTERVENTION IN WRONGFUL DISMISSALS*

By

DURGA PRASAD†

I

JURISDICTION TO INTERVENE

A. Statutory Provisions

Section 10(1) (c) of the original Industrial Disputes Act, 1947, provided:

> "If any industrial dispute exists or is apprehended, the appropriate Government may by order in writing,.....
> refer the dispute to a Tribunal for adjudication."

And, Section 15(1) provided:

> "Where an industrial dispute has been referred to a Tribunal for adjudication, it shall hold its proceeding expeditiously and shall as soon as practicable on the conclusion thereof, submit its award to the appropriate Government."

The trend of legislative amendments has, since 1947, been towards enlarging the jurisdiction of the Government to make references[1] and limiting the

* This Article is a part of author's dissertation submitted by him for his LL. M. examination. The dissertation was written by him under the guidance of Dr. Anandjee, Dean Faculty of Law, Banaras Hindu University, and has drawn considerably from Dr. Anandjee's preliminary synopsis on "Community Regulation of Labour Management Relations in India", The assistance is respectfully acknowledged,

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1 The Madras High Court, in a series of cases decided during 1949 and 1951, laid down that factual existence or apprehension of a dispute, before it was referred by the Government, must be proved and that general omnibus references were invalid. See, *Ramaya Pantulu v, Kutty and Rao (Engineer). Ltd.*, (1949) Mad. 616; In re *R.B.S.S. N. Lakshmane Chettier.* (1950) Mad. 835; *Kundan Textiles v. The Industrial Tribunal* (1951) Mad. 616; In re *Calicut Hosiery*, (1950) Mad. 231. These cases were overruled by the Supreme Court in *State of Madras v. C.P. Sarathy*, (1953) S.C. 53, where Chief Justice Patanjali Shastri observed:

> "It must be remembered that in making a reference under S. 10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be compe-

jurisdiction of the Tribunal to adjudicate only matters referred to it.[1]

In *State of Madras v. C. P. Sarathy*,[2] however, the Supreme Court observed:

> tent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters."

and admonished the Courts from taking too technical views:

> "In view of the increasing complexity of modern life and the interdependence of the various sectors of a planned national economy, it is obviously in the interest of the public that labour disputes should be peacefully and quickly settled within the frame-work of the Act rather than by resort to methods of direct action which are only too well calculated to disturb the public peace and order and diminish production in the country, and courts should not be astute to discover formal defects and technical flaws to overthrow such settlements."

However, the Industrial Disputes (Amendment) Act, 1952, had already cleared the ground by amending Section 10(1) to read as follows:

> "10(1). *Where the appropriate Government is of the opinion that any* industrial dispute exists or is apprehended, it may *at any time*, by order in writing...."

Thus, it is no more necessary for the courts to enter into a detailed enquiry as to the factual existence or otherwise of a dispute.

The decision in *Punjab National Bank Ltd., v. Their workmen*, (1952)1 L.L.J. 791, focused attention on another aspect of Section 10(1) (c). Could the government refer merely a matter connected with an industrial dispute to an industrial tribunal for adjudication? The Industrial Disputes (Amendment) Act, 1952, made the position clear by amending clause (c) to read:

> "refer the dispute *or any matter appearing to be connected with, or relevant to, the disputes*, to a Tribunal for adjudication."

Further, it added the following as sub-clause (5) of Section 10:

> "Where a dispute concerning any establishment or establishments has been, or is to be, referred to a Tribunal under this section and the appropriate Government is of opinion, whether on an application made to it in this behalf or otherwise, that the dispute is of such a nature that any other establishment, group or class of establishment of a similar nature is likely to be interested in, or affected by, such dispute, the appropriate Government may, at the time of making reference or at any time thereafter but before the submission of the award include in that reference such establishment, group or class of establishments whether or not at the time of such inclusion any dispute exists or is apprehended in that establishment, group or class of establishments."

These changes have vested the Government with very wide powers for making references.

1 Industrial Disputes (Amendment) Act, 1952, added the following as sub-clause (4) to Section 10:

> "Where in an order referring an industrial dispute to a Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication the Tribunal shall confine its adjudication to those points and matters incidental thereto."

This naturally had restraining effect on Tribunals.

2 (1953) S. C. 53.

"No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award."[1]

And, it remains to be seen whether personnel grievance is:

"any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

within the meaning of Section 2 (k) of the Industrial Disputes Act, 1947.

B. Judicial Response

1. *Common-place Occurrence Epoch-making Decision:*

Western India Automobile Association[2] enunciated an epoch-making principle of law in a setting of common-place occurrence. The workmen's union reinforced its demands, first, by a strike notice and, later, by strike. The management retaliated by serving notice on striking workmen that, unless the strike was called off and striking workmen reported to duty, their services would be deemed to have been terminated with effect from the date they went on strike. Workmen did not resume work and their services were terminated. The union served a fresh "charter of demands", including the demand for reinstatement, with back wages, of the workmen whose services had been terminated.

Government reference of the dispute to an industrial tribunal for adjudication marked off the beginning of a legal battle. The management successfully contested the jurisdiction of the tribunal to direct reinstatement of discharged workmen before Mr. Justice Coyajee of the Bombay High Court. But, on appeal, a division bench of the Bombay High Court reversed the decision of Coyajee, J. The management, thereupon, preferred an appeal to the Federal Court.

Mr. Setalvad, who apperred for the management, emphasised that an "industrial dispute" meant:

1 Ibid., 57

2 (1949) F. C. 111

"....any dispute....between....employers and workmen.... which is connected with the employment or the non-employment ....of any person."[1]

and urged before the Federal Court that the dispute raised by the union was not an "industrial dispute" because:

(i) a private entreprenneur was not an "employer" within the meaning of Section 2 (g) of the Act and, therefore, Western India Automobile Association could not be a party to an "industrial dispute";

(ii) a union of workmen was something very distinct from "workmen" and, therefore, Western India Automobile Association Staff Union could not be a party to an "industrial dispute";

(iii) dimissed employees were not "workman" within the meaning of section 2(s) and, therefore, a dispute between them and their erstwhile employer could not be an "industrial dispute"; and

(iv) questions relating to reinstatement were not covered by the expression "employment or non-employment" and, therefore, a dispute relating to reinstatement was not an "industrial dispute."

The Federal Court, however, rejected these contentions.

2. *The First Contention:*

Section 2(g) of the Act defines an "employer", who is one of the likely parties in an "industrial dispute", to mean:

"(i) in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, the head of the department;

"(ii) in relation to an industry carried on by or on behalf of a local authority, the Chief Executive Officer of that authority"

It was, accordingly, argued in *Western India Automobile Association v. Industrial Tribunal, Bombay*,[2] that the scope of the Act was limited to cases of government-run concerns or those in which a local authority was the employer and that the government had no jurisdiction to refer disputes between employers and workmen in the private sector.

1 See, Section 2(k) of the Industrial Disputes Act.

2 (1949) F. C. 111.

However, the Federal Court of India had no 'hesitation' in repelling the contention. Explained Mahajan, J.,:

> "In plain terms, the definition says that 'employer' in relation to an industry carried on under the authority of any department of Government in British India means the head of the department (where no other authority is prescribed) and in the case of an industry carried on by or on behalf of a local authority, it means the chief executive officer of the authority. In relation to such industries a definition has been given of the term 'employer'. As it was not easy in such cases to discover with certainty an individual or an officer who would answer that description, this definition indicates who shall be regarded as employer in the particular cases. No attempt, however, was made to define the term 'employer' generally or in relation to other persons carrying on industries or running undertakings."[1]

The Court, thereafter, compared the definition of the term 'employer' under the Act with that given in the Trade Disputes Act, 1929 ; examined various provisions of the Act ; ascertained the scope of the Act ; considered the different institutions for which provision had been made in the Act for the settlement of industrial disputes ; and held :

> "It is, in our opinion, not possible to argue that this elaborate machinery was devised for the benefit of industries run by Government and local authorities only and that the Trade Disputes Act, 1929, was repealed in order to exclude from its ambit industries run by private persons."[2]

We agree.

3. *The Second Contention :*

Section 2(s) of the Act defines a "workman" who is one of the likely parties in an "industrial dispute" to mean, *inter-alia :*

> "any person including an apprentice employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied"

Further, Section 36(1) provides :

> "A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by—

1 (1949) F. C. 111, 113

2 (1949) F. C. 111, 113.

> (*a*) an officer of a registered trade union of which he is a member ;
>
> (*b*) an officer of a federation of trade unions to which the trade union referred to in clause (a) is affiliated ;
>
> (*c*) where the worker is not a member of any trade union, by an officer of any trade union concerned with, or by any other workman employed in, the industry in which the worker is employed and authorized in such manner as may be prescribed."

And, under Section 18, a settlement or an award is, generally speaking, binding only on the parties to the "industrial dispute". Mr. Setalvad, therefore, argued that a union of workmen, as distinguished from workmen themselves could not be a party to an industrial dispute. But, the Federal Court observed :

> "We see no difficulty in the respondents (union) taking up the cause of the discharged workmen and the dispute being still an industrial dispute between the employer and the workmen. The non-employment 'of any person' can amount to an industrial dispute between the employer and the workmen, falling under the definition of that word in Industrial Disputes Act. It was argued that if the respondents represented the undischarged employees, there was no dispute between them and the employer, That again is falacious, because under the definition of industrial dispute, it is not necessary that the parties to the proceedings can be the discharged workmen only. The last words in the definition of industrial dispute, viz., 'any person' are a complete answer to this argument of the appellant."[1]

We agree that union should be a party in an industrial dispute. *Burwood Cinema Ltd. v. Australian Theatrical and Amusement Employees' Association,*[2] focuses attention on the non-inclusion of union in an industrial dispute :

> "The term 'industrial dispute' cannot by any possibility be limited to disputes between persons standing in the actual present contractual relation of master and servant. Such a limited construction would in effect exclude demarcation disputes, which are substantially between different classes of employees, and would exclude all disputes by organizations, which *exnatura rerum* can never be employees. It is no answer to say that an organization

1 (1949) F. C. 111, 120-121

2 (1924-25) 35 C.L.R. 528

could represent its members for the purposes of litigating the dispute, for that could still exclude the organization as a party to the dispute before litigation, and would exclude as principals all present members of the organisation who were not actually employed by the respondents and would further exclude all future members of the organisation. In the case of an organisation of employers, the doctrine would similarly exclude employers. And, to be consistent, the doctrine based on the notion that an employer cannot be in dispute except with his own employees would as to each employer exclude all employees of other employers at the time of the dispute, even though they were members of the organization and afterwards entered the service of the first named employer. The construction contended for as adverse to the jurisdiction is, therefore, impossible, inconsistent, and as applied to the well-known subject of 'industrial dispute,' absurd."[1]

However, on an interpretation of the statute, as it stands, one is compelled to agree with Mr. Setalvad.

4. *The Third Contention :*

Section 2(s) of the Act as it stood in 1947 defined a "workman" to mean, *inter-alia, :*

> "any person....employed in any industry....and includes, for the purposes of any proceeding under this Act in relation to an industrial dispute, a workman discharged during that dispute"

Since the workmen in *Western India Automobile Association* had not been discharged during the pendency of any dispute, it was argued that they were not "workman" within the meaning of the Act.

But the Court observed :

> "It will be a curious result if the view is taken that though a person discharged during a dispute is within the definition of the word 'workman', yet if he raises a dispute about dismissal and reinstatement, it would be outside the words of the definition 'in connection with employment or non-employment'[2]

We agree.

We may, however, point out that in a large number of cases Courts have failed to appreciate the significance of the decision of the Federal Court

1 *Ibid.*

2 (1949) F.C. 111,115.

and many discharged workmen were left without remedy. Consequently, Section 2(s) was amended in 1956 to read :

> "any person....employed in any industry....and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, or discharged, or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute.

This has set the controversy at rest.

5. *The Fourth Contention :*

Mr. Setalvad argued that the words "employment or non-employment" were used in the same sense ; that they were so used in order to remove any ambiguity that might have arisen if the words "or non-employment" had not been used ; and that the expression "in connection with employment or non-employment" excluded the question of non-employment itself which must exist as a fact to supply the nexus with the dispute. But the Court explained :

> "The words of the definition may be paraphrased thus : 'any dispute which has connection with the workmen being in, or out of service or employment.' 'Non-employment' is the negative of 'employment' and would mean that dispute of workmen out of service with their employers are within the ambit of the definition. It is the positive or the negative act of an employer that leads to employment or non-employment. It may relate to existing employment or to a contemplated employment, or it may relate to an existing fact of non-employment or a contemplated non-employment....The failure to employ or the refusal to employ are actions on the part of the employer which would be covered by the term 'employment or non-employment'. Reinstatement is connected with non-employment and is therefore, within the words of the definition."[1]

and emphasised that the words "in connection with" widened the scope of an industrial dispute :

> "Any dispute connected with employment or non-employment would ordinarily cover all matters that require settlement between workmen and employers, whether those matters concern the causes of their being out of service or any other question and it would also

1 (1949) F. C. 111, 114-115.

include within its scope the reliefs necessary for bringing about harmonious relations between the employers and the workers."[1]

And, having reinforced its view with reference to the scope of the Act, the object of the Act and the English decisions on analogous statutory provisions, held :

"Having regard to general words "in connection with the employment or non-employment" in the definition of industrial disputes it seems clear that if there arises non-employment by reason of the termination of employment by the employer, it will be within the jurisdiction of the tribunal to determine whether the termination was justifiable."[2]

This basic premise has not since been seriously challenged.

C. Legislative Approval of Judicial Response

Subsequent legislative prescriptions have made it abundantly clear that the industrial tribunals have jurisdiction to intervene in personnel grievances. Thus, the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, specifically provides that if a dispute relates :

"to the propriety or legality of an order passed by an employer under the Standing Orders ;"[3]

"to discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen wrongfully dismissed"[4]

the labour court,[5] industrial tribunal[6] and national industrial tribunal[7] have jurisdiction to adjudicate upon the dispute. But, if the dispute relates to "retrenchment of workmen and closure of establishment,"[8] industrial tribunal[9] and national industrial tribunal[10] have jurisdiction to adjudicate upon the dispute.

Further, Section 33 A[11] also specifically empowers industrial tribunals to adjudicate personnel grievances. Section 33 places certain restrictions

1 (1949) F. C. 111, 115
2 Ibid., 116
3 See, Schedule II clause (1) of the Industrial Disputes Act, 1947.
4 See, Schedule II clause (3) of The Industrial Disputes Act 1947.
5 See, Section 10(1) (*c*) of the Industrial Disputes Act, 1947.
6 See, Section 10(1) (*b*) of the Industrial Disputes Act, 1947.
7 See, Section 10(1A) of the Industrial Disputes Act, 1947.
8 Schedule III clause 10 of the Industrial Disputes Act, 1947.
9 Section 10(1) (*d*) of the Industrial Disputes Act, 1947.
10 Section 10(1A) of the Industrial Disputes Act, 1947.
11 Industrial Disputes Act, 1947.

on the exercise of management prerogatives during the pendency of proceedings :

"33. (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—

(*a*) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding ; or

(*b*) for a misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute,

save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute,—

(*a*) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding ; or

(*b*) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, the workman :

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2) , no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute.—

(*a*) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings : or

(*b*) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending".

and, Section 33 A provides :

Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner to such Labour Court, Tribunal or National Tribunal and on receipt of such complaint that Labour Court, Tribunal or National Tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its award to the appropriate Government and the provisions of this Act shall apply accordingly".

There are a number of cases involving discharge or dismisal under this Section.

The Industrial Employment (Standing Orders) Act, 1946, provides :

"13A. If any question arises as to the application or interpretation of Standing Order certified under this Act, any employer or workman may refer the question to any one of the Labour Courts constituted under the Industrial Disputes Act, 1947, and specified for the disposal of such proceeding by the appropriate Government by notification in the official Gazette, and the Labour Court to which the question is so referred shall, after giving the parties an opportunity of being heard decide the question and such decision shall be final and binding on the parties".

Since standing Orders generally provide the conditions under which workmen may be discharged, retrenched or dismissed, it is apparent that Labour Courts can, to a certain extent, entertain personnel grievances under Sec. 13A of the Industrial Employment (Standing Orders) Act, 1946. It must, however, be emphasised that the jurisdiction of the Court under Section 13-A of Industrial Employment (Standing Orders) Act, 1946, is more restricted than under Section 10(1)(c), or 10(1)(d) or 33-A of Industrial Disputes Act, 1947. This is because of the words "application or interpretation". Obviously, they exclude questions relating to *propriety* of termination of service. Moreover, the Labour Court has no jurisdiction under Section 13A of the Industrial Employment (Standing orders) Act, 1946 to grant appropriate relief.

II

THE CAUTIOUS APPROACH OF EARLY ADJUDICATORS

Technical existence of jurisdiction is something very different from practical exercise of that jurisdiction, particularly where the jurisdiction merely authorises a person to intervene at his discretion. We shall here, endeavour to ascertain the circumstances under which tribunals interfere with the decision of the management.

The approach of early adjudicators was very cautious. They adopted different standards depending upon whether there was a certified standing order, an established practice, or neither standing order nor established practice.

A. Where There was Certified Standing order

In cases of termination of service in accordance with the provisions of certified standing orders, some of the tribunals were of the view that they could not sit in appeal over the management decision[1]. Others felt that they should not sit in appeal over the management decision if the management had given an opportunity to the workman to meet the charges levelled against him and the procedure, as provided for in the standing order, had been observed. Absent opportunity to be heard and/or conformity with the procedure laid down in the standing orders, they could intervene[2]. Still other tribunals were of the opinion that they should not sit in appeal over the decision of the management unless it was shown that there was want of bonafides or that the standing order was used as a cloak for unfair labour practice[3].

B. Where There was Established Practice

If the termination of service of the workman took place according to the established practice of the Company, early adjudicators were content if the practice had, in fact, been followed, Later adjudicators went a step further. They also enquired if the practice met the requirements of natural justice. Still later adjudicators entered into a detailed scrutiny of the

1 See, for instance, *New Pratap Spinning and Weaving and Manufacturing* Co. Ltd., (1944) Bomb. Lab. Gazette, 326 ; *Asarva Mills Ltd., (1944) Bomb.* Lab. Gazette, 451 ; *Sholapur Weaving and Spinning Mills Ltd., (1944) Bomb.* Lab. Gazette, 707.

2 See, for instance, The Bradbury Mills (1944) Bomb. Lab. Gazette, 501 ; *Bombay Dying and Manufacturing Co. Ltd., (1944) Bomb.* Lab. Gazette, 751

3 See, for instance, *Meyer's Mills* (1951) 1 L.L.J. 283 ; *New Pratap* Weaving and Spinning Mills Ltd., (1949) Bomb. Lab. Gazette, 840.

management action to ascertain the bonafides of the management action, presence or absence of unfair labour practice, and even the propriety of the particular punishment imposed. Of course, they ascertained whether the practice met the requirements of natural justice and whether the management had followed the practice in terminating the services of the workman.

C. Where There was Neither Standing Order Nor Established Practice

Where there was neither standing order nor established practice prescribing the circumstances and procedures under which the service of a workman may be terminated, the tribunals generally interfered with the order of termination of service on the grounds of bonafides of management action, violation of principles of natural justice, presence of unfair labour practice and victimization, and severity of punishment. This class of cases of termination of service of workman attracted greatest amount of interference by the tribunals.

III

THE RULE IN BUCKINGHAM AND CARNATIC MILLS LTD.[1]

A. The Decision

This case involved, *interalia*, a dispute regarding termination of services of thirty two workmen. Services of six of these workmen were terminated by the company for absence, without leave, on eight or more consecutive working days; of five workmen for misconduct; and of thirteen workmen without assigning any reason but on fifteen days' notice. The Industrial Tribunal, on the dispute having been referred to it by the government, directed reinstatement of twenty four of these workmen. It refused to reinstate the remaining eight workmen. The company appealed against the order directing the reinstatement of the aforesaid twenty four workmen. The order refusing to direct reinstatement of the remaining eight workmen was appealed against by the Madras Labour Union.

The Company contended:

1. That the question (of) the legality or propriety of the termination of service must be considered on the basis of the standing orders as they stood at the time when services (of concerned workmen) were terminated.
2. That, if the services had been terminated in accordance with the standing orders, an industrial tribunal had no power to sit in judgement over the managements' decision except

1 (1951) 2 L.L.J. 314.

(*a*) to enquire into the bonafides of the action of the management,

(*b*) to see if the procedure laid down in the standing orders had been followed, and

(*c*) to see if the rules of natural justice had been observed".

The Labour Appellate Tribunal observed:

> "..the common law right of an employer to discharge or dismiss an employee or what is popularly known in some countries as 'the right to hire and fire' has been subjected to satutory restrictions."

Besides the right to organise and the right to strike which had been secured to the workmen, the Labour Appellate Tribunal pointed out that:

> "There are three other accepted fundamental principles, namely, (1) that an industrial worker must be placed in such a position that the security of his service may not depend upon the caprice or arbitrary will of the employer, (2) that industrial peace should be maintained and (3) that industry should be efficiently managed".

The Labour Appellate Tribunal, thereafter, examined the scope of enquiry in the different set of cases of termination of service. In the first of these types of cases, namely, automatic termination of service for absence without leave for a stated period or for overstaying leave without satisfactory explanation, the labour Appellate Tribunal held that it would be at liberty to examine the explanation offered by the employee for his absence as also other relevant circumstances for the purpose of seeing whether the employer had acted with honest purpose. In the second of these types of cases, i.e., where the standing order authorised discharge without assigning any reason but on notice or payment of wages in lieu of notice, the scope of enquiry, the Labour Appellate Tribunal held, would be similar. In the third type of cases, i.e., where an employee is dismissed for alleged misconduct, the question which would arise may be formulated as follows:

" (1) to what extent and in what circumstances is the tribunal entitled to interfere with the findings of the management that the charge against the employee has been proved;

" (2) if the charge is held to have been proved, to what extent should a tribunal interfere with the punishment which the management has inflicted, and

" (3) if the tribunal holds that the charge has not been proved, what relief should a tribunal award"

The Labour Appellate Tribunal held that it would be entitled to examine the findings of the management on the charge of misconduct to assure itself

that there was evidence to support the finding and that the decision of the management was a possible view on the evidence before it. The Labour Appellate Tribunal warned that "in such a case tribunal should not act like a court of appeal".

B. The Rule

The Labour Appellate Tribunal laid down the following Rule in *Buckingham and Carnatic Mills Ltd*:

> "The decision of the management in relation to the charges against the employee will not prevail if-
>
> (*a*) there is want of *bonafide*, or
>
> (*b*) it is a case of victimization or unfair labour practice or violation of the principles of natural justice, or
>
> (*c*) there is basic error on facts, or
>
> (*d*) there has been perverse finding on the materials."

And, observed that, even after it was satisfied that the charge had been proved,it could interfere with the punishment. However, it warned against light-hearted interference with the punishment:

> "The management, with the knowledge and experience of the problem which confront it in the day to day work of the concern, ordinarily ought to have the right to decide what the appropriate punishment should be, but its decision is liable to be revised if the tribunal is of opinion that the punishment 'is so unjust that remedy is called for in the interest of justice.".

The rule in *Buckingham and Carnatic Mills Ltd.* has been referred and followed in a number of later decisions[1] of tribunals as well as of courts and has been treated as the leading decision on the subject.

C. The Supreme Court and The Rule

The Supreme Court has approved the rule in *Buckingham and Carnatic Mills Ltd*, and has prescribed similar grounds for the intervention of the tribunals. In *Chartered Bank Bombay*,[2] Their Lordships of the Supreme Court observed:

1 See, for instance, *Banaras Light and Power Co. Ltd.* (1952) 1 L.L.J. 6; *Punjab National Bank Ltd.* (1952) 2 L.L.J. 648; *Upper India Sugar Mills Ltd.* Khatauli (1953) 1 L.L.J. 654; *L.H. Ayurvedic College Pharmacy (1954) 1 L.L.J.* 417; *Vijay Kumar Mills, Ltd., Palni*, (1955) 1 L.L.J. 483; Spencer and Co. Ltd. (1956) 1 L.L.J. 715; *Madhya Pradesh Electricity Board (1960)* 1 L.L.J. 95; *Assam Oil Company, Ltd.*, (1960) 1 L.L.J. 587; *Hukumchand Mills Ltd.*, (1960) 1 L.L.J. 732; *Chartered Bank, Bombay*, (1960) 2 L.L.J. 222; *U.B. Dutt and Co. (Private) Ltd.*, (1962) 1 L.L.J. 374.

2 (1960) 2 L.L.J. 223, 226.

> "In *Buckingham and Carnatic Company Ltd. etc. v. workers of company. etc.* (1951-2 LLJ 314), the Labour Appellate Tribunal had occasion to consider this matter relating to discharge by notice or in lieu thereof by payment of wages for a certain period without assigning any reason. It was of opinion that even in a case of this kind the requirement of *bonafides* is essential and if the termination of service is a colourable exercise of the power or as a result of victimization or unfair labour practice, the industrial tribunal would have the jurisdiction to intervene and set aside such termination. We are of opinion that this correctly lays down the scope of the power of the tribunal to interfere where service is terminated *simpliciter* under the provisions of a contract or of standing orders or of some award like the Bank award".

In *Assam Oil Company, Ltd*,[1] Their Lordships observed:

> "In this connection it is important to remember that just as the employers' right to exercise his option in terms of the contract has to be recognised, so is the employees' right to expect security of tenure to be taken into account. These principles have been consistently followed by industrial tribunals and we think rightly. (vide *Buckingham and Carnatic Co. Ltd. v. Workers of the Company* (1951) 2 LIJ 314)".

And, in *Indian Iron and Steel Company Ltd. and another*,[2] their Lordships held:

> "Undoubtedly, the management of a concern has power to direct its own internal administration, but the power is not unlimited and, where a dispute arises, the tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. In cases of dismissal on misconduct the tribunal does not, however, act as a court of appeal and substitute its own judgment for that of the management. It will interfere.
>
> (i) when there is want of good faith,
>
> (ii) when there is victimization or unfair labour practice,
>
> (iii) when the management has been guilty of a basic error or violation of a principle of natural justice, and
>
> (iv) when on the materials, the finding is completely baseless or perverse".

1 (1960) 1 L.L.J. 587, 591.

2 (1958) 1 L.L.J. 260.

This is merely a restatement of the Rule.

We shall now advert to the discussion of the grounds of intervention in detail.

IV

THE SCOPE OF THE RULE

A. Bonafides of Management Action

The management's action, in order to be sustained, must be *bonafide*, i.e., it must have been taken in good faith. However, unless otherwise proved, management action is presumed to be *bonafide*. Their Lordships of the Supreme Court pointed out in *Orissa Cement Ltd. Rajganpur*[1] that it was for the party alleging *malafides* of the management action to lead reliable evidence in support of the plea and held the action of the Company in discharging workmen, who failed to obtain the necessary permit, to be *bonafide* as there was no evidence on behalf of the wiremen concerned to support the plea of *malafide* action.

The aforesaid decision is in sharp contrast with some of the earlier decisions of tribunals where they required managements to prove *bonafides*. For instance, in *G.N. Chakrapani Chetty & Sons Ltd.*,[2] the industrial tribunal held the discharge of two workers to be *malafide* because the management failed to prove that there was any reduction in the total output of work or there was any financial loss sustained by the management because of which retrenchment was effected. In view of the Supreme Court decision in *Orissa Cement Ltd. Rajganur, supra*, these cases must now be deemed to be over-ruled.

There are a number of cases where management's action has been set aside as being not *bonafide*.[3] In *Radhakrishna Mills Ltd.*,[4] for instance, Mr. Justice Ramchandra Ayyar pointed out that the failure by the management to accept the decision of the Criminal Court acquitting the concerned workman or even to consider it showed that the management did not act *bonafide* in the matter. If a person is discriminately selected for discharge or dismissal, without any valid reason, it amounts to *malafides* action on

1 (1960) 2 L.L.J. 91

2 (1952) 2 L.L.J. 412

3 See, for instance, *Bally Municipality* (1954) 2 L.L.J. 500; *G.N. Chakrapani Chetty & Sons Ltd.*, (1952) 2 L.L.J. 412; *Radhakrishna Mills. Ltd.* (1960) 2 L.L.J. 678.

4 (1960) 2 L.L.J. 678

the part of the management. In *Bally Municipality*,[1] for instance, the concerned employee was dismissed for issuing antidated receipt for tax so as to include the collection in the financial year which ended prior to the payment of the tax. The Tribunal found that it was a practice to issue such receipts and other employees had also issued similar antidated receipts, though the practice was unauthorised. It was also found that the employee in question was selected by the Chairman for punishment because the the Chairman entertained ill-feelings towards the person to whom the receipt was issued by the employee in question. The tribunal held that the punishment of dismissal, in the circumstances of the case, was discriminatory and could not be justified.

There may be various other circumstances the presence of which may lead to a conclusion that the action of the management is not *bonafide*, e.g., discharge with a view of ridiculing labour prestige, conversion of order of suspension into that of discharge and, among other things, presence of ulterior motive. But it is exceedingly difficult to determine *bonafides* of a person who acts within his discretionary rights. In *Caltex (India) Ltd.*[2] period of probation of a workman was extended by a further period of three months and on the eve of the expiry of the extended period workman was discharged from services without assigning any reason by the company. Their Lordships of the Calcutta High Court set aside the erroneous award of the tribunal which directed reinstatement of the workman on the ground that company had not acted in good faith in terminating the services of workman without showing any real or genuine cause and held:

> "A probationer has no right to be confirmed in the post and an employer is not liable to give any reason as to why he does not confirm the probationer. By trying to give a reason as to why the respondent 3 was not made permanent but discharged from service, the petitioner company resorted to an overdoing. By emphasizing on that aspect of the matter, the tribunal proceeded on irrelevant consideration. Its conclusion as to *malafides* is of irrelevant consequence because if one acts within his discretionary rights, it is difficult to ascribe *malafides* in him[3]".

B. Unfair Labour Practice and Victimization

1. General:

Despite a few isolated attempts to distinguish unfair labour practice from victimization, it is impossible to reconcile the reported decisions

1 (1954) 2 L.L.J. 500

2 (1963) 1 L.L.J. 156.

3 *Ibid*, 158

and to delineate the respective spheres of "unfair labour practice" and "victimization". Illustrative of the prevailing confusion are the observations in *Khandesh Spinning and Weaving Mills, Ltd.*[1] and *India Paint, Colour and Varnish Co. Ltd.*[2] In the former case Sri D. G. Karmarkar observed :

> "Industrial court does not interfere with an otherwise valid order of discharge and order reinstatement unless the employer is guilty of unfair labour practice and the true reason was victimization of the employee for trade union activities".

In the latter, the Industrial Tribunal observed :

> "victimization and unfair labour practice are like twins who cling together. According to some, unfair labour practice can stand by itself, but victimization must always keep company with unfair labour practice".

Originally it appears that whenever an individual worker was the object of unfair labour practice on the part of the employer, the workman was said to be victimized. However, all unfair labour practices do not affect individual workmen in their personal capacity. From this point of view, we can say that all cases of victimization are also instances of unfair labour practice but all unfair labour practices do not necessarily lead to victimization. In so far as we are dealing with termination of service, it is inevitable that the two phrases should cover identical grounds.

2. *The Narrow View :*

Early adjudicators confined the expression "unfair labour practice" to the meaning assigned to that expression under the American Law.[3] Observed the tribunal in *India Paint, Colour and Varnish Co. Ltd*[4] :

> "In the earlier awards victimization did invariably occur in connection with trade union activities. In other words, 'no trade union activity, no victimization".

This view was evidently supported by the provisions of Section 28 K of the Indian Trade Unions Act. However, this approach did not appeal to later adjudicators. First, it gave very limited protection to workers and that too to only those limited number of workers who were, or intended to become, members of trade unions. Second it provided lesser scope to the tribunals to interfere in the interest of industrial peace, with managements' order discharging or dismissing his employee.

1 (1951) 1 L.L.J. 391.
2 (1952) 1 L.L.J. 410, 411
3 See section 8 of National Labour Relations Act.
4 (1952) 1 L.L.J. 410, 411

3. *Extension of the Coverage :*

There is no definition of victimization or unfair labour practice which may be taken as complete and covering all situations. But the phrase has undoubtedly aquired a vast area by a method of judicial inclusion and exclusion. Sri K. C. Sen observed in the Bank Disputes :

> "In our opinion the expression 'victimization' should embrace all cases of discharge, dismissal, punishment inflicted on or suffering caused to an employee where such discharge, dismissal etc. are so unjust that a remedy is called for in the interest of justice between the parties".[1]

This exposition may, and does, cover a large area. But the qualifying phrase, viz., "so unjust that a remedy is called for in the interest of justice between the parties", is vague and is hardly amenable to objective test. Mr. G. Palit has opined :

> "I, for myself, am inclined to think that victimization should be sufficiently comprehensive to embrace the cases of punishment which the employer inflicts on the employee, whether for his trade union activities or for other reasons where such penalty is given not in a straight forward manner but in a sinister way".

The definition, if it can be called one, is perhaps more exact.

In *Arjun Sugar Mills*[2], Janab Nawaj Muhammad was of the opinion, that whatever injured or illegally affected an employee was victimization. The simplicity of the language should not, however, obscure the inherent difficulty. What is the meaning of the expression "injured or illegally affected?" If they contemplate violation of legal rights, what are those rights? On the other hand, if those words are used in layman's language, where shall we put the limit ?

Sri Krishna Rao, in *Coimbatore Cement Works*[3], rejected the narrower interpretation of victimization. He pointed out that if the expression "victimization" was confined merely to trade union activities, employees who did not happen to have any union and, as such, could not possibly any trade union activity, would be disentitled to relief at the hands of the tribunal even if the employees were wrongfully discharged. Mr. Rao defines the term "victimization" as "the taking of some action prejudicial to the

1 *India Cycle Manufacturing Co. Ltd.* (1951) 1 L.L.J. 390, 392.
2 Cited in *India Paint. Colour and Varnish Co. Ltd.* (1952) 1 L.L.J. 410, 411
3 Cited in *India Paint. Colour and Varnish Co. Ltd.* (1952) 1 L.L.J. 410, 412 and also in *Alexandra Jute Mills Ltd.* (1950) L.L.J. 1261, 1266

workers on some pretext other than the real reason". This, it would seem, equates "victimization" with *malafide* action on the part of the management.

Mr. Justice Sinha of the Calcutta High Court,[1] is of the view that cases of victimization may arise in two ways: First, when the workman concerned is innocent and yet he is punished because he has, in some way, displeased the employer. Second, when an employee has committed an offence but he is given a punishment quite out of proportion to the gravity of the offence.

Sri A. T. Sen Gupta in his award in *Turner Morrison and Co. Ltd.*[2] illustrated "unfair labour practice".

> "any order made in bad faith with an ulterior motive arbitrarily or with harshness is an instance of unfair labour practice".

There are other illustrations, e.g., hasty action of company without giving the employee any notice and holding an enquiry which is opposed to all principles of natural justice[3]; discharge of a workman for refusal to accept conversion from the monthly-rated to daily-rated grade[4]; and delegation of work to contractors with a view to discharge recalcitrant workmen.[5]

Sri S. C. Chakravarty in *Rampuria Cotton Mills Ltd. Seramphore,*[6] observed:

> "the tribunal will have the propriety to interfere in cases involving trade unionism and also in cases where there has been an encroachment of any natural, contractual, statutory or legal rights of the employees".

Sri Matish Chandra Banerjee holds the most comprehensive view. According to him the tribunal may direct reinstatement when it is proved to its satisfaction that the concerned employee was victimized for trade union activities or the employer was otherwise guilty of an unfair labour practice or, in other words, when the employer terminated the employment in bad faith with an ulterior motive or committed an encroachment of any natural, contractual, statutory or legal rights of the employee.

Justice Dhawan of the Allahabad High Court is of the view that what is unfair labour practice or victimization is a question of fact to be

1 In *National Tobacco Company of India, Ltd.* (1960) 2 L.L.J. 175
2 (1950) LLJ. 122, 123.
3 *Napier Paint Works Ltd.* (1952) 1 LL.J. 63.
4 See, *Kedarnath Purushottam & Co. Ltd.* (1952) 2 L.L.J. 349
5 See, *The Bank Line (India) Ltd.* (1952) 1 L.L.J. 215
6 (1950) L.L.J. 969

decided by a labour tribunal upon the circumstances of each case.[1] Their Lordships of the Supreme Court in the following two cases appear to have taken the same view. In *Khardah & Co. Ltd.,*[2] their Lordships dismissed the appeal against the award where in the industrial tribunal, holding that domestic enquiry was not fair and proper, held further enquiry and, on facts, came to the conclusion that the dismissal of the concerned workman was not justified on merits and was actuated with a view to victimi ze him for his trade union activities. In an earlier case, viz., *Bengal Bhatdee Coal Company*[3] their Lordships of the Supreme Court observed:

> "Now there is no doubt that though in a case of proved misconduct, normally the imposition of a penalty may be within the discretion of management, there may be cases where the punishment of dismissal for the misconduct proved may be so unconscionable or so grossly out of proportion to the nature of the offence that the tribunal may be able to draw an inference of victimization merely from the punishment inflicted".[4]

We agree.

4. Onus of Proof:

It was held in *India Cycle Manufacturing Co. Ltd.*[5] that the initial burden was on the union or workmen to establish unfair labour practice. The union or workmen may prove that the discharged employee indulged in trade union activities; and that the discharge was not bonafide or regular. The union or workmen need not show what exactly was at the back of the mind of the employer in discharging the employee. Once the initial burden was discharged, it was upto the company to show that there was no evil motive behind the discharge; and that the discharge was fair and square, i.e., based on sound reasons. The same view has been taken, and we think rightly, in *India Paint, Colour and Varnish Co. Ltd.*[6]

D. Natural Justice

It is settled beyond doubt that one of the functions of the Industrial tribunal is to scrutinize the action of the management in order to satisfy itself that the action is not, in fact, opposed to the principles of natural

1 See, *L. H. Sugar Factories Oil Mills (Private) Ltd. Pilibhit* (1961) 1 LLJ 686
2 (1963) 2 LLJ 452
3 (1963) 1 LLJ 291, 293
4 *Id.*
5 (1951) 1 LLJ 390
6 (1952) 1 LLJ 410.

justice. In *Janata Pictures Theatres Ltd.*,[1] the Labour Appellate Tribunal observed :

> "So far as the principles of natural justice are concerned, the authority dealing with the workmen should not be guilty of adopting unfair means and must not only act in good faith but also fairly and reasonably and without violating the principle of *audi alteram partem*. The authority in question must give the party an opportunity of being heard before him and stating their case. Another well established principle is that no one can be a judge in his own cause..Yet another principle is that justice should not only be done but should manifestly and undoubtedly seem to be done".

These are the three main principles of natural justice. They have given rise to the following requirements of natural justice which must be observed in any enquiry by the management against his employee :

1. Charge :

The charge must clearly mention the allegations against the workman. Mr. Justice S. N. Dwivedi of Allahabad High Court in *J. K. Cotton Spinning and Weaving Mills Company, Ltd., Kanpur*[2] observed :

> "It is not disputed that fair hearing presupposes a precise and definite catalogue of charges so that the person charged may understand them and effectively meet them. If the charges are imprecise and indefinite, the person charged would not be able to understand them and defend himself effectively. In the result the enquiry would not be a fair and just enquiry".[3]

If no charge is framed and the workman is dismissed, the order of dismissal would not stand. Dismissal in such cases is always wrongful.[4] Similarly, if allegations mentioned in the charge are not proved and the workman is discharged for some other allegation or misconduct, the discharge is held to be wrongful, because, in fact, in such a case there is no charge in the eye of law. Any difference between the charge and the cause of termination of service makes the dismissal or discharge worngful.

2. Explanation :

The first requirement of an explanation is that the workman must be given an opportunity to submit an explanation. He must be allowed

1 (1956) 2 LLJ 67.
2 (1963) 1 LLJ 475
3 Ibid., 477
4 See for instance *Advertising Corporation of India Ltd.*, (1954) 1 LLJ 365 ; Madras Press Labour Union, (1954) 1 LLJ 752.

sufficient time. In *Kohinoor Saw Mills*,[1] the concerned workman was given time-limit within which to submit explanation of a charge alleged against him, but the order of dismissal was passed even before the expiry of such time-limit. The dismissal was held to be unjustified.

The second requirement of explanation is that the explanation submitted by the employee must be considered by the management. Dismissal of a workman without proper enquiry and without considering his explanation is held to be improper and unjustified. The reason is obvious. If the explanation submitted by the workman is not considered by the management while passing the order against the workman, it is useless to provide him any opportunity to submit the same.

What if the concerned employee refuses to, or does not, submit any explanation against the allegations levelled against him. As a normal rule, the refusal by the employee must go against him. But, the rules of natural justice require that, even in such a case, the charge must be proved by the management before it can take any action against the workman.

3. Formal Enquiry :

After receiving the explanation of the workman concerned, the management must hold an enquiry to prove the allegations levelled against the workman and mentioned in the chargesheet supplied to him. The enquiry must be fair and just. As observed in *Khardah & Co., Ltd.*,[2] by Gajendragadkar, J. ;

> "the enquiry conducted by the management before a domestic tribunal must be a fair and just enquiry and in bringing home to the workman the charge framed against him, principles of natural justice must be observed"[3]

and, as observed by Mr. Justice Veeraswami of Madras High Court :

> "A tribunal charged with quasi-judicial function-and a domestic tribunal is of such a nature-is expected to approach the question for decision by it in an objective manner. If facts, of the enquiry show that attempt was made in it to put leading questions in order to get answers in support of the charge, it is obvious that such an enquiry can not be said to be quite fair".[4]

We agree.

1 (1954) 1 LLJ 429
2 (1963) 2 LLJ 452 (S.C.) ; 3 *Ibid* 455 See also *Associated Cement Cos.*(1963) 2 LLJ 396, 399 ; 4 Pierce, Leslie & Co., Ltd. (1963) 1 LLJ 797, 798

justice. In *Janata Pictures Theatres Ltd.*,[1] the Labour Appellate Tribunal observed :

> "So far as the principles of natural justice are concerned, the authority dealing with the workmen should not be guilty of adopting unfair means and must not only act in good faith but also fairly and reasonably and without violating the principle of *audi alteram partem*. The authority in question must give the party an opportunity of being heard before him and stating their case. Another well established principle is that no one can be a judge in his own cause. Yet another principle is that justice should not only be done but should manifestly and undoubtedly seem to be done".

These are the three main principles of natural justice. They have given rise to the following requirements of natural justice which must be observed in any enquiry by the management against his employee :

1. Charge :

The charge must clearly mention the allegations against the workman. Mr. Justice S. N. Dwivedi of Allahabad High Court in *J. K. Cotton Spinning and Weaving Mills Company, Ltd., Kanpur*[2] observed :

> "It is not disputed that fair hearing presupposes a precise and definite catalogue of charges so that the person charged may understand them and effectively meet them. If the charges are imprecise and indefinite, the person charged would not be able to understand them and defend himself effectively. In the result the enquiry would not be a fair and just enquiry".[3]

If no charge is framed and the workman is dismissed, the order of dismissal would not stand. Dismissal in such cases is always wrongful.[4] Similarly, if allegations mentioned in the charge are not proved and the workman is discharged for some other allegation or misconduct, the discharge is held to be wrongful, because, in fact, in such a case there is no charge in the eye of law. Any difference between the charge and the cause of termination of service makes the dismissal or discharge worngful.

2. Explanation :

The first requirement of an explanation is that the workman must be given an opportunity to submit an explanation. He must be allowed

1 (1956) 2 LLJ 67.
2 (1963) 1 LLJ 475
3 Ibid., 477
4 See for instance *Advertising Corporation of India Ltd.*, (1954) 1 LLJ 365 ; Madras Press Labour Union, (1954) 1 LLJ 752.

sufficient time. In *Kohinoor Saw Mills*,[1] the concerned workman was given time-limit within which to submit explanation of a charge alleged against him, but the order of dismissal was passed even before the expiry of such time-limit. The dismissal was held to be unjustified.

The second requirement of explanation is that the explanation submitted by the employee must be considered by the management. Dismissal of a workman without proper enquiry and without considering his explanation is held to be improper and unjustified. The reason is obvious. If the explanation submitted by the workman is not considered by the management while passing the order against the workman, it is useless to provide him any opportunity to submit the same.

What if the concerned employee refuses to, or does not, submit any explanation against the allegations levelled against him. As a normal rule, the refusal by the employee must go against him. But, the rules of natural justice require that, even in such a case, the charge must be proved by the management before it can take any action against the workman.

3. Formal Enquiry :

After receiving the explanation of the workman concerned, the management must hold an enquiry to prove the allegations levelled against the workman and mentioned in the chargesheet supplied to him. The enquiry must be fair and just. As observed in *Khardah & Co., Ltd.*,[2] by Gajendragadkar, J. ;

> "the enquiry conducted by the management before a domestic tribunal must be a fair and just enquiry and in bringing home to the workman the charge framed against him, principles of natural justice must be observed"[3]

and, as observed by Mr. Justice Veeraswami of Madras High Court :

> "A tribunal charged with quasi-judicial function-and a domestic tribunal is of such a nature-is expected to approach the question for decision by it in an objective manner. If facts, of the enquiry show that attempt was made in it to put leading questions in order to get answers in support of the charge, it is obvious that such an enquiry can not be said to be quite fair".[4]

We agree.

1 (1954) 1 LLJ 429
2 (1963) 2 LLJ 452 (S.C.) ; 3 *Ibid* 455 See also *Associated Cement Cos.*(1963) 2 LLJ 396, 399 ; 4 Pierce, Leslie & Co., Ltd. (1963) 1 LLJ 797, 798

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1 (1954) 1 LLJ 429
2 (1963) 2 LLJ 452 (S.C.) ; 3 *Ibid* 455 See also *Associated Cement Cos.*(1963) 2 LLJ 396, 399 ; 4 Pierce, Leslie & Co., Ltd. (1963) 1 LLJ 797, 798

4. Real And Not Perfunctory Enquiry :

Formal enquiry does not mean perfunctory enquiry. It must be a real and *bonafide* enquiry. It was pointed out in *Janata Pictures and Theatres Ltd.*[1] that the principles of natural justice require that justice should not only be done, but should manifestly and undoubtedly seem to be done. Even if the management wants to take any action *bonafidely* and in good faith, it must hold a proper enquiry. In the above-mentioned case, the dismissal of the concerned workman was held to be improper and unjustified because proper enquiry had not been held before dismissing him. Recently their Lordships of the Supreme Court have observed :

> "It has been laid down by this court in a series of decisions that if an industrial employee's services are terminated after a proper domestic enquiry held in accordance with the rules of natural justice and the conclusions reached at the enquiry are not perverse, the industrial tribunal is not entitled to consider the propriety or the correctness of the said conclusions. In a number of cases which have come to this court in recent months, we find that some employers have misunderstood the decisions of this court to mean that the mere form of an enquiry would satisfy the requirements of industrial law and would protect the disciplinary action taken by them from challenge. This attitude is wholly misconceived. An enquiry can not be said to have been properly held unless
>
> (i) the employee proceeded against has been informed clearly of the charges levelled against him
>
> (ii) the witnesses are examined ordinarily in the presence of the employee in respect of the charges,
>
> (iii) the employee is given a fair opportunity to cross-examine witnesses,
>
> (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and
>
> (v) the enquiry officer records his findings with reasons for the same in his report."[2]

We shall now consider the various requirements of proper formal enquiry seriatum.

(a) The Right of Representation :

The workman has a right to be represented in any proceeding, under the Industrial Disputes Act, by an officer of registered trade union of which he

1 (1956) 2 LLJ 67

2 *Sur Enamel and Stamping works, Ltd.* (1963) 2 LLJ 367, 369

is a member ; or by an officer of a federation of trade unions to which his trade union is affiliated ; or, if he is not a member of any trade union, by an officer of any trade union connected with, or by any other workman employed in the industry in which the worker is employed[1]. Though this right has been given with regard to proceedings under the Act, the management must allow this right to be exercised even in proceedings of formal domestic enquiry on the basis of natural justice.

(b) The Right Of Cross-Examination :

The workman has a right to cross-examine the witnesses produced by the management so that he may be able to impeach the credibility of the witness and elicit entire facts relating to the allegations against him. If a workman is denied this right, the resulting order of discharge or dismissal may be held to be wrongful. Their Lordships of the Supreme Court in *Meenglas Tea Estate*[2] observed :

> "It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the testimony is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires,"[3]

We agree.

(c) The Right To Tender Evidence :

This is an important right of the workman. If the management alleges some misconduct, the workman must be allowed the opportunity to disprove the allegation[4]. Without tendering evidence, the workman may not be in a position to disprove the allegations. Therefore, management is required to allow opportunity to workman to tender evidence in support of his explanation as also to repudiate allegations.

(d) Notice :

A necessary corrollary of the right to tender evidence is that the workman must receive notice to give evidence. If the management does not give notice to the workman informing him to produce his evidence at

1 Section 36 of the Industrial Disputes Act.

2 (1963) 2 LLJ 392.

3 Ibid., 394 ; See also *Associated Cement Company Ltd.*, (1963) 2 LLJ 396 ; *Kesoram Cotton Mills, Ltd.*, (1963) 2 LLJ 371, 380.

4 (1963) 2 LLJ 392, 394 ; (1963) 2 LLJ 396

the appointed time and place, the management is not, later on, allowed to take the plea that the workman deliberately did not produce evidence. The notice must provide sufficient time to the workman to produce evidence. Their Lordships of the Supreme Court have held:

> "It may be that failure to intimate to the workman concerned about the date of the enquiry may, by itself, not constitute any infirmity in the enquiry, but on the other hand, it is necessary to bear in mind that it would be fair if the workman is told as to when the enquiry is going to be held so that he has an opportunity to prepare himself to make his defence at the said enquiry and to collect such evidence as he may wish to lead in support of his defence. On the whole, it would not be right that the workman should be called on any day without previous intimation and the enquiry should begin straight way. Such a course should ordinarily be avoided in holding domestic enquiries in industrial matters."[1]

While expressing our agreement with their Lordships we want to emphasise that such a course should not only ordinarily be avoided but it should always be avoided.

5. *Effect Of Proper formal Enquiry:*

If services of a workman are terminated after proper formal enquiry by the domestic tribunal in accordance with the principles of natural justice, the industrial tribunals have no jurisdiction to interfere with the decision of the management. Dealing with this aspect of the matter their Lordships of the Supreme Court observed:

> "If the termination of an industrial employee's services has been preceded by a proper domestic enquiry which has been held in accordance with the rules of natural justice and the conclusions reached at the said enquiry are not perverse the tribunal is not entitled to consider the propriety or the correctness of the said conclusions."[2]

We agree.

6. *Communication of the Order Proposed:*

Before the management finally passes an order of discharge or dismissal, it must afford an opportunity to the workman to make his objections against the proposed order. In *Port Trust, Bombay*[3], the Tribunal observed:

1 *Associated Cement Companies Ltd.*, (1963) 2 LLJ 396, 400

2 *Anand Bazar Patrika (Private) Ltd.* (1963) 2 LLJ 429, 432. See also *India Marine Service (Private) Ltd.*, (1963) LLJ 122

3 (1954) 1 LLJ 192, 199

> "I think it is only just and fair that in a departmental enquiry the person charged should be afforded an opportunity to explain why the punishment proposed should not be inflicted upon him"

The order of dismissal passed in the case against the concerned employee was held to be void, inoperative and of no legal consequences, the same having been passed without giving an opportunity to the workman to explain as to why proposed dismissal should not be ordered.

7. *Order:*

After giving an opportunity as aforesaid, the management may pass any order which it, under the circumstances, thinks fit. The order must, however, be in writing and a copy of the same must be provided to the concerned workman, on demand, so that he may be able to prefer an appeal against the order if he so likes.

E. Basic Error of Facts and Perverse Finding:

It was held in *Buckingham and Carnatic Mills Ltd*[1]. that it would be open to the tribuanl to examine the findings of the management to assure itself that there was evidence to support the findings and that the decision of the management was a possible view on the evidence on record. In *L. H. Ayurvedic College Pharmacy*,[2] where the management dismissed a workman on the strength of a finding arrived at a departmental enquiry and the finding was not based on any positive proof on record but on a personal belief of an officer regarding the alleged charge against the workman, it was held that the dismissal was unjustified as there was a basic error and the finding was perverse on the facts and material on record.

The error of facts or perverse finding, so far as they relate to facts, are the same thing. These expressions mean a finding of fact for which there is no evidence on record. If the evidence of material witness in favour of the accused workman is not recorded, any finding based on that enquiry is incomplete and it may also be called a perverse finding. The evidence of the witness refused may rebut all the evidence produced by the management. An order of discharge or dismissal based on a finding in the absence of such evidence is void. The refusal to record the evidence of material witness in favour of the accused is treated on the same footing as a refusal to base the findings on the material on record. In other words, if the management refuses to record the evidence of a material witness of the accused workman and discharges him or dismisses him on the basis of his own evidence, the

1 (1951) 2 LLJ 314

2 (1954) 1 LLJ 417

discharge or dismissal is held to be unjustified and wrongful. Not only refusal to record the evidence of the workman's witness may give rise to perverse finding but it has also been held that a finding of an enquiry, in which the presiding officer refused to record the evidence of the material witness of the management in favour of the workman, was perverse.[1]

H. Harshness of The Order

Can tribunals interfere with the punishment awarded by the management ? This question was left open by the Supreme Court in *Indian Iron and Steel Company case*[2]. There are different views. The Labour Appellate Tribunal, in 1956, was of the opinion that where an industrial tribunal states the principles governing the question of punishment but fails to apply the same to the facts of the case before it, and interferes with the punishment awarded by the management without stating any cogent or convincing reason as to why it considered the punishment unduly harsh or excessive or how the requirement of maintenance of discipline would be satisfied by awarding lesser punishment, such interference is improper and unjustified[3]. Where the circumstances justifying such interference are not specified, a mere statement that the circumstances of the case justify intereference is also insufficient. Where the punishment has been awarded by the management after taking into consideration the gravity of the misconduct, the previous service record of the concerned workman and other circumstances connected with the case, interference and substitution of punishment by industrial tribunal without specifying a single extenuating circumstance in favour of the workman is again imporper and unjustified[4]. In *Standard Motor Products of India, Ltd. Vandalur*[5], following the decision of Supreme Court in *Indian Iron and Steel Co.*,[6] the industrial tribunal drew a distinction between a case of termination of service and that of a dismissal. It held that, in of termination of service, the tribunal could go into the question whether such termination was justified and award appropriate relief. But in case of dismissal for misconduct, the tribunal could not function as a court of appeal and substitute its own judgment for that of the management. It could exercise only, what may be called, a revisional or correctional jurisdiction in the circumstances mentioned in the *Indian Iron and Steel Company*

1 *The Upper India Sugar Mils. Ltd. Katauli* (1963) 2 LLJ 854
2 (1958) 1 LLJ 260
3 *Consolidated Coffee Estate* (1943), Ltd. (1956) 2 LLJ 504
4 *Ibid.*, 505
5 (1958) 1 LLJ 640
6 (1958) 1 LLJ 260

case[1]. *Standard Motor Products of India*[2], however, highlights the dangers inherent in exercising even revisional or correctional jurisdiction. Notwithstanding, tribunal's enunciation of the principles of law, the High Court of Madras found that the tribunal took evidence for itself and decided whether the workers in question merited dismisal. In other words, it had constituted itself as a tribunal of first instance in disciplinary matter. The High Court observed that the tribunal could only consider good faith, victimization, unfair labour practice, basic error in dealing with the case of workers, violation of principles of natural justice or baselessness and perverseness of the finding. The High Court of Andhra Pradesh[3] has taken the view that, once the management action could be regarded as being generally in conformity with the accepted procedure and principles of natural justice, it would not be open to the industrial tribunal to interfere with the action taken by the management unless it is satisfied on the materials before it :

(1) that the action of the management in the disciplinary step taken by them and the imposition of the punishment was either contrary to law or lacked good faith, or was baseless or perverse ; or

(2) that it was done by way of victimization or unfair labour practice and not for imposing a just punishment.

In a case where it was contended that the labour court exceeded its jurisdiction in interfering with the order of dismissal, the Allahabad High Court refused to quash the award of the labour court as it found that the finding of of the enquiry committee was perverse[4].

The point in question was again raised before their Lordships of the Supreme Court in *Andhra Scientific Company, Ltd.*[5] The appellant contended that, once the labour court found that the allegations mentioned in the charge had been proved, it had no jurisdiction to consider the question whether the order of dismissal made by the management was excessive. Their Lordships held :

> "It is settled law that where the conclusion reached by the management as regards the guilt of the accused of the misconduct urged against him remains undisturbed the industrial tribunals will not ordinarily interfere with the punishment imposed.

1 (1958) 1 LLJ 260
2 (1958) 1 LLJ 640
3 *Hendricks & Sons* (1960) 2 LLJ 484
4 *Delhi Cloth and General Mills Compay, Ltd. Delhi* (1961) 2 LLJ 724
5 (1961) 2 LLJ 117

There can be no doubt, however, that when the acts in respect of which the workman is ultimately found guilty do not amount to misconduct at all under the standing orders of the employer the tribunal not only can but should consider the question what punishment should be inflicted on the altered finding of guilt."

The result, is that the Rule laid down in *Buckingham and Carnatic Mills Ltd*[1]., by the Labour Appellate Tribunal that the managements' decision regarding punishment is liable to be revised if the tribunal is of opinion that "the punishment is so unjust that remedy is called for in the interest of justice" stands modified by the Supreme Court[2] to the extent that the tribunal cannot revise managements' decision if the guilt of the accused of the misconduct urged against him remains undisturbed.

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1 (1951) 2 LLJ 314

2 *Andhra Scientific Company Ltd.* (1961) 2 LLJ 117

JUDICIAL DELINEATION OF THE WORD 'CIVIL POST' UNDER ARTICLE 311(2) OF THE INDIAN CONSTITUTION*

By

MAHESHWAR NATH CHATURVEDI†

I

The role of civil servants in any modern state is significant. It acquires even more imposing stature in an under-developed country:

> "The less advanced the country, socially and economically, the less the likelihood of the non-official playing a leading part in the carrying out of policy and the more significant the role of the public services."[1]

Responsibilities of civil services in India have further increased because of the Constitutional declaration of the Directive Principles of State Policy. Said Pandit Govind Ballabh Pant:

> "India is now a Democratic Republican State. The Directive Principles enshrined in its Constitution dictate the needs of formulating and carrying out policy for the advent of a welfare state on a socialistic pattern as quickly as possible. Those objectives lay a heavy and onerous task on the instruments and mechanism that translate policy into practice, viz., the civil service."[2]

With responsibilities naturally come substantial power in the hands of civil servants. Moreso, in a parliamentary form of government where, as Mr. Krishna Menon[3] caustically remarked:

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1 A. D. Gorwala: "The Public Services And Democracy", published in 'Leadership and Political Institution in India", Edited by Richard L. Park and Irene Tinker, 1959, p. 329.

2 From a talk delivered on the 18th August, 1955, on All India Radio, reprinted in the Indian Journal of Public Administration, (1955) Vol. I, p. 181.

3 From a speach of V. K. Krishna Menon delivered at the Conference of Military Psychology at Londour, Reported in Northern India Patrika dated June 11, 1959, on p. 1, col. 2.

"Minister (is selected) because of his ignorance of the subject ....the job of a Minister in Parliamentary system is to tell civil servants what public does not want"

At the same time, there are certain limitations imposed on civil servants in the public interest. They cannot exercise civil and political rights like ordinary citizens. Their trade union activities are significantly curtailed, if not wholly prohibited. Further, their tenure is at the pleasure of the Head of the State though[1] in matters connected with disciplinary actions certain procedural safeguards are provided to them under Article 311.

The Constitutional protection, under Article 311, is limited to:

"....a member of Civil Service of the Union or an All India Service or a Civil Service of a state or to a person who holds a civil post under the union or a state...."

Of these, the coverage of the last category is the subject matter of a good deal of judicial controversy. Courts differ on the scope of each of the three critical words, namely, "Civil post", "Under" and "State", which are used in the Article. Concedes Mr. Justice P. B. Mukharji[2]:

"There have been many debates as to what is a 'civil post' under a state....The Court's search for tests to define what is a civil post under the state has been so far exploratory without being decisive."

The difficulty, however, is that courts' "exploratory" excursions very often appear to be aimless meanderings: atleast, they do not reveal the objective which courts are trying to reach.

II

The Constitutional description of protected persons is, *prima facie*, capable of being subdivided into the following four categories:

1. a member of the Civil Service of the Union[3];

1 Article 310.

2 *Barada Kanta Adhikari v. The State of West Bengal.* A. I. R. 1963. Cal 161, 162.

3 Sub-rule (h) of Rule 2 of the Central Civil Service (Classification, Control and Appeal) Rules, 1957, defines "service" to mean:

"a civil service of the Union."

Rule 6 thereof classifies the Civil Services of the Union into:

" (i) Central Civil Services, Class I;
(ii) Central Civil Services, Class II,
(iii) Central Civil Services, Class III;
(iv) Central Civil Services, Class IV."

And, Rule 7 provides for the Constitution of Central Civil Services:

"The Central Civil Services, classes I, II, III, and IV, shall consist of the services and grades of services specified in the schedule".

2. a member of an All-India Service[1];
3. a member of the Civil Service of a state; and
4. a person who holds a civil post under the Union or a state.

However, the basic category is the last category, namely, of persons "who hold a civil post under the Union or a State."

The constitution itself does not define the expression "civil post."[2] However, the term has also been used in Article 310

1 Article 312 of the Constitution provides for the creation of All-India Service:

"(1) Notwithstanding anything in Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it was necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services common to the Union and the states, and, subject to the other provisions of this chapter, regulate the recruitment, and the conditions of service of persons appointed to any such service. (2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article."

Recently the following three new all-India services have been created:

1. The Indian Service of Engineers (Irrigation, Power, Buildings and Roads)
2. The Indian Forest Service and
3. The Indian Medical and Health Service.

(Vide, The Gazette of India, Extraordinary, Part II—Section I No. 25, dated September 6, 1963).

Professor T. K. Tope observes:

"Creation of All India service in a federal Constitution might appear to be an encroachment on the autonomy of the units. Hence, it is provided that such services can be created if the Council of States passes a resolution that it is necessary or expedient in the national interest to creat such services"

and throws light on the peculiar procedure envisaged by the Constitution for the creation of an all-India service: T.K. Tope; "Constitution of India" (Second Edn. 1963) pp. 463-64.

Section 2 of All-India Service Act, 1951 (No. LXI of 1951), defines the expression All India Service to mean:

"the service known as the Indian Administrative service or the service known as the Indian Police service"

And, according to Sub-rule (*m*) of Rule 2 of All India Service (Leave) Rules, 1955:

"member of the service' means a member of the Indian Administrative Service or the Indian Police Service as the case may be."

2 Rule 8 of the Central Civil Service (Classification, Control and Appeal) Rules, 1957 provides for the classification of civil posts:

"(1) Civil posts under the Union, other than those ordinarily held by persons to whom these rules do not apply, shall by a general or special order of the President be classified as follows:

(i) Central Civil Posts, Class I;
(ii) Central Civil Posts, Class II;
(iii) Central Civil Posts, Class III,
(iv) Central Civil Posts, Class IV.

"(i) Except as expressly provided by this Constitution, every person who is a member of a defence service or a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a state or holds any civil post under a state holds office during the pleasure of the Governor."

It would, therefore, appear that the expression "civil post" has been used in contradistinction with the expressions "defence service" and "any post connected with defence."

None of the earlier Constitution Acts of India defined the expression "civil post."[1] However, the use of the expression in section 240 of the Government of India Act, 1935, is in harmony with the aforesaid interpretation.

Court decisions confirm the view that the expression "civil post" has been used to distinguish persons holding those posts from persons holding

Under notification dated Ist April 1958, the President directed that the Civil posts be classified in the following manner:

1. "A Central Civil post carrying a pay or a scale of pay with a maximum of not less than Rs. 850.....Class I.
2. A Central Civil post carrying a pay or a scale of pay with a maximum of not less than Rs. 500 but less than Rs. 850.....Class II.
3. A Central Civil post carrying a pay or a scale of pay with a maximum of over Rs. 60 but less than Rs. 500.....Class III
4. A Central Civil post carrying a pay or a scale of pay with a maximum of which is not more than Rs. 60.....Class IV.

Rule 9 provides for the Central Service:

"Central civil posts of any class not included in any other Central Service shall be deemed to be included in the General Service of the corresponding class and a government servant appointed to any such post shall be deemed to be a member of that service unless he is already a member of any other Central Civil Service of the same class."

1 Section 96-B of the Government of India Act, 1919, read:

"(1) subject to the provisions of this Act and of the rules made thereunder, every person in the Civil Service of the Crown in India holds office during His Majestys' pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed....."

Section 240 (i) of the Government of India Act, 1935, was as follows:

"Except as expressly provided by this Act, every person who is a member of a Civil Service of the Crown in India, or holds any civil post under the Crown in India holds office during His Majesty's pleasure."

posts in defence services or posts connected therewith. Observed Cornelius, J[1]:

"I have examined the various definition clauses in the Constitution Act and fail to find any definition of the expression 'civil post'. The expression must, therefore, be construed in the ordinary dictionary sense of the words employed, namely, an appointment or an office on the civil side of the administration as distinguished from the military side."

And recently Mr. Justice P. K. Tare[2] confirmed the view:

"....it is significant to note the difference in the language of Articles 309 and 310 on the one hand and Article 311 on the other hand. In Article 311 of the Constitution, there is no reference to a member of Defence Services or to a person holding a post connected with defence....from this it can reasonably be inferred that the omission to mention persons in civilian sections connected with defence excludes all persons connected with defence from the operation of Article 311 of the Constitution."

There is a catena of cases emphasising the distinction first drawn by Mr. Justice Cornelius[3].

1 *Yusuf Ali Khan v. The Province of Punjab*, A. I. R. 1950 Lahore 59
The case was regarding the prohibition that a civil servant should not be dismissed by an authority subordinate to that by which he was appointed. In this case the plaintiff was appointed by the Director of Civil Supplies as sub-Inspector in Civil Supplies department but was dismissed by the Provincial Government. The dismissal was held to be valid.

2 *Kapoor Singh Harnam Singh V. Union of India*, A. I. R. 1960 M. P. 119, 121.
In this case the appellant was a supervisor in the Military Dairy at Jabalpur.

3 *In Tara Singh Ujagar Singh V. The Union of India*, (1959) B. L. R. 1185, 1188, where the appellant was permanent S. D. O. and was removed for misappropriation of Government stores, Justice K. K. Desai expressed the similar opinion when he observed:

"On comparison of the provisions of Articles 310 (i) and Article 311 it is clear that the persons described as 'a member of defence service' or 'holding any post connected with defence' has been altogether excluded from Article 311. The term or office of such a person under Article 310 (1) was 'at pleasure' and yet he was not intended to be given any protection as provided under Article 311. That is the irresistible conclusion one reaches by reason of specific exclusion of such a person from Article 311."

This view has also been expressed in other cases. For instance *Chandra Bhan V. Union of India*, A. I. R. 1956 Bom. 601; *Subodh Ranjan V. N. A. O. Callaghan*, A. I. R. 1956 Cal. 532; *Dass Mul V. Union of India*, A. I. R. 1956 Punj. 42; *Atindra Nath Mukherjee V. G. F. Gillot*, A. I. R. 1953 Cal. 543.

In *Union of India V. Ramchand*, A. I. R. 1953 Punj. 166, Justice Kapoor said:

"At no time in the Constitutional history of India has any similar protection against arbitrary dismissal, removal or reduction in rank been provided in regard to (defence) service."

and after referring to the position under Government of India Act, 1919 and 1935 and under the present Constitution he concluded that "the law in regard to Defence service has remained the same."

It might be mentioned that, even though Article 311 does not protect defence personnel, almost equivalent safeguards are provided by various statutes, rules and regulations to persons employed in defence services or posts connected therewith[1].

1 "Civilians in Defence services (Classification, Control and Appeal) Rules, 1952 "apply to every person paid from Defence Service Estimates and not subject to the Army Act, 1950, the Indian Navy (Discipline) Act, 1934 and the Air Force Act, 1950, who is in the wholetime employment of the Government of India under the Ministry of Defence." Rule 15 of these Rules provides that :

"Without prejudice to the provisions of the Public Servant Inquiries Act, 1850, no order of dismissal, removal, *compulsory retirement* or reduction shall be passed on a member of a service (other than an order based on facts which had led to his conviction in a criminal court or by a Court Martial) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself....."

The coverage of Rule 15, it will be observed, is, in fact, wider than that of Article 311 of the Constitution in so far as it provides safeguard against compulsory retirement which safeguard, it is now well established by court decisions, is not available under Article 311 of the Constitution.

Before 1952, members of the defence services and civilian personnel of defence were regulated by Army Instructions, 1949 and Rules 6-9 thereof provided safeguards similar to those now provided by Rule 15 of the Civilian in Defence Services (Classification, Control and Appeal) Rules, 1952. However, Courts have taken different views regarding the nature of these "Instructions". On the one hand, Justice K. K. Desai observed in *Tara Singh Ujagar Singh's case*, supra :

"It appears to me that these are the subject matter of a Government Resolution and made for the purpose of guidance of military authorities in connection with civilians employed in defence services. These rules are only directory..... (and) have in any event no force of affecting the provisions of Article 310 regar ding the tenure of office of persons employed in the service of Government of India or state. The tenure of office of persons employed in such services continues to be at pleasure of the President or the Governor....., as the case may be."

On the other hand, Justice P. K. Tare held the "instructions" to be binding in *Kapoor Singh Harnam Singh's* case, *supra*, and set aside the order of dismissal because rule 8 of the Instructions had been violated when the dismissing authority passed the order in the absence of any "material on record to indicate as to on what charges the dismissing authority held the appellant guilty and what punishment was proposed for each charge found proved."

Reference may be made here to a similar controversy over the binding nature of Rule 14 framed under Section 96-B of the Government of India Act, 1919. This rule provided that :

"In all cases in which the dismissal, removal or reduction in rank of any officer is ordered, the order shall.....be preceded by a properly recorded departmental enquiry. At such an enquiry, a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it, and any evidence which he may adduce in his defence shall be recorded in his presence, and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge."

State :

In order to come within the protection of Article 311, it is not enough that a person is holding a civil post : the post itself must be under the

The Calcutta High Court held in *Satish Chandra Das V. The Secretary of state*, A. I. R. 1927 Cal. 311, that the rule was mandatory. This view was accepted by the Rangoon High Court in *J. B. Baroni V. The Secretary of State*, A. I. R. 1929 Rang. 207.

But the Madras High Court took a contrary view in *Venkata Rao V. The Secretary of State*, A. I. R. 1934 Mad. 516. The appellant in this case was a reader in the Government Press Madras. He fell under suspicion of being concerned in leakage of information in respect of Pleadership Examination Papers. The appellant denied the charge. He was, however, directed to vindicate his character in a Court of Law, Accordingly, he filed a suit for libel against a candidate for the said examination, who had supplied the incriminating information. While the suit was pending, he was first suspended and later dismissed. The suit, having been ultimately decreed in his favour by default for nominal damages, he challenged the order of dismissal on the ground that it was contrary to the aforesaid rule 14, which provided for departmental enquiry. The Madras High Court rejected the petition. On appeal, the Privy Council confirmed the decision of the Madras High Court. *Venkata Rao V. The Secretary of State*, A. I. R. 1937 P. C. 31. Lord Roche agreed that :

"a most definite and salutary rule was disregarded in most essential respects and the contention, which was in effect that what was done was "well enough" is a contention mischievous in tendency and illfounded in fact."

But at the same time he rejected the appeal on the ground that :

"Section 96-B, in express terms, states that office is held during pleasure. There is, therefore, no need for the implication of this term and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance. The rules are manifold in number and most minute in particular and are all capable of change....."

Notwithstanding the strict legal position, Lord Roche was greatly impressed by the desirability of observing the rules :

"It is obvious.....that supreme care should be taken that this assurance should be carried out in the letter and in the spirit, and the very fact that government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error therebe, and to make proper redress, if wrong has been done."

and very politely advised the Government to observe them :

"To give redress is the responsibility and, their Lordships can only trust, will be the pleasure of the Executive Government."

Recently the Supreme Court in *State of Uttar Pradesh, V. Babu Ram Upadhya*, has criticised the decision of *Venkata Rao's case*. The respondent in this case was dismissed without complying with the provisions of para 486 (1) in the Police Regulations. The appellant contended that the said regulations were merely administrative directions and the non-compliance of those regulations cannot affect the validity of the action taken against the respondent. Observed Justice Subba Rao :

"In our view, subject to the overriding power of the President or the Gover-

Union or the state. However, the meaning of the word "state" is a matter of controversy.

Munro's remarks :

> "constitutional terminology is not made of vandiam steel; it has the resilency of a toy balloon",[1]

is strikingly illustrated by the meaning assigned to the term "state". The Indian Constitution does not attempt a general definition of that term: it defines the term from different points of view to meet different situations[2].

nor under Article 310, as qualified by the provisions of Article 311, the rules governing disciplinary proceedings cannot be treated as administrative directions, but shall have the same effect as the provisions of the statute whereunder they are made, in so far as they are not inconsistent with the provisions thereof."

He supported his decision by quoting Maxwell :

> "Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation."
>
> ("On the Interpretation of Statutes" 10th Edn. pp. 50-5.)

It is respectfully submitted that Lord Roche and Justice K. K. Desai have unduly emphasised the element of "pleasure". Article 311 of the Constitution makes it clear that the "pleasure of the President" is not unlimited and unbridled. Does it make any difference if the Constitution, instead of itself limiting the "pleasure", authorises the President to make necessary rules and the President, under those rules, limits his "pleasure" ? Are these rules not a part of the Constitution ? The reason why the Constitution, instead of itself prescribing the safe-guards ensuring security of tenure of defence personnel, has left the task of prescribing those safegurads to the President is to enable him to make detailed rules balancing the paramount interest which the society has in the security of the naion and the interest which a member of the defence personnel has in his security of tenure. It will be observed that the balancing of these interests requires precision: the safe-guards which are deemed to be appropriate in the case of one category of defence personnel may not be appropriate for another category and, even with respect to the same category, what may be appropriate in times of peace may not be appropriate in times of emergency or war. The flexibility which is so urgently needed in these cases, would have been lost, much to the detriment of the nation, if the rules had been enshrined in the rigid provisions of the Constitution. Moreover, the record-breaking details of the Indian Constitution would have become even more cumbersome. However, once the rules have been framed, there is no reason why they should not be followed, atleast so long as they are in force.

1 Munro "The Government of the United States" p. 400

2 When Article 7 of the Draft Constitution of India, corresponding to the present Article 12, was being discussed by the Constituent Assmebly, Mr. Mahboob Ali Baig Sahib Bahadur criticised the use of the word "state" with variable contents in the different Articles. According to him, it was not "advisable that an expression in a legislative enactment should bear different meanings in different parts of the enactment" because it was likely to "create confusion". See, Constituent Assembly Debates of 25th November 1948 pp. 608-10, referred to by Sri D. N. Banerjee in "Our Fundamental Rights", p. 38. It is, however, submitted that, though this criticism sounds logical, it has practical limitations. Moreover, the Constitution of a country being "superior paramount law", has to deal with different kinds of problems facing the country and, one universal definition of the word "state" is neither appropriate nor adequate to meet all situations.

Thus, Article 1 in Part I of the Constitution uses the word' 'state" to delineate the territory of India[1]. Articles 12 and 36 define the term "state" with reference to thedecision-making authorities for the purpose of preserving fundamental rights and ensuring the achievement of nation's socio-politico-economic objectives[2]. Article 152 enumerates various "states" for the purpose of defining and, among other things, delineating their respective executive, legislative and judicial functions.[3] The original Article 308 specified various "states" for the purposes of ascertaining the applicability or otherwise of constitutional provisions relating to "services under the Union and the States".[4] Although the seventh Amendment of the Constitution, rephrased the relevant part of the Article,[5] one doubts if any alteration in the basic content of the Article, apart from exclusion of Jammu & Kashmir, is contemplated.

It will be observed that these definitions are given at the commencement of the different parts of the Constitution for the specific purposes of the concerned Part.

An attempt to interpret the word "state" in Article 311 in terms of Article 12 has proved abortive.[6] "It is said that Article 12 of the Consti-

1 "(1) India, that is Bharat, shall be a Union of states.
(2) The States and the territories thereof shall be as specified in the First schedule.
(3) The territory of India shall comprise :
(a) the territories of the state ;
(b) the union territories specified in the First schedule ; and
(c) such other territories as may be acquired."

2 "In.....Part (III), unless the context otherwise requires, 'the state' includes the Government and Parliament of India and the Government and the Legislature of each of the state and all local or other authorities within the territory of India or under the control of the Government of India.
Article 36 adopts this definition :
"In.....Part (IV), unless the context otherwise requires 'the state' has the same meaning as in part III."

3 "In.....Part (IV), unless the context otherwise requires, the expression "state" means a state specified in Part A of the First Schedule."

4 (In.....Part (XIV), unless the context otherwise requires the ,expression "state" means a state specified in Part A (or Part B) of the First Schedule.")

5 "In this Part, unless the context otherwise requires the expression "state" does not include the state of Jammu and Kashmir."

6 *Smt. Ena Ghosh v, State of West Bengal*, A.I.R. 1962 Cal.420 ; *Roop Singh Devi Singhv. Sanchalak Panchayat and Samaj Seva M.P.*A.I.R. 1962 M.P. 50, *Ranjit Ghosh v. Damodar Valley Corporation*, A.I.R. 1960 Cal. 549 ;

tution lays that the word 'state' would include not only the Government but all local or other authorities within the territory of India, or under the control of the government of India. It is, therefore, argued that the Damodar Valley Corporation, which is controlled by Government is also a "state", and, therefore, its employees are civil servants entitled to take advantage of Article 311 of the Constitution." But Mr. Justice Sinha rejected the contention: "In my opinion, there is nothing in this point. So far as Article 12 is concerned, the short answer is that it has been made clear in the Article itself that the particular definition introduced therein *was only for the purpose of Part III of the Constitution*, which deals with fundamental rights. (Emphasis added)[1].

Moreover, the Constitution has provided a very comprehensive definition of "state" in Article 12 because, as Dr. Ambedkar[2] explained:

> "The object of the Fundamental Rights is two-fold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority....which has got either the power to make laws or the power to have discretion vested in it....If the Fundamental Rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules or make by-laws."

and such a wide interpretation of the word "state" would neither be logical nor appropriate in relation to civil servants.

We do not think that the original Article 308 was self-contained, certainly the amended Article, which even omits the reference to the first schedule, is not self contained. The First Schedule merely enumerates the names of various states:

> "Andhra Pradesh, Assam, Bihar, Bombay, Gujrat, Kerala, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh, West Bengal, Jammu and Kashmir"

Therefore, reading Article 308 with the First Schedule, the expression "state" would mean "the state of Andhra Pradesh", "the state of Assam",

1 *Ranjit Ghosh v. Damodar Valley Corporation*, A.I.R. 1960 Cal. 549-50

2 Constituent Assembly Debates of 25th November, 1948, pp. 608-10; quoted by D.N. Banerjee in "Our Fundamental Rights" ,p. 38.

and among others, "the state of West Bengal". However, this by itself is insufficient to delineate the constituent elements of a State.

Part VI of the Constitution classifies the functions of the State into three division: executive, legislative and judicial. Now the question whether civil posts under the State of Andhra Pradesh in Article 311 cover only posts under the executive branch or the legislative branch or the judicial branch or under all of them or under only some of the aforesaid branches of the state of Andhra Pradesh, cannot be decided with reference to Article 308. To the extent to which we have to traverse outside Article 308 in answering these questions, it is obvious that Article 308 is not self-contained.

The critical question in *Smt. Ena Ghosh v. State of West Bengal* and other similar cases was not whether the word "state" occuring in Article 311 could be interpreted in terms of Article 12 but whether the meaning to be assigned to the word "state" in Article 311 must necessarily be confined to the one given in Article 308. Further, an enquiry into the question as to whether the word "state" in Article 311 should be interpreted in terms of the definition of that word in Article 12 or in any other Article of the Constitution. The question here is whether any particular meaning of the word "state", other than the one given in Article 308 and irrespective o whether that meaning has been assigned to the word "state" in any other Article of the Constitution, can be assigned to the word "state" occuring in Article 311.

It might be pointed out that, notwithstanding the fact that the legislature of a state is the part and parcel of the State, no body can possibly argue that Article 311 applies to appointments made by the speaker.

In our view Article 308 merely "specifies" the names of various states for the purposes of ascertaining the State under which a person may be holding a civil post and for determining rights, duties and liabilities in matters connected with terms and the conditions of service of government employees. It is significant that whereas marginal notes to Articles 12, 36 and 152 speak of definition, the marginal note to Article 308 speaks of interpretation. Moreover, the "interpretation" is itself subject to the clause:

> "unless context otherwise requires."

It is, therefore, submitted that there is nothing in Article 308 which excludes the possibility of giving a wider meaning to the word "state." Indeed, if the object of Article 311 is to be achieved, in our view, the most comprehensive meaning should be given to that word, particularly because the

expression "civil" has been used in Article 311 not with a view to describe any particular kind of post but in contradistinction to the word "military" and is, in fact, equivalent to "non-military".

"Under"

The use of the word "under" raises a question as to the nature of the relationship contemplated between the state and the person holding a civil post. In *K. C. Deo Bhanj v. Raghunath*[1] Justice Imam observed:

> ".... there is a distinction between 'serving under the Government' and 'in the service of the Government', because while one may serve under a Government, one may not necessarily be in the service of the Government. Under the latter expression one not only serves under the Government but is in the service of the Government and it imports the relationship of master and servant."

However, Courts have surprisingly failed to grasp the wide connotation of the term "under". They have instead assumed that only those persons hold civil posts under the Union or the states who are employed *as servants* by the Union or the state, as the case may be, and proceeded to lay down the tests for the determination of required master-servant relationship. This twisted and technical interpretation has, as we shall see, done much harm to the cause of civil servants.

Mersy Docks and Harbour Board v. Coggins and Griffith[2] is the most quoted and authoritative pronouncement for the purposes of determining master-servant relationship. Their Lordships of the House of Lords, in this case conceded that the determination of the existence or otherwise of master-servant relationship was often a difficult proposition and that no single inquiry was conclusive. They suggested that the answer would depend on a number of inquiries such as:

(*a*) who was the appointing authority;

(*b*) who was the pay-master;

(*c*) who was entitled to tell the employee the way in which he was to do the work; and

(*d*) who could dismiss the employee.

1 1959 S.C.J. 612, 618; The point involved in this case was whether the sarpanch of a gram Panchayat controlled under Orissa Gram Panchayats Act, 1948, was a person in the service of the Government or not. The Court, after considering the various provisions of Orissa Gram Panchayats Act, came to the conclusion that he was not in the service of the Government.

2 (1946) 2 All. E.R. 345.

However, the absence of any single determinative inquiry and, particularly, the relevance of several inquiries, raise issues not only of delineating the contents of specific inquiries but also of ascertaining the relative importance of those inquiries where, as often, they lead to different conclusions. The observations of Mr. Justice P. B. Mukharji that[1]:

> "(*a*) certain amount of flexible interpretation guided by the facts of each case is a necessity in the present context of the Governmental administration. The most orthodox limits and ideas of a civil service or a civil post under the state may not today exhaust all such categories under Article 311 (1) of the Constitution".

cloakes the difficulty of conclusive determination. A perusal of Indian case law shows that Courts have widely differed on evaluation of the effect of the aforesaid inquiries.

1. The Appointing And Dismissing Authority Test:

The fact that the Union or the State has the power by exercising which it appoints a person to a post does not necessarily create the relationship of master and servant between such appointing authority and the appointee. In *Mangal Sain v. State of Punjab*[2] the petitioner was the Executive Officer of the Ambala City Municipal Committee, which paid his remunerations. He was appointed to the post by the State Government under sub-section (9) of Section 3 of the Punjab Municipal (Executive Officer) Act, 1931, and was dismissed by the State Government under sub-section (7) of Section 3 of the aforesaid Act. The High Court of Punjab emphasised the source of payment of remuneration and held that the petitioner was an employee of the Municipal Committee: the mere fact that the power of appointment and dismissal could be exercised by the Government did not make him a servant of the State.

The same view was reiterated in *State of Punjab v. Prem* Prakash,[3] where the Municipal Committee of Muktsar was not discharging its functions satisfactorily. The State Government, instead of superseding the Municipal Committee, ordered the creation of a post of Superintendent of Waterworks, directed the duties of the Water Works Department to be discharged by such superintendent of Water Works and appointed the petitioner to the newly created post of the Superintendent of Water-Works: his salary

1 *Barada Kanta Adhikari v. The State of West Bengal*, A.I.R. 1963 Cal. 161, 163.

2 A.I.R. 1952 Punj. 58

3 A.I.R. 1957 Punj. 219

being payable out of the Municipal funds. It was held that, notwithstanding the fact that he was appointed by the state Government, the Superintendent was an employee of the Municipal Committee.

The latest case in this line is of *Roop Singh Devi Singh v. Sanchalak Panchayat and Samaj Seva, Madhya Pradesh*[1] where the petitioner was temporarily appointed as the Secretary of the Makdone Kendra Panchayat by the State Government: the salary being paid out of the funds of the Panchayat. He was, however, removed from service by the Director of the Panchayat and Samaj Seva. Justice Krishnan observed:

> "The test is not the appointment of the member, but of his service or actual post.....The petitioner was really the servant of the panchayat of Makdone, though in accordance with the statute, his appointment was made by the head of the department of Government.....The appointment was for the punchayat and the mere fact of its being made by a department or an officer of the State Government does not make him the member of the civil service of the state or the holder of a civil post under the state."

and held the petitioner to be an employee of the Makdone Kendra Panchayat.

The disregard for appointing authority as a criterion is reflected in the judgement of Mehrotra, J., in *Audh Narain Singh v. State of Uttar Pradesh.*[2] Even assuming that treasurers were independent contractors and it was they who appointed Tahvildars, His Lordship held the petitioner to be an employee of the state because his salary was disbursed from the state funds and his conditions of service, including appointment, removal, dismissal and leave, were all under the control of the Collector.

But the story has not been the same all over. In *P. N. Sarkar v. State of Bihar,*[3] the petitioner was appointed by the Court of Wards as General Manager of Gidhaur and Dhamua Wards' Estates in the district of Maughyr on a graded salary. The appointment was made by the Board of Revenue with the sanction of the Provincial Government of Bihar. The Board of Revenue dismissed the petitioner without fulfilling the provisions of Article 311 of the Constitution. He moved the High Court for a writ of certiorari. The Government of Bihar claimed that the petitioner was not holding a Civil post under it, but that he was an employee of the Raja and his salary was also paid out of the income of the Gidhaur Wards Estates.

1 A.I.R. 1962 Madh. Prad. 50-54.

2 A.I.R. 1961 All. 515.

3 A.I.R. 1960 Patna, 366.

Petitioner's status, it was urged, was that of a statutory agent of the Court of Wards. Chief Justice Ramaswami, however, rejected the contention of the Government of Bihar. He explained:

> "It is true that the plaintiff had to perform statutory duties and that he had statutory powers under sections 40 and 41 of Act IX of 1879. It does not, however, necessarily follow that the plaintiff was not holding a civil post under the state Government within the meaning of Article 311 of the Constitution.....the appointment of General Manager is made by the Board of Revenue under Act IX of 1879 with the sanction of the state Government.....the Board of Revenue is not a statutory body with a distinct legal personality independent of the Government.....but (is) a name for a body of civil servants under the State Government....."

and held that the petitioner was holding a civil post under the State of Bihar within the meaning of Article 311 of the Constitution.

Of course, where other enquiries lead to the conclusion that a person is a state employee, the presence of authority in the state to appoint, howsoever rudimentary and symbolic that authority may be, has been stressed. In *M. Ramappa v. Sangappa,*[1] the Supreme Court held that Patels and Shanbhogs were holding civil posts under the state because they were officers who were appointed to their respective offices by the Government, eventhough the Government had no option in certain cases but to appoint an heir of the last holder. The Court emphasised that the Patels and Shanbhogs held office by reason of such appointment, their salary was paid out of the Government funds and they performed their duties under the supervision and control of the Government.

In G. D. Rama Rao v. State of Andhra Pradesh[2], the Supreme Court held the office of a village Munsif under the Madras Hereditary Village Office Act, 1895, to be an office under the State. Justice S. K. Das stressed the fact that:

> "The appointment is made by the Collector, emoluments are granted or continued by the State, the Collector has disciplinary powers over the village Munsif including the power to remove,

1 A.I.R. 1958 S. C. 937. See also *Karruppa Udavar v. State of* Madras A.I..R. 1956 Mad. 460, where it was held that a village officer such as the village Karnam, whether he is a hereditary officer or a non-hereditary officer, is a civil servant who holds the post under the State.

2 A.I.R. 1961 S.C. 564.

suspend or dismiss him, the qualifications for appointment can be laid down by the Board of Revenue."[1]

to show that the office was not a private office under a private employer but was an office under the state.

The decision in *Audh Narain Singh v. State of Uttar Pradesh*[2] is significant. It extended the concept of "appointing authority" to include appointments made through servants. The petitioner, a tahvildar, was appointed to his post by a Government Treasurer and worked in the cash department of the Government Treasury. On being dismissed from service, he challenged the order of dismissal, alleging violation of Article 311. The State of Uttar Pradesh, relying on paragraph 1561 of the Treasury Manual,[3] claimed that the petitionor was not an employee of the State. Justice Mehrotra, however, rejected the Government contention. He *inter-alia*, held that Treasurers were government servants holding civil posts under the State,[4] with authority to appoint subordinates, and, relying on *Shivanandan Sharma v. Panjab National Bank Ltd.*[5] wherein the Supreme Court had observed :

> "If a master employs a servant and authorises him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for a cash consideration, the employees thus appointed by the servant would be, equally with the employer, servants of the master".

and ruled that Tahvildars were holding civil posts under the State. In the Letters Patent appeal that followed[6] a Division Bench of the Allahabad High Court agreed with the aforesaid view of Mehrotra, J. After referring to relevant statutory provisions and the form of the bond which a treasurer had to execute, Chief Justice Mootham concluded[7] :

1 Ibid. p.

2 A.I.R. 1957 All. 799.

3 "Tahvildars at sub-treasuries are no longer government servants. They are employed by the treasurer who receives an allowance from the Government to cover their pay and leave salary. The treasurer, however, shall not employ any person as a tahvildar without the approval of the District Officer. The treasurer shall remove a tahvildar or transfer him from one tahsil to another if required by the District Officer to do so on any ground which in the latter's opinion justify such a step."

4 The view, as pointed out later in the text ,was confirmed on appeal. Cf. the dicta of Dhavan, J., in *Balbhaddar Prasad v. Collector of Fatehpur*, A.I.R. 1959, All. 739, where ,on the materials placed before him, he was unable to hold that the Government Treasurer was an employee of the state.

5 A.I.R. 1955 S.C. 404.

6 A.I.R 1961 All. 515.

7 A.I.R. 1961 All. 515. 517-518.

> "The treasurer's appointment and removal rests with the Government. He receives a salary and holds an office. His relationship with the state is not such that he is entrusted with a task which he can perform in the way he likes.....If the tests for distinguishing an independent contractor from a servant.....are applied, the position of a Treasurer must in our opinion be held to be that of a servant and not of an independent contractor. If the treasurer is an employee of the state.....the principle laid down in *Shivanandan Sharma's case* becomes directly applicable".

Thus, even though the petitioner was not directly appointed by the State and paragraph 1561 of the Treasury Manual specifically said that tahvildars were not government servants, he could nevertheless claim to hold a civil post under the state and to have the benefit of Article 311 of the Constitution, because he was appointed by a person who was holding a civil post under the State and who was authorised by the State to appoint tahvildars[1].

It might be emphasised that *P. N. Sarkar v. State of Bihar*[2] while adopting the views expressed in *State of Uttar Pradesh v. Audh Narain Singh, supra*, infact further extended the concept of appointment-by-servant-under-delegated authority. It was applied to a case where the servant was paid salary neither out of state funds nor out of state funds allocated to the state servants authorised to appoint servants, but out of quite independent funds of a third party.

We agree with the decision in *P. N. Sarkar v. State of Bihar, Supra*, both in regard to the emphasis it laid on the appointing and dismissing authority test as also with regard to the extension of the concept of appointing authority, Article 311 of the Constitution aims at curbing arbitrary action in matters of dismissal and such interpretation should be placed on it as would be conducive to the attainment of that objective. Over emphasis on payment of salary test or direction and control test may result in determining master-servant relationship with a degree of precision but would almost inevitably lead to the avoidance of the very object of Article 311. The case of *Mangal Sain, Prem Prakash* and *Roop Singh Devi Singh, Supra* illustrate our point. They create a "veritable legal Alsatia" in which nopotism and spitefulness are permitted reign supreme without

1 Recently, the decision was affirmed by the Supreme Court in *State of Uttar Pradesh v.Audh Narain Singh*, (1964 II. S.C.J. 590.)

2. A.I.R. 1960 Patna, 366.

any remedy for the agrieved. The arbitrary dismissal in those cases could not be challenged, because of the payment of salary test, under Article 311. Further, they cannot be challenged under any other law inforce in the Country. Law of Contracts may provide for compensation for breach of contract against the employer, but the most important relief of reinstatement cannot be granted.

2. The Payment of Salary Test :

The Supreme Court decisions in *M. Ramappa v. Sangappa*[1] and *G. D. Rama Rao v. State of Andhra Pradesh*[2] do not, in view of the fact-situations involved therein, negative the suggestion that the payment of salary test may be all-important. On the other hand, there is no doubt that test proved to be determinative of the issue of master-servant relationship in *Mangal Sain v. State of Punjab*[3] *State of Punjab v. Prem Prakash*[4] and *Roop Singh Devi Singh v. Sanchalak Panchayat and Samaj Seva, Madhya Pradesh.*[5] Reference may here be made to two other cases.

Lachmi v. *Military Secretary To the Governor of Bihar,*[6] emphasizes not only that the state should be the pay-master but also, perhaps in opposition to the *reason de 'artre, of Shivanandan Sharma v. Punjab National Bank,*[7] that the payment should be made directly by the state.

Lachmi and three others were employed as 'Malis' in the garden of Raj Bhawan. Their appointing and dismissing authority was the Military Secretary who exercised the power on behalf of the Governor. Their salaries were paid out of allowances paid to the Governor by the Government. Their work was supervised by the superior staff of the Raj Bhawan. Under these circumstances, they claimed that they were entitled to the constitutional protection guaranteed by Article 311. But, the claim was resisted on the ground that the "Malis" were contingent menials and were paid monthly wages from garden contingency fund. They were employed entirely on a temporary basis and their number was reduced or increased according to requirement. They were not given any uniform or livery nor any badge. Justice Imam responded :

1 A.I.R. 1958 S.C. 937.
2 A.I.R. 1961 S.C. 564.
3 A.I.R. 1952 Punj. 58.
4 A.I.R. 1957 Punj. 219.
5 A.I.R. 1962 Madh. Pra. 50
6 (1955) 34 I.L.R. 312, 421.
7 A.I.R. 1955 S.C. 404.

"It is true that these petitioners were paid from the Government funds, but that, by itself, would not necessarily make them Government servants. By way of an example, it may be stated that the Judges of this Court are permitted to draw Rs. 35 a month in order to pay their malis. In other words, though the Judge appoints the mali, through the Judge the Government pays the mali. In these circumstances, it could not possibly be held that the mali of the Judge is a Government Servant."[1].

and held that petitioners were not holding civil posts under the State.

Bhawani Sahai v. Mr. Syed Naqui Imam[2] emphasises payment of fixed salary. The petitioner, in this case, was appointed as an English Copyist under the provisions of the High Court's General Rules and Circular Orders.[3] On termination of service, he alleged violation of Article 311. The Patna High Court rejected the State contention that the position of a typist or copyist was no better than that of a day labourer, whose services could be dispensed with at the discretion of the employer. But, it nevertheless held that the petitioner was not a member of the civil service of the Union or the State and that he did not hold a "civil post" within the meaning of Article 311 of the Constitution, because according to the rule under which he was appointed, his salary was not fixed.

These cases permit the formulation of a hypothesis that the payment of salary test is exceedingly relevant and that, where the Salary is directly paid out of state funds and is fixed, the test is determinative. However, there are judicial pronouncements which demolish, or atleast cast a doubt upon the validity of, every single assumption constituting the hypothesis.

First : there are cases which hold that, even on payment of fixed remuneration directly out of state funds, a person may not be holding a civil post under the State. In *State of Rajasthan v. Madan Swarup*[4] the petitioner was appointed Government Advocate of the former Bikaner State in the grade of Rs. 400-25-600, for a period of five years. On the merger

1 I.L.R. (1955) Patna 412, 422.
2 I.L.R. (1956) Patna 312.
3 The number of Copyists appointed must not be greater than will admit, under ordinary circumstances, of each vernacular copyist earning atleast Rs. 50 - and of each English Copyist earning at least Rs. 100 per month. If the average earnings fall regularly below this rate, steps should be taken to reduce the establishment.
(Rule 4, Chapter II, Part IV of the High Court's General Rules and circular Orders, Civil, Vol. I.)
4 A.I.R. 1960 Rajasthan 138.

of state, his services were continued by the Rajasthan Government. His services were, however, later terminated in violation of the procedural safeguards guaranteed by Article 311. While rejecting the contention of the petitioner that he was the holder of a civil post under the State, Justice Modi approved of the following observations in the unreported Judgment of the Rajasthan High Court in *Chander Singh v. State of Rajasthan*,[1] wherein the status of public prosecutors had come up for consideration:

> "It is a contradiction in terms for a person to be a holder of a civil post and to continue still as an advocate of this Court. He is no more and no less than any advocate employed by a private person. The only difference is that in this case the Government finds it convenient to employ the same person in all its cases. But, merely because the Government employs the same person in all its cases and has entered into a contract with him to look after their work in a particular district on payment of a certain honorarium, it does not convert the advocate into a member of a civil service or the holder of a civil post,"

and observed:

> "The contracts between the two parties in the present cases were entirely professional contracts and did not involve the relationship of master and servant. I may also point out that the mere circumstance that instead of receiving any separate fees for each case conducted by them, they.....(received)...a monthly honorarium is hardly something which can affect their true position as legal practitioners and convert them into members of a permanent service."

Justice Jagdish Sahay of the Allahabad High Court further rationalised the view that an additional Government Advocate was not holding a civil post under the State in *Prithwinath Chowdhry v. State of Uttar Pradesh*:[2]

> "He was not required under the law to take the permission of the High Court before accepting the post.....which the law would have required him to do had the acceptance of that post amounted to the entering into any service by the petitioner. A person cannot carry on an independent profession and yet be in the regular public service. No doubt that emoluments which were

1 Civil Writ No. 76 of 1956 dated 20-11-1956.

2 A.I.R. 1959 All. 169.

> paid to the petitioner are described as pay or salary. To my mind they are in the nature of fees for professional service rendered."

and, held that the relationship between the Government and the petitioner to be that of a client and a professional man.

Second: *P. N. Sarkar v. State of Bihar*[1] refutes the contention that the salary should necessarily be paid directly out of state funds. Indeed, in this case salary was paid, not out of state funds whether directly or indirectly—but, out of the funds of the Gidhaur Estate. Nevertheless the petitioner was held to be holding a civil post under the State.

Finally: even in the absence of any payment of salary whatsoever, courts have held the existence of master-servant relationship. In *Brojo Gopal Sarkar v. Commissioner of Police*[2] the petitioner was appointed a special constable under Section 12[3] of the Calcutta suburban Police Act, 1866, and Section 23[4] of the said Act vested in him the powers, functions and privileges of a Police Officer. He was discharged, in voilation of the procedural safeguards conferred by Article 311, on the ground that he was not likely to become an efficient member of the Force. Brojo Gopal Sarkar challenged the order of dismissal. The defendants argued, *inter-alia*, that a person not entitled to any pay or remuneration for the services rendered by him and even required to purchase uniform at his own cost, could not be said to be holding a "civil post" within the meaning of Article 311 of the Constitution. But, Justice Bose rejected the contention:

> "It is true that the petitioner does not belong to the cadre of any regular constituted service. His office of a special constable continues, so long as the temporary emergency within the meaning of Section 12 of the Calcutta Police Suburban Act continues. But he is nevertheless holder of a Civil Post."

He explained:

> "It will be a curious position indeed, if a special Police Officer ....remains subject to all the penalties or punishments which can

1 A.I.R. 1960 Patna, 366.

2 59 C.W.N. 628 (1955)

3 Section 12 of the Calcutta suburban Police Act (Bengal Act II of 1866), reads:

> "The Commissioner of Police may of his own authority appoint special police-officers to assist on any temporary emergency."

4 Section 13 of the Act provides:

> "Every police officer, so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties, and shall be amenable to the same penalties and be subordinate to the same authorities as the ordinary officers of Police"

be inflicted on ordinary police officers for remissness or neglect of duty ,but he is deprived of the ordinary privileges and protection which are available to an ordinary police officer, including the privilege or pretection afforded under Article 311 of the Constitution. A removal or dismissal from the office of a special constable may have the effect of casting a slur on the character of the officer concerned or may affect him materially in respect of any other office which he may be holding under the Government or an other employer. It is therefore only reasonable and proper that he should have an opportunity of showing cause against the actions proposed to be taken against him."[1]

and quashed the order of dismissal.

The Direction And Control Test :

The original concept of the tort doctrine required factual existence of direction and control. However, in course of time, the test emphasised a theoretical right to direct and control. Today, Courts freely concede that not only factual existence of direction and control may be irrelevant for the purposes of determining master-servant relationship but also that the theoretical right to direct and control may be non-existent and yet master-servant relationship may be held to exist.

The tort doctrine of direction and control was nevertheless adopted by the Supreme Court of India in determining whether or not a person was a "workman" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947[2] or a "worker" within the meaning of Section 2(l) of the Factories Act, 1948.[3]

Through labour law, and sometimes even independently of it, the direction and control test has invaded the field of constitutional law. The element of direction and control, like a ritual, has been canvassed in nearly all cases that have come up for decision under Article 311 of the Constitution. However, neither arguments of counsels nor judgements of decision-makers reveal either the nature of direction and control or the quantum of such direction and control that is required to establish master-servant relation-

1 (1955) 59 C.E.W.N. 628, 631-633.

2 *Dharanadhara Chemical Works Ltd. v. State of Saurashtra.* (1957) 1 LLJ 477.

3 *Chintaman Rao v. State of Madhya Pradesh,* A.I.R. 1958 S.C. 388.

ship within the meaning of Article 311.[1] Paucity of case-law prevents exhaustive analysis of cases in the field of constitutional law though available decisions clearly indicate the possibility of a similar chaos in this field.

1 Criticising the application of direction and control test to labour cases, Professor Anandjee remarks :

"The Supreme Court has conceded that :

"the nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition."

Reported decisions, however, reveal that even with respect to the same "business" different decision-makers have used different standards. The result is anything but intelligent, coherent, or logical. 'Hamalies' in *Tungabhadra Industries* are 'independent contractors' but 'collies' in Muir Mills Company are 'employees'. Bedi workers, Handloom weavers and Gold-smiths have been variously categorised as 'independent contractors' and 'employees.' Managing salesmen of *Singer Sewing Machine Company,* under identical terms and conditions of employment, are 'independent contractors' according to the Assam and the West Bengal Industrial Tribunals, but 'employees' according to the Behar, Bombay and the Madras Tribunals. One has merely to contrast the decisions in *Panchkari Bedi Factory,* or *Kalicharan Kundu and Janakinath Kundu* with the decision in *Surivakannu Handloom Factory* to 'marvel at the flexibility of the legal intellect so strickingly demonstrated.' The current confusion in the case law warrants a detailed study of the quantitative and qualitative yardsticks of the 'direction and control' test.

In order to constitute master-servant relationship these cases generally agree that the 'direction and control' should not be merely limited to the 'end result' but should extend over 'the manner in which the work is to be done'. There is, however, no agreement over what constitutes 'direction and control'. Some Tribunals are, apparently, of the view that an industrial worker is like a nursing child who must be told, at every step, what to do, what not to do, how to do, and when to do. Others are inclined to treat the worker as an 'adolescent' with some knowledge of know how. To these Tribunals it is enough if the employer has some measure of control ! The third group realizes that the worker may be an 'adult' and factually, there may not be any 'direction and control'. They, accordingly, insist on a 'reservation of the right to control'. Factual existence of control, even if it passes the quantitative standards, does not, however, necessarily imply master-servant relationship. For instance where there is unauthorised assumption of control, or where supervision is in pursuance of statutory obligation, Tribunals have held the relationship to be that of employer-independent contractor. The view that, even in an entrepreneurial dealing, an employer is 'certainly interested in the work as a whole' further minimizes the effect of actual control exercised by the employer.

There is not a single criterion which, by itself and standing alone, either establishes or negatives master-servant relationship. The issue is decided 'on a number of facts, the entire picture of their engagement, method of work, conduct during work, in short, the whole relationship between the parties. Judicial

(b) *Quantitative Measure of Direction and Control:*

Courts have not yet delineated the quantity of direction and control that they would require to establish master-servant relationship within the meaning of Article 311. However, the "nursing child", the "adolescent" and the "adult" are as much present in the civil services as in the factory employment. The spectrum of civil post extends from the warder to the Inspector-General of Prisons, from the ward-bearer to the Inspector-General of Health Services, from the traffic constable to the Inspector General of Police and among others from a poen in the secretariat to the Chief Secretary to the Government. Indeed, the very fact that the salary in the Government serives ranges from rupees fifty or so to over rupees three thousand (and is not limited to a sum of rupees five hundred as in cases covered by labour statutes), itself indicates that the quantum of requisite direction and control cannot be the same for all categories of state employees. It is, therefore, not surprising that the courts have even not attempted to open this pandora's box.

(c) *Qualitative Criteria of Direction and Control:*

Ascertainment of the qualitative criteria of "direction and control" is no less difficult. Distinguishing "independent contractors" from "servants", over a hundred years ago, Justice Crompton observed:

> "The test here is, whether the defendent retained the power of controlling the work."[1]

opinion, however ,is almost unanimous that the fact that a person works at his own residence, or that he is remunerated on piece-rate basis, or that he is described either as an 'independent contractor' or 'servant' is colourless for the determination of his jural status. But where there is absence of control over working hours, or where the workers do not enjoy benefits under the Factories Act, or where workers work in more than one concern, or where they themselves employ assistants, the Industrial Tribunal have evinced a distinct inclination to negative the existence of master-servant relationship. On the other hand, long years of engagement in the same concern, or receipt of bonus has generally been taken to be indicative of the existence of that relationship.

The foregoing reveals the non-conclusive character of leading criteria of the 'direction and control' test. With both, quantitative and qualitative contents, being flexible, it is exceedingly difficult to apply the test with any degree of precision or uniformity."

Anandjee, "Community Regulation of Labour Management Relations in India (1947-57)", A dissertation submitted to the Yale Law School for the degree of Doctor of the Science of Law (1959), unpublished.

1 *Sadler v. Herlock*, 4 E. & B. 570, 577

However, with the passage of time several innovations have been made. First, the direction and control test is now being applied without any reference to the "independent calling" test.[1] Second the direction and control test is now being applied to determine the employment-relationship not of a "common" "ordinary" "labourer", but of a person who is often highly skilled in his profession and exercises a good deal of discretion. Third, the direction and control test now requires the positive proof of control and not the proof of abdication of the control by the employer.

Courts today concede that the right of control should not merely be with respect to the end-result but should extend over "the manner in which the work is to be done"[2]:

> "It has been generally recognised that an employer-employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is accomplished. Conversely, an employer-independent contractor relationship exists where the control is merelylimited to the result to be accomplished and does not apply to the method and manner of the services rendered."[3]

But, in determining what constitutes control over the rendition of work, courts are not now so much concerned with the work-situation itself as with attendant circumstances such as appointing and dismissing authority, the nature of disciplinary control, who pays the remuneration and, among others, questions relating to hours of work and leave. In short, they take into account "the entire picture of engagement." The result is that there is no criteria which can be taken to be determinative of the issue.

Broadly speaking, case-law on the subject may be divided into two categories:

(i) Cases where direction and control was held to be insufficient to establish master-servant relationship within the meaning of Article 311; and

(ii) Cases where direction and control was held to be sufficient to establish such relationship as aforesaid.

We shall discuss them in the order indicated.

1 See, *Langher, v. Pointer*, 5 B & C. 547; *Quarman v. Buruett*, (1840) 6 M. &. W. 499; *Milligan v. Wedge*, (1840) 12 A & E 737; *Rapson vs. Cubitt*. 9 M. &. W. 710: *Allen v. Hayward*, (1840) 7 Q B. 960; *Reedie v. L.N.W. Railway*, (1849) 4 Ex. 244; *Knight v. Fox*, (1850) 5 Ex. 721; *Overton v. Freeman*, (1851) U.C.B. 867.

2 *Dharangdhara Chemical Works Ltd. v. State of Saurastra*, (1957) 1 LLJ 477

3 *In re Morris Steinberg Et. Al*, 22 L.R.R.M. 1201, 1203

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"(*a*) that the Bank of Patiala is owned by and its entire assets are the property of PEPSU;

(*b*) that the control and management of its affairs have been substantially in the hands of the state Government;

(*c*) that before the formation of PEPSU, a Minister of former Patiala State, whether the Finance Minister or the Prime Minister and, at one time, both had charge and control of it, and after that it has been under the charge of the Finance Secretary;

(*d*) that its employees, above certain specified grades of pay, are having the status of gazetted officials, as the gazetted state officers, whose appointments have been in the hands of the State Government and it follows that they can be dismissed by the same authority;

(*e*) that in the beginning it was a department of the State and attempts at its separation from the State administration still left it an integral part of the same; and

(*f*) that after the formation of the PEPSU the Government has, by executive orders, been making changes in its Constitution, and the manner and method of handling and utilisation of its profits"

and held that the Bank was not a separate and independent legal entity but a commercial concern of the PEPSU Government, financed, managed and controlled by the Government. He, accordingly, ruled that the Managing Director of the Bank held a civil post within the meaning of Article 311 of the Constitution.

The High Court of Calcutta held in *Brojo Gopal Sarkar v. Commissioner of Police*[1] that a special police officer who had "the same powers, privileges and protection....(was) liable to perform the same duties....(was) amenable to the same penalties, and (was) subordinate to the same authorities as the ordinary officers of Police"[2] was holding a civil post.

The Indian Court of Wards Act seeks to protect the person and the property of Minors through the appointment of managers and guardians. Section 5 of the Act states:

> "The Board of Revenue shall be the Court of Wards for the territories to which this Act extends"

and Section 20 authorises the Court of Wards to appoint one or more managers to administer the property of the ward. Under these provisions,

1 (1955) 59 C.W.N. 623

2 Section 13 of the Calcutta Suburban Police Act (Bengal Act, II of 1866).

one P. N. Sarkar[1] was appointed the general manager of Gidhaur and Dhamna estate by the Board of Revenue, *acting as Court of Wards*, with the approval of the State Government. He was, however, dismissed for misconduct after a preliminary enquiry but without serving him with the second notice contemplated by Article 311. He, accordingly, challenged the order of dismissal. The State of Bihar denied that P. N. Sarkar was holding a civil post under the State. It argued that the Board of Revenue in appointing the petitioner as the general manager of Gidhaur and Dhamna estate was acting as Court of Wards which was a statutory body. Consequently even though the appointment had been made with the sanction of the Government, P. N. Sarkar was an employee of Gidhaur and Dhamna estate and not of the State of Bihar. However, Chief Justice Ramaswami rejected the contention:

> "It is manifest that the Board of Revenue is not a statutory body with a distinct legal personality independent of the Government. On the contrary, the Board of Revenue is nothing but a name for a body of civil servants under the State Government."

It is submitted that the learned Chief Justice missed the thrust of the argument. The contention was not that the Board of Revenue was an independent statutory body but that the Court of wards was an independent statutory body and to the extent to which the Board of Revenue was acting as Court of Wards, it assumed the status of that statutory body.

In *Audh Narain Singh v. Collector*,[2] Justice Mehrotra of the Allahabad High Court held that a Tahvildar was holding a civil post under the State, *inter-alia*, because his conditions of service, appointment, removal, dismissal and leave were all under the control of the Collector who himself was a government employee[3].

The Supreme Court of India emphasised, in *G. D. Rama Rao v. State of Andhra Pradesh*,[4] that the appointment of a village Munsif under the Madras Hereditary Village Officers Act, 1895 was made by the Collector, emoluments were granted or continued by the State, the disciplinary powers

1 *P. N. Sarkar* v. *State of Bihar* A.I.R. 1960 Pat. 366, 368.

2 A.I.R. (1957) All 779.

3 Cf. *The State of Uttar Pradesh v. Audh Narain Singh*, A.I.R. (1961) All. 515 where on appeal, Mootham, C.J., was of the view that the evidence on record did not conclusively prove that leave and other conditions of service were under the control of the District Officer.

4 A.I.R. (1961) S.C. 564; The same view was taken by the Supreme Court in an earlier case of *M. Ramappa v. Sangappa* A.I.R. 1958 S.C. 937.

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It is submitted that the learned Chief Justice missed the thrust of the argument. The contention was not that the Board of Revenue was an independent statutory body but that the Court of wards was an independent statutory body and to the extent to which the Board of Revenue was acting as Court of Wards, it assumed the status of that statutory body.

In *Audh Narain Singh v. Collector*,[2] Justice Mehrotra of the Allahabad High Court held that a Tahvildar was holding a civil post under the State, *inter-alia*, because his conditions of service, appointment, removal, dismissal and leave were all under the control of the Collector who himself was a government employee[3].

The Supreme Court of India emphasised, in *G. D. Rama Rao v. State of Andhra Pradesh*,[4] that the appointment of a village Munsif under the Madras Hereditary Village Officers Act, 1895 was made by the Collector, emoluments were granted or continued by the State, the disciplinary powers

1 *P. N. Sarkar* v. *State of Bihar* A.I.R. 1960 Pat. 366, 368.

2 A.I.R. (1957) All 779.

3 Cf. *The State of Uttar Pradesh v. Audh Narain Singh*, A.I.R. (1961) All. 515 where on appeal, Mootham, C.J., was of the view that the evidence on record did not conclusively prove that leave and other conditions of service were under the control of the District Officer.

4 A.I.R. (1961) S.C. 564; The same view was taken by the Supreme Court in an earlier case of *M. Ramappa v. Sangappa* A.I.R. 1958 S.C. 937.

including the power to remove, suspend or dismiss were vested in the Collector and the qualifications for appointment were laid down by the Board of Revenue to hold that the office of the aforesid village Munsif was a civil post under the State.

(*d*) *State Enterprises and Direction and Control Test:*

In a recent case[1], Justice P. B. Mukharji remarked:

> "The welfare state or the service state under the present Constitution of India has encouraged a number of public undertakings where the control lies with the state and the Government. Their number, patterns and variety are legion. They do not represent any uniform type. The control is not merely in respect of finance but also of management".

The learned Judge classified various types of state enterprises into the following four main categories:

(i) Government's Departmental Undertakings;

(ii) Statutory Corporations formed by and under special Statutes passed by both Parliament and State Legislatures;

(iii) Government Companies under the Companies Act with special Articles and Memoranda; and

(iv) Non-Government Companies but with Government Control.

We shall be discussing the status of employees of the aforesaid categories of state enterprises in the order indicated above.

(i) *Governments' Departmental Undertakings:*

In this category fall State Railways, Post-offices, Telegraph offices and, among others, State Road Transport undertakings. It is now well-established that employees of State Railway hold civil posts under the Union and are protected under Article 311 of the constitution. Rule 2 of the Railway Services (Conduct) Rules, 1956, which defines the term "Government", is significant:

> 'Government' means, in respect of persons holding posts in the Railway Board, the President; in respect of other gazetted officers, the Railway Board, in respect of non-gazetted staff on Railways, the General Managers; and in respect of the other non-gazetted staff in offices directly under the administrative Control of the Railway Board, the Head of the offices concerned".

1 *M. Verghese v. Union of India*, A.I.R. 1963 Cal. 421, 426.

Courts have held that Railway Rules which contravene the provisions of Article 311 are void and inoperative[1].

Likewise, the employees of the Indian Posts and Telegraphs Department are governed by the Civil Services (Classification, Control and Appeal) Rules.

(ii) *Statutory Corporations:*

Corporations, established by different statutes, are not of the same pattern. "Like flowers in spring, they have grown as variously and profusely and with as little regard for conventional patterns. They are even less susceptible of orderly classification: with quasi-Government bodies, a new species often suggests a new genus[2]. They differ according to their purpose. They are governed by terms and conditions laid down in the creating statute: the nature and extent of governmental control being different in different corporations. Under this category we may place, among others,:

1. The Damodar Valley Corporation[3];
2. The Road Transport Corporations[4];
3. The Reserve Bank of India[5];
4. The State Bank of India[6]; and
5. The Life Insurance Corporation[7].

There is substantial case law regarding the status of the employees of these corporations.

Narayanaswami Naidu v. Krishna Murty[8], a case decided under Article 191(1)(a), is exceedingly instructive. The petitioner-respondent

1 *M. M. Oidwai v. G.G. in Council*, A.I.R. 1953, All. 17, (A sub-permanent way Inspector of Oudh and Tirhut Railway was held to be protected under S. 240 of the Government of India Act 1935). *Union of India v. Someshwar Banerji*, A.I.R. 1954 Cal. 399; The plaintiff was a permanent Bridge inspector under Bengal and Assam Railway. He was removed from service on medical grounds without any opportunity of being heard. Removal was held invalid, being in violation of S. 340 of the 1935 Act).

A.R.S. Choudhary v. Union of India, 60 C.W.N. 933.

Sri Swedesh Bhushan Ghosh v. Chief Commercial Superintendent, Eastern Railway, A.I.R. 1961 Cal. 93, The petitioner was a ticket-collector at Puri. He was removed in violation of Article 311(2) of the Constitution for taking passes on false declarations. The order of removal was quashed.

2 Sir Arthur Street in "British Government since 1918"

3 See, The Damodar Valley Corporation Act, (Act XIV of 1948)

4 See, the Road Transport Corporations Act (Act XXXII of 1950)

5 See, the Reserve Bank of India Act, 1934.

6 See, the State Bank of India Act, 1955.

7 See the Life Insurance Corporation Act, (Act XXXI of 1956)

8 (1958) 1 M.L.J. 367.

here was a junior Inspector in Life Insurance Corporation. His nomination to the Madras State Assembly was rejected on the ground that he was holding an office of profit under the Government of India and was, therefore, disqualified to contest election. He filed an election petition under Section 100(1) of the Representation of the People Act, seeking to set aside the election of the appellant on the ground that his own nomination had been improperly rejected. The appellant argued that even assuming, without conceding, that:

> "....an employee of the Life Insurance Corporation of India did not hold an office of profit under the Government of India....the Regulations made by the Life Insurance Corporation which was a law within the meaning of Article 191(1)(a)....disqualified the petitioner from standing for election".

The Tribunal decided both the points in favour of the petitioner-respondent. Justice Rajagopala Ayyangar, on appeal, agreed with the Tribunal that the petitioner-respondent was not holding an office under the Union. But, disagreeing with the Tribunal, he held that the petitioner-respondent was disqualified to stand for election to the Madras State Assembly under Regulation 29 of the Corporation which prohibited employees of the Corporation from taking "an active part in politics or in any political demonstration or (from standing) for election as member for a Municipal Council, District Board or any Legislating Body" and which constituted a law within the meaning of Article 191(1)(e) of the Constitution.

We are here concerned with the first part of the judgment, namely, that the petitioner-respondent was not holding a civil post under the Union. It will be observed that the Central Government exercises substantial control over the Life Insurance Corporation. To wit, Section 4(1) of the Life Insurance Corporation Act, 1956, empowers the Central Government to determine the constitution of the Corporation[1]. Section 5(1) enjoins the said Government to invest the capital[2]. Under Section 6(1), the Corporation functions subject to the rules made by the Central Government. The Central office of the Corporation, under Section 18(1), is located at a place

1 "The Corporation shall consist of such number of persons, not exceeding fifteen, as the Central Government may think fit to appoint thereto and one of them shall be appointed by the Central Government to be the Chairman thereof".

2 "The original capital of the Corporation shall be five crores of rupees provided by the Central Government.....and the terms and conditions relating to the provision of such capital shall be such as may be determined by the Central Government."

specified by the Central Government. Section 21 binds the Corporation to abide the directions that may be issued by the Central Government[1]. Section 25 provides that the auditors shall be appointed by the Corporation but only with the previous sanction of the Central Government, which Government is also empowered to fix the remuneration to be paid to the auditors. Under Section 27, the Corporation is enjoined to submit an Annual Report, in the prescribed form, to the Central Government, which is required under Section 29, to place the Report before Parliament. Section 37 provides:

> "The sums assured by all policies issued by the Corporation, including any bonuses declared in respect thereof....*shall be guaranteed as to payment in cash by the Central Government*". (Emphasis added).

Section 48 vests substantial rule-making power in the Central Government to carry out the purposes of the Act.

Sri V. K. Tiruvankatachari forcibly argued that the employees of the statutory Corporations, in particular of the Life Insurance Corporation, were holding posts under the Government. He emphasised that:

1. the traditional reasoning stressing independent status of statutory Corporations because of their incorporation failed to take notice of "recent trends in Government administration, particularly in the case of post-war modern welfare states, and that it attached too much importance to form ignoring the substance"[2].
2. "the Government had nationalised the business of the insurance by taking over the assets of companies theretofore transacting life insurance business, had by statute created a monoply in such business, and had created a Corporation for the transaction of what was thereby rendered a state activity"[3].
3. "as the carrying on of the business of insurance involved commercial operations, the department had to be conducted on business and commercial lines, (making the concern subserve the economic needs of the people of the state), and with a

1 "In the discharge of its functions under this Act, the Corporation shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing; and if any question arises whether a direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final".

2 (1958) M.L.J. 367, 369.

3 Ibid., p. 371

policy co-ordinated to the economic purpose and the social objectives which the Government had in view....notwithstanding that in form a new legal entity was created....it was virtually a department of Government"[1].

4. "the Corporation was the servant of the state and the employees of the Corporation were the employees of the State"[2].
5. "incorporation of Government departments was known to the law and that the mere fact of incorporation was not sufficient to deny or negative the incorporated body from being either a department of the Government or a servant of the Government"[3].
6. "the Union and the States had, under the Constitution, a right to carry on business as part of their governmental functions.... If, without any attendant legislation, a business activity was set up by the Government, there could be no doubt that the activity would be governmental in its essence notwithstanding its being also commercial....the existence of legislation would or ought to, make no difference"[4]. and
7. "to hold that an employee of the Life Insurance Corporation did not hold an office of profit would defeat the very purpose of Article 191(1) and would in effect bring in the evils which that Article was intended to obviate....(It) would enable the party in power....to reward their supporters in Parliament with appointments under the Corporation and that the very existence of Parliamentary democracy would be threatened by such unwholesome practices springing up"[5].

However, the brilliant argument of the Advocate-General failed to "pierce the veil of incorporation". Mr. Justice Ayyangar emphasised that under

1 (1958) 1 M.L.J. 367, 372

2 *Ibid.*

3 (1958) 1 M.L.J. 367, 372 ; Reference may be made to *S. Mohan Singh v. Patiala & East Punjab States Union. Patiala*, A.I.R. 1954 PEPSU 136, where the Bank of Patiala was incorporated but it was held that it was a part of the state government. To illustrate the point the example of Post-master General of England was mentioned.

4 (1958) 1 M.L.J. 367, 380-381 ; Mr. Tiruvenkatachari stressed that :

"Legislation.....became necessary for the creation of a body for the management of the Life Insurance Corporation for two reasons : (1) There was an acquisition of the assets of the existing companies which was affected by a process different from the compulsory acquisition under the general acquisition Acts. (2) The Government created for themselves the sole ownership of that business, in other words, they excluded private enterprise from this field"

5 *Ibid.*, 385

sub-section (2) of Section 3 of the Life Insurance Corporation Act, 1956, the Life Insurance Corporation of India was "a body corporate having perpetual succession with a common seal" and was, *prima facie*, independent of the Government. His Lordship traced the development of public Corporations, explained the nature and functions of such Corporations, and delineated the scope and extent of governmental control over their affairs to support his decision.

In the course of his judgement, Mr. Justice Ayyangar indicated the nature of inquiry to be adopted to determine whether or not a statutory corporation was independent of State. He observed :

A. "If the statute in terms answered the question, as it did in the case of the Central Land Board under the Country and Town Planning Act, 1947, the need for any further enquiry is obviated".[1]

B. "But in the absence of such statutory declaration or provision, the intention of Parliament has to be gathered from the provisions of the statute constituting the corporation. These provisions have to be judged in the light of the following :

First : the incorporation of the body though not determinative is of some significance, as an indication by Parliament of its intention to create a legal entity with a personality of its own, distinct from the state ;

Second : the degree of control exercised by the Minister over the functioning of the Corporation is a very relevant factor, a complete dependance on him making it as really a governmental body, while comparative freedom to pursue its administration being treated as an element negativing an intention to constitute it a government agent, this semi-autonomy deriving from the desire to avoid plenary Parliamentary control over the details of its normal administration ;

Third : the degree of dependence of the Corporation on the Government for its financial needs ; (and)

Last : the functional or historical aspect-some of the decisions laying stress on whether the function discharged by the Corporation could really be treated historically as a pure governmental function—one which pertained to sovereignty or whether it was the administration of a matter merely of local or regional concern"[2].

1 *Ibid.*, 374

2 (1958) 1 M.L.J. 367, 374-74

Since the Life Insurance Corporation of India, as we have already seen, was an incorporated body ; the degree of ministerial control did not measure up to His Lordship's standards ; the financial control of the government was limited to the initial payment of rupees five crores to the Corporation, (incidentally, the judgement does not refer to the provision of Section 37 which insured state guarantee for payment of policies and bonus) ; and Life Insurance business was not a traditional activity of the Government, Mr. Justice Ayyangar, relying on *Tamlin v. Hannaford*[2] and *Abdul Shakoor*

2 (1950) 1 K.B. 18.

The facts of the case were that premises No. 2 of Buckland Street, Plymouth belonged to the Great Western Railway Co. The plaintiff was a lessee of the house and the defendant was a sub-tenant of some room therein. During the relevant periods tenants, other than those occupying Crown property, had the protection of the Rent Restriction Acts in force in Engand. On the nationalisation of the Railways, the house became the property of the British Transport Commission according to the Transport Act, 1947. A question, therefore, arose as to whether the house had, on nationalisation, become property of the Crown and was, therefore, outside the scope of the Rent Restrictions Acts.

The Court held that the British Transport Commission was not a servant or agent of the Crown. Its servants were not civil servants and it was as much bound by Acts of Parliament as any other subject of the King. Eventhough, it was a public authority and its purposes were public purposes, it was not a Government department and its powers and functions did not fall within the province of Government.

Lord Denning observed :

"(The Minister) is given powers over this Corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors—the members of the Commission—and fixes their remuneration. They must give him any information he wants; and, lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature, in matters which appears to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers but still we cannot regard the Corporation as being his agent. In the eye of the law, the Corporation is its own master and is answerable as fully as any other person or Corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not crown property."

Commented Davlin, J., in *Bank voor Handel v. Staford*, (1952) All. E.R. 314, 324 :

".....I would respectfully observe that the term 'servant or agent' gives an appearance of precision which may ,on this subject matter, be misleading.Before the days of the Constitutional monarchy, it would have been easy to ascertain who were the Kings' servants by looking in each case to see whether the ordinary incidents of the relationship of master and servant were present. Most of the great officers of state have their origin in the appointment by the King of men who owed to him personally the same duty of obedience that every servant owes to his master. But from the time the king became constitutionally bound to act on the advice of his Ministers, the ordinary master and servant relationship ceased. It is no longer practicable or useful to inquire whether a secretary of state has to do what the king tells him to do. Meticulous devotion to theory might have kept the relationship alive as a legal fiction, but even as a fiction it has been largely ignored and overlaid.....There is, I think uncertainty about what is meant by the Crown and uncertainty about who are its servants or agents. The only thing that is reasonably certain is that service or agency is not in this connection to be ascertained in the ordinary way".

But though the judgement of Davlin, J., was affirmed by House of Lords, L.R. 1954 A.C. 584, Lord Reid disagreed on this point :

"It was suggested by Davlin, J., at one point in his judgment in this case that there is now no such thing as a servant of the Crown in the strict sense. I cannot agree. Ministers are pre-eminently Her Majesty's servants.....a person might find some anomaly in that because by constitutional practice the Sovereign can only act on the advice of a Minister. But no one denies that Ministers come within the category of servants of Crown.....The Crown controls them and directs their activities in a way which to my mind makes the term 'servant' quite appropriate."

v. *Rikhaba Chand*[1], held that the Life Insurance Corporation was an independent body and its employees were not holding office of profit under the Central Government.

In *Bibhuti Bhushan Ghosh v. Damodar Vally Corporation*[2], the petitioner, an Assistant Civl Engineer in the Corporation, claimed to be a person holding a civil post within the meaning of Article 311 of the Constitution.

There is no doubt that the Central Government exercises a good deal of control over the affairs of the Damodar Valley Corporation. Thus, Section 6 of the Act empowers the Central Government to make the appointment of top executive officers.[3] Likewise, Section 11 of the Act authorises the Central Government to mark off the territorial limits of Damodar Valley and area of operation.[4] Further, Section 48 of the Act enjoins the Corporation to abide by the directives issued by the Central Government[5].

1 A.I.R. 1958 S.C. 52.

2 A.I.R. 1953 Cal. 581.

3 "(1) The Secretary and the financial adviser of the Corporation shall be appointed by the Central Government.

(2) The Secretary shall be the Chief Executive Officer of the Corporation."

4 "(1) The Central Government shall, by notification in the official Gazette, specify the limits of the Damodar Valley.

(2) The Central Government may, after consultation with the Provincial Governments, by notification in the Official Gazette, direct that the Corporation shall carry out such functions and exercise such powers in such other area as may be specified therein and the area so specified shall be called the 'area of operation' of the Corporation."

5 "(1) In discharge of its functions the Corporation shall be guided by such instructions on questions of policy as may be given to it by the Central Government.

(2) If any dispute arises between the Central Government and the Corporation as to whether a question is or is not a question of policy, the decision of the Central Government shall be final."

Section 51 vests in the Central Government the authority to remove and suspend members of the Corporation, whether or not appointed by the Central Government.[1] Under Section 56 of the Act all members, officers and servants of the Corporation are deemed to be public servants within the meaning of Section 21 of the Indian Penal Code and Section 59 of the Act prescribes the rule-making power of the Central Government.[2] Section 60 of the Act assigns rule-making power regarding some other matters to the Corporation; but, evenso, it is significant that the Corporation can exercise the power only with the previous sanction of the Central Government.

Nevertheless, Justice Bose emphasised the distinct entity of the Corporation:

> "The different provisions of the Damodar Valley Corporation Act 1948 indicate that the Corporation has a separate and independent existence and is a different entity from the Union or State Government. This Corporation has properties vested in it under the Act, it has its own fund and its functions and duties are defined in the Act"

1 "(1) The Central Government may remove from the Corporation any member who in its poinion:
(a) refuses to act,
(b) has become incapable of acting,
(c) has so abused his position as a member as to render his continuance on the Corporation detrimental to the interest of the public, or
(d) is otherwise unsuitable to continue as member.
"(2) The Central Government may suspend any member pending any enquiry against him."
"(6) If the Corporation fails to carry out its functions or follow the directions issued by the Central Government under this Act, the Central Government shall have the power to remove the Chairman and the members of the Corporation and appoint a Chairman and member in their places."

2 "The Central Government may, by notification in the Official Gazette, make rules to provide for all or any of the following matters, namely:
(1) the salaries and allowances and conditions of serivce of members, the Secretary and the financial adviser;
(2) the function and duties of the financial adviser;
(3) the dams or other works or the installations which may be constructed *without* the approval of the Corporation;
(4) the forms of the budget, the annual report and the annual financial statements and the dates by which copies of the annual financial statements shall be made available to the Participating Governments;
(5) the manner in which the accounts of the Corporation shall be miantained and audited;
(6) the appointment of an Advisory Committee; and
(7) the punishment for breach of any rule made under this Act."

minimised the over-lapping nature of functions:

> "It may be that this Corporation has been set up by the Government for the purpose of discharging certain functions of the Union or the State Governments, but there can be no doubt that it has a separate existence and cannot be considered as a part of the Union or State Government. Just as the Corporation of Calcutta discharges certain duties and functions which are to be performed by the State Government so also certain functions and duties of the Union and the State Governments have been allocated to the Damodar Valley Corporation, but the Corporation performs these duties and functions as a separate entity"

and held that the petitioner was not holding a civil post within the meaning of Article 311 of the Constitution.[1]

The control of the state government over the Calcutta State Transport Corporation is evident from Section 5 of the Road Transport Corporation Act, 1950, which deals with the composition of the Corporations created under the Act.[2] Even so, in *Prafulla Kumar Sen v. Calcutta State Transport Corporation*[3] Justice P. N. Banerjee presumably relying on section 4 of the Act,[4] held that the Corporation was an entity different from the State Government.

The petitioner in *Baleshwar Prasad v. Agent, State Bank of India, Gaya*[5] was acting as head cashier at the time of his removal from service in the Bank. He claimed that he was holding a civil post under the Union within the meaning of Article 311 of the Constitution. He stressed that the Central Government exercised a substantial degree of control over the financial and administrative activities of the Bank under the State Bank

1 The view was reiterated in *Damodar Valley Corporation v. Provat Ray*, 60 C.W.N. 1023 and affirmed in *Ranjit Ghosh v. Damodar Valley Corporation*, A.I.R. 1960 Cal. 549.

2 "Subject to the other provisions of this Act any Corporation appointed by a Provincial Government shall consist of such number of persons as the Provincial Government may think fit to appoint and shall have such rights and privileges and shall exercise such duties and functions as may be specified by or under any Provincial law".

3 A.I.R. 1963 Cal. 116;

4 "Any Corporation appointed by a Provincial Government in pursuance of this Act shall be a body corporate having perpetual succession and a common Seal and may sue and be sued by the name given to it by or under the relevant Provincial law".

5 A.I.R. 1958 Pat. 418; see also *Suprasad Mukherji v. State Bank of India*, A.I.R. 1962 Cal. 72.

of India Act, 1955.[1] However, the Court ignored these elements of control and direction. It was apparently influenced by sub-Section (2) of Section 3,[2] in holding that the State Bank was an independent statutory body and, consequently, the petitioner was not holding a civil post within the meaning of Article 311 of the Constitution.

1 For instance, Proviso to Section 4 of the Act provides:

"the Central Government may increase or reduce the authorised capital as it thinks fit so however that the shares in all cases shall be fully paid up shares of one hundred rupees each".

and, sub-section (3) of Section 5 of the Act lays down:

"no increase in the issued capital beyond twelve crores and fifty lakhs of rupees shall be made.....without the previous sanction of the Central Government."

Section 18 of the Act enjoins the Central Board of the Bank to abide by the directions issued by the Central Government:

"(1) In the discharge of its functions the State Bank shall be guided by such directions in matters of policy involving public interest as the Central Government may, in consultation with the Governor of the Reserve Bank and the Chairman of the State Bank, give to it.

(2) .....if any question arises whether a direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final."

Section 19 of the Act empowers the Central Government to nominate a majority of the members of the Central Board:

"(1) the Central Board shall consist of the following, namely:

(*a*) a chairman and a vice-chairman to be appointed by the Central Government.....

(*b*) not more than two managing directors, if any, appointed by the Central Board with the approval of the Central Government;

(*c*).....

(*d*) eight directors to be nominated by the Central Government .....to represent.....territorial and economic interests.....

(*e*) one director to be nominated by the Central Government."

and Section 24 of the Act authorises the Central Government to remove members nominated by it, though sub-section (6) of section 25 guarantees "an opportunity of showing cause against his removal" to the aforesaid members, Further, under Section 27, 28 and 29 of that Act, the remuneration of the chairman, Vice-Chairman and managing directors are fixed by the Central Board with the approval of the Central Government. Section 49 of the Act empowers the Central Government to make rules:

"(1) The Central Government, in consultation with the Reserve Bank may, by notification in the official Gazette, make rules to carry out the purposes of this Act".

2 "The Reserve Bank, together with such other persons as may from time to time become shareholders in the State Bank in accordance, with the provisions of this Act, shall, so long as they are shareholders in the State Bank, constitute a *body corporate with perpetual succession and a common seal under* the name of the State Bank of India. and shall sue and be sued in that name." (Emphasis added).

Likewise, Courts have held that employees of the Port Commissioners[1] do not hold civil posts under the Union.

(iii) *Government Companies Under Companies Act:*

Section 3(1) of Indian Companies Act, 1956, defines a company to mean:

"a company formed and registered under this Act or an existing company as defined in clause (ii)"

There is no prohibition on government investing money in aforesaid companies. Indeed, the Act recognises the possibility of government investment and declares that any company of which at least fifty one per cent shares are held by government, shall be called government company[2] and makes special provisions prohibiting appointment of managing agents[3], authorising the concerned Government to appoint auditors[4] and enjoining the concerned Government to place the annual and audit report of such companies before the concerned Legislature.[5]

Government holdings exhibit marked variation. Even among Government companies, there is a variation from 51 percent to 100 per cent. The governmental control, other than those under the Act itself, over the companies in which they hold shares is directly in proportion to the percentage of shares they hold, though there are cases where government do not hold any share and yet they exercise control.[6]

We are concerned in this section with government companies which are, paradoxically, registered as private companies[7] under the Indian

1 *Batit Pabhay v. Commissioners for the Port of Calcutta*, A.I.R. 1957 Cal. 720; *Nagendra Kumar Roy v. Commissioners for the Port of Calcutta*, A.I.R. 1955 Cal. 56.

2 Section 2 (18) read with section 617 of the Indian Companies Act.

3 Section 618

4 Section 619

5 Section 619A

6 See, *S. K. Mukherjee v. Chemicals and Allied Products, Export Promotion Council*, A.I.R. 1962 Cal. 10 discussed infra.

7 Sub-Section (iii) of Section 3 defines a private company to mean:

"a company which, by its articles:

(*a*) restricts the right to transfer its shares, if any;

(*b*) limits the number of its members to fifty not including--

(i) persons who are in the employment of the company, and

(ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased; and

(*c*) prohibits any invitation to the public to subscribe for any shares in or debentures of the company"

Commenting on the constitution of the Hindustan Steel Ltd., in *M. Verghese v. Union*

Companies Act and which have been hailed as "a new type of legal creation in company management."

In *Subodh Ranjan Ghosh v. Sindri Fertilisers and Chemicals Ltd.*,[1] the petitioner was appointed in 1948 as a shift enigneer in the Sindri Fertilizer Project by the Ministry of Industry and Supply of the Government of India. In 1951, Sindri Fertilizers and Chemicals Ltd., a private company, was constituted and the assets of the Fertiliser Project were transferred to the new company, but he continued in its employment until 1955 when his services were terminated in violation of the procedural safeguards of Articles 311. He moved the Patna High Court for a writ to quash the order terminating his services. He stressed that the company was completely owned by the Government of India : out of 3,00,000 shares, 2,99,999 shares were in the name of the President of India and the remaining one share was in the name of the Secretary of Production. The management of the company was in the hands of a Board of Directors, who were nominatenated by the President and could be removed by him. Article 110 of the Articles of Association empowered the President "to issue such directives as he may consider necessary in regard to the conduct of the business of the company" and enjoined the directors to abide by and to give "immediate effect to directives so issued". However, the contention of the petitioner that "the company was really a department of the Union Government" was rejected by Ramaswami, C. J. who observed :

> "In the eye of law, the company is its own master and it cannot be regarded as an agent of the Government any more than a company can be regarded as an agent of the shareholders".[2]

The fact that the Asoka Pillar, the emblem of the Government, was used on the stationary and pamphlets issued by the company was not the "conclusive circumstance or even a relevant circumstance for deciding the point at issue". The learned Chief Justice added ;

of India, A.I.R. 1963 Cal. 421. 424, Justice P.B. Mukherji remarked :

> "In this particular case Hindustan Steel Ltd. is a Government company but paradoxically enough it is a Private Limited Company although it is the most public of all the public companies dealing with the most public of all public matters like iron and steel.....But although in Section 13(1) (*a*) of the Companies Act the Word 'Private Limited' are necessary appendix in the designation of all Private Limited Companies, this legal requirement has been dispensed with by a special notification under Section 620 of the Companies Act".

1 A.I.R. 1957 Patna 10.

2 A.I.R. 1957 Patna 10, 14

> "It is true that the ownership, control and management of the company is completely vested in the President of India but I do not think that the Court is entitled, for determination of the question in the present case to pierce the veil of corporate entity and examine the reality beneath"[1]

In *re Hariharan*[2], the inability of the law "to pierce the veil of corporate entity" cost one V. S. Hariharan his job of superintendent of Stores in the Hindustan Shipyard Ltd.[3] Eighty percent capital of the company was subscribed by the Government of India and, out of thirteen directors, the Government was entitled to nominate ten directors.

In *M. Verghese* v. *Union of India*[4], the petitioner was a temporary driver employed under the Durgapur Steel Project, which was under the Hindustan Steel Ltd., a company entirely financed by the Government of India and controlled by the President of India. His services were terminated in violation of the procedural safeguards of Article 311. He contended that "the mere fact that the Government takes a garb of the name of a company cannot alter the essential nature of the service of the employees of the company who are employees of a Government Company", and that "the fiction alone that the company is a legal entity and as such separate from Government does not alter the essential nature of the service of the employees which remains Government serivice."[5]

Mr. Justice P. B. Mukherjee struck a bright note, when he observed :[6]

> "In an appropriate case in future it may be necessary to re-examine and thoroughly consider how far the doctrine of incorporation making the company a legal entity creates a veil that cannot be pierced and tends to prevent service under such a company from

1 Ibid, 15

2 A.I.R. 1963 Cal. 421.

3 Hariharan in this case did not invoke the protection of Article 311. He filed a writ petition for quashing the order terminating his services on the ground that it was in violation of sub-rule 1 of Rule 24 of the Officer's Service Rules of the Hindustan Shipyard Ltd. The petition was, however, dismissed on the technical point that the Hindustan shipyard Ltd. was mot a "person" within the meaning of Article 226. Justice Seshachalpati held that, inspite of substantial governmental control, the Hindustan shipyard Ltd. was a limited liability company, and could "in no sense be called a judicial or quasi-judicial tribunal or public or statutory authority."

4 A.I.R. 1963 Cal. 421.
The case was decided on the ground that since the petitioner held a temporary appointment, his termination did not attract the provisions of Article 311 of the Constitution.

5 A.I.R. 1963 Cal. 421, 425

6 A.I.R. 1963 Cal. 421, 427.

being a serivce under the State within the meaning of Article 311 of the Constitution, specially in such companies like the Hindustan Steel, Ltd., where it is admittedly a completely Government owned company, with all the funds of the capital and all the shares owned by the Government and where the Government is not merely the majority share-holder of 51 percent but also the 100 percent owner of the company".

But, since the petitioner's services could be terminated at any time and Article 311 did not extend its protection to such employees his Lordship had no opportunity to judge the sharpness or otherwise of the law "to pierce the veil of the corporate entity."

(iv) *Non-Government Company But with Government Control:*

Under this category mention may be made of the Chemicals and Allied Products Export Promotion Council. This Council is a limited Company registered under Indian Companies Act, 1956. The memorandum is signed by eight persons, who are associated with the manufacturing of Chemicals and allied products. The object of the company is to support, maintain and increase exports. Some control is exercised by the Central Government which, *inter-alia*, is empowered to appoint four members of the Council and may appoint auditors.

The Calcutta High Court held in *S. K. Mukherjee v. Chemicals and Allied Products, Export Promotion Council,*[1] that the petitioner, who was a stenographer and was removed without being heard, was not protected under Article 311 of the Constitution : the direction and control which the Central Government exercised could not pierce the "iron curtain" of incorporation.

(v) *Is The "Iron-Curtain" Impregnable ?*

We are inclined to think that the concept of independent corporate personality has been over-emphasised and, like the common law test of direction and control, has been indiscriminately extended to cover situations other than those contemplated by the foundation cases. It is, therefore, not surprising that the usefulness of the doctrine has been questioned. In the *Jawahar Mills Ltd., Salem v. Sha Mulchand and Co. Ltd.*[2] Justice Satyanaran Rao, while rejecting the ratio of *Solomon's* case[3], observed :

1 A.I.R. 1962 Cal. 10.

2 (1949) 2 M.L.J. 88, 102; The Supreme Court in *Sha Mulchand* & Co. v. The Jawahar Mills Ltd., (1953). M.L.J. 364, reversed the judgement of the Madras High. Court It may, however, be mentioned that the Supreme Court has not expressed any opinion regarding lifting of the veil of corporate personality.

3 *Solomon v. Solomon & Co. Ltd.*, 1897 A.C. 322

".....It is too late in the day to still adhere to the strict formalism of *Solomon's case* while the facts stare us in the face and the corporate personality is utilised to play a game of hide and seek".

Foreign decisions concede that Courts have the power to "pierce the veil" of legal personality. Notwithstanding the fact that the spirit of *Solomon v. Solomon,* which placed the "iron curtain" between the company and its members, still hovers overeven recent decisions from England,[1] Friedmann observes[2] :

"The result, at least in English law, is inconclusive. Sometimes the strict formalism of Solomon's case prevails, sometimes corporate form is disregarded and the economic purpose of a transaction analysed..'

Generally, Courts have disregarded the corporate fiction in cases where an attempt was made to ascertain the enemy character of the Corporation, or to evade taxes or to violate the provisions of criminal law or to commit fraud. "Thus far it is obvious that a strongly formalistic and rigid interpretation of the corporate form is increasingly giving way to a more sociological and relativist interpretation.."[3]

We submit that courts should not hesitate to lift the veil of statutory corporations and governmental companies registered under the Companies Act in deciding the availability or otherwise of the protection of Article 311 to the employees of the aforesaid corporations and companies. It is anomalous to hold that while employees of Railways and Post Offices are protected under Article 311, employees of the Sindri Fertiliser Ltd., which is completely owned by Government, are not protected. Moreover, if direction and control can pierce the veil of the "real" personality of a human being, we fail to see why it should not pierce the statutory—endowed personality of a corporation ? Is the "iron curtain" that protects the corporation more sacrosanct than the natural personality of a human being ? Adolf. A. Berle remarked[4] :

"Whenever 'Corporate entity' is challenged, the Court looks at the enterprise. Where the enterprise as such would be illegal or against public policy for individuals to conduct, that enterprise is equally illegal when carried out by a Corporation, and the *Corporation is not a protection.....* The nature of the enterprise

1 Gower, Company Law (2nd Edn.) Chap. 10 (1957)

2 "Legal Theory", (4th Edn.) p. 517. (1960)

3 *Ibid*, 523.

4 "The Thoeory of Enterprise Entity", (1947) 47 Columbia Law Review, 343, 354.

determines the result, negativing the Corporate personality or any other form of organisation of that enterprise".

(emphasis added)

We suggest that, if direction and control test is determinative, it is the nature and quantum of direction and control which should determine the applicability of Article 311, not the fact of incorporation.

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