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The Rule of Law and Constitutional Developments

"Government and their policies may change. What constitutes to the stability of the State is its judiciary. A nation may afford to lose its confidence in its King or even in its Parliament but it would be an evil day if it loses its confidence in its judiciary. Amidst the strident clamour of political strife and the tumult of the clash of conflicting classes the Courts of Law remain steadfast and impartial. Only a real and full acceptance of these principles can enable our new born democratic republic to survive."

V.G. Ramachandran: *Administrative Law*, 2nd. Ed., 1984, p. 32

"Eternal vigilance is the price of liberty."

Harold Lasky

"Liberty has never come from the government. Liberty has always come from the subjects of it. The history of liberty is a history of resistance. The history of liberty is a history of limitations of government power, not the increase of it."

Woodrow Wilson

God, give us men. A time like this demands;
Strong minds, great hearts, true faith and ready hands;
Men whom the lust of office does not kill;
Men whom the spoils of office cannot buy;
Men who possess opinions and a will;
Men who have honour: men who will not lie;
Men who can stand before a demagogue and damn his treacherous flatteries without winking;
Tall men, Sun-crowned, who live above the fog;
In public duty and in private thinking.

H.R. Khanna: *Making of India's Constitution* (1981), *in preface (quoting N.A. Palkhivala) p. vi*

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1. The Rule of Law

(a) Legal Concept : Meaning.—The doctrine of rule of law is a legal concept: a mental process contrasted with perception. For example a contract is a legal concept abstracted from various instances of legal relationships which are called Contracts. Consequently a concept is an abstraction from particular things or events forming a general notion. It is a tool of thought which we use to deal with certain situations and its development is guided as much by a desire to do justice in the individual case as by any *a priori* logic which deals with the inherent properties of a concept. Compared with the broadness of a principle or the elasticity of a standard a concept comparatively fixes contours of legal thought.[1]

The development and formulations of concepts and doctrines are the works of judges, not of legislation, which treats particular rules only.

(b) Concept of Rule of Law.—Latin expression for the rule of law is "La Legalite". Rule of Law is quite similar to American expression "due process of Law" which connotes government on principles of law and not of men; law must really rule and that justice should prevail. It means conduct of legal proceedings according to the established principles and rules safeguarding individual and group rights.

This concept of rule of law which embraces within its fold legislation (enacted law i.e. lex) and principles of natural justice (i.e. jus) is so powerful and all pervading that no democratic country could afford to disregard it. It is therefore the sole basis of Administrative-Law-Structure.

(c) Origin.—The concept, it is said, first arose in England in 1215 but even before this period its roots are traced in Roman law when Kourad II, the Holy Roman Emperor[2] by his decree on 18-5-1027 A.D. declared that no lord in his kingdom shall be deprived of his land but *by the laws of his Empire* and by the judgment of his peers. In England King John Lackland in Magna Carta[3] of 1225

1. Walker: *The Oxford Companion to Law*, 1980, 265 : Paton : *A Text-Book of Jurisprudence*, 1964, Ed. 3, 204-06.
2. 1024 to 1039 A.D.
3. Chapter 39.

declared that "No free man shall be taken or arrested or disseised or exiled or in some way destroyed, nor will we go upon him nor will we send for him, except under a *lawful judgment of his equals* and by *the law of the land.* In the reign of Henry III[4] this was reformulated by Coke[5] and in 1354[6] it was declared that "no man shall be put out of land or tenemant, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought to answer without due process of law."[7] The concept thus originated in middle ages on the basis of the belief that there were certain fundamental laws which could not be altered even by government. This connects this concept with that of natural law. In England, the seventeenth century witnessed a struggle between the King, Court and Parliament and the Court and Parliament emerged victorious which gave impetus to this concept which had its origin in the idea propounded by Sir Edward Coke that the king cannot be above law; he is subject to the power of law and to God both.

In 1885 the idea of rule of law became synonymous with due process of law in America as it encompassed within itself the broad principles of law enacted or natural, kind or cruel, just or unjust. The word "due" signifies fair and adequate procedure according to principles of natural justice. This idea has now become so firm, so fundamental and universally accepted that men cannot change it.

In America by the Fifth[8] and the Fourteenth[9] amendment of its Constitution the concept of rule of law was adopted and extended to state actions. It means the same as the law of the land.

(d) Definition.—The concept, though of utmost importance defies any definition. It is unclear in its connotations. It is so fluid that it is likely that everyone may understand and express it in his own way.

(e) Dicey's Concept.—As expounded by Dicey, in Law of the Constitution it means "that all men are equal before the law, whether they be officials or not (except the Queen), so that the acts of officials in carrying out the behests of the Executive Government are cognisable by the ordinary Courts and judged by the ordinary law, as including any special powers, privileges and exemptions attributed to the Crown by the prerogative or statute. So far as offences are concerned, an offender will not be punished except for a breach of the ordinary law, and in the ordinary Courts: There is here an absence of the exercise of arbitrary power. Further the fundamental rights of citizens are rooted in the ordinary law, and not upon any special "constitutional guarantees".[10] Dicey attributed the following three meanings to the doctrine of Rule of Law : (1) Supremacy of law; (2) Equality before law; and (3) Predominance of legal spirit.

The concept of Rule of Law thus includes the following three ideas :

(*i*) Absence of arbitrary power;

(*ii*) Equality before Law; and

4. Oct. 28, 1216 to Nov. 16. 1272.
5. Henry's Charter by Coke.
6. Reign of Edward III 1327 to 1377.
7. 23 Edn. III C-3.
8. In 1791.
9. In 1867.
10. Burke: *Osborn's Concise Law Dictionary*, Ed. 6, 1976, 297.

(*iii*) Protection of Individual Liberties.

(f) Implications and importance.—"The concept implies that the ruler must also be subject to law. It is the subordination of all authorities, legislative, executive, judicial and other to certain principles which would generally be accepted as characteristic of law, such as the ideas of the fundamental principles of justice, moral principles, fairness and due process. It implies respect for the supreme value and dignity of the individual.[11]"

No civilised country on this earth can run its government without law. Law rests on subjection of force to reason and "reason is the life of the law, nay, the common law itself is nothing else but reason".[12] It thus boils down that the law must rule and the rule of law is opposed to governmental arbitrariness and tyranny of power. Finally the government itself is subject to law, it cannot disregard it or reformulate it to suit its own purpose. The concept and its enforcement therefore acts as a brake on governmental actions lest they become barbaric and anarchic. Government intervention in many daily activities of the citizens is on the increase creating a possibility of arbitrariness in state action. The Rule of Law is useful, therefore, as a counter to this situation.[13] A democratic legislature, as suggested by Justice Bhagwati, may "make laws, but its power should not be unfettered, and that there should be an independent judiciary to protect the citizen against the excesses of executive and legislative power".[14]

(g) Dicey's concept criticised.—The concept advocated by Dicey has been criticised from various angles. According to Dicey—(1) there should be no interference by the government, and (2) that the courts were supreme in determination of disputes since everyone was equal before law. But the first meaning was much less true than in Dicey's time and the second meaning has become untrue since Dicey's time. Passing of the Crown Proceedings Act, 1947 (abolishing Crown privileges in litigation), curtailment of liberties, establishment of Tribunals for deciding issues other than the common law, the rise of trade unionism which coerced the English Parliament into granting them immunity from the ordinary rules of law (e.g. immunity from liability in tort) and the increase in lawlessness and the decline in trust in the courts are the proofs in support of the above. Besides, his conception about the third meaning was wholly wrong as it was based on the idea of sovereignty of the Parliament. The Judiciary in England according to him was only the interpreter of the Act and nothing more. This was so because in England there are no constitutional guarantees as they exist in the written Constitutions of India and America.

However, as observed by Dr. Jain, in substance, Dicey's emphasis, on the whole, in his enunciation of Rule of Law is on the absence of arbitrary power, equality before law and legal protection to certain basic human rights, and these ideas remain relevant and significant in every democratic country. It is also true that dictated by needs of practical government, a number of exceptions have been engrafted on these ideas in modern democratic countries, e.g. there is a universal growth of broad

11. Walker: *Oxford Companion to Law*, 1980, 1093.
12. Institutes: *Commentary upon Littleton*. First Institute 8, 97-b.
13. Jain: *Indian Constitutional Law*. Ed. 4, 1987, 5.
14. *Bachan Singh*, (1982) 3 SCC 24, quoted in Jain.

discretionary powers of the administration; administrative tribunals have grown; the institution of preventive detention has become the normal feature in many democratic countries. Nevertheless, the basic ideas are worth preserving and promoting.[15]

(h) Latest Improvements by I.L.I.

The concept of Rule of Law, which arose and developed in Anglo-American countries and which is the backbone of a welfare State has been accepted in India under Parts III and IV of the Constitution.

In order to achieve the objectives outlined in the Constitution of India: Justice, Liberty, Equality and Fraternity: Rule of Law is the only instrument available. Otherwise people will not be able to control and curb monopolistic power and madness of political parties which "drains vitality from the rule of law".[16] As expressed by the Law Commission of India in its Fourteenth Report, where there is no effective opposition in legislature, the legislature and the executive inevitably tend to be intolerant and sometimes even contemptuous of the decisions of the Courts interpreting laws in a manner which they consider to be opposed to their policies. This tendency to trample ruthlessly upon the rights of the individuals with the aid of a steamroller majority is to be deprecated. And this nation has experienced this truth.

As Ramachandran in his treatise[17] says, "Government and their policies may change. What constitutes to the stability of the state is its judiciary. Amidst the strident clamour of political strife and the tumult of the clash of conflicting classes the Courts of Law remain steadfast and impartial. Only a real and full acceptance of these principles can enable our new born democratic republic to survive."

The Indian Law Institute gives the following meaning[18] to Rule of Law.

(*a*) Powers of executive may be increased only in unavoidable circumstances.

(*b*) Discretionary powers of the executive should be limited.

(*c*) Power handed over to executive is not its inherent power, it is granted to it by law.

(*d*) Administrative decisions should be subject to judicial review.

(*e*) There should be proper publicity in case of delegated legislation and it should be subject to control of Parliament and Judiciary.

(*f*) Principles of natural justice should be observed by administration while decisions are taken.

The Supreme Court of India explaining this concept said in *Soma Raj*[19] "The absence of arbitrary power is the first postulate of Rule of Law upon which our constitutional edifice is based. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antethesis of Rule of Law."

In *Om Prakash case*[20] the Supreme Court observed that in the present context, it means, "the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the

15. Indian Constitutional Law, Ed. 4, 1987, 5.
16. *Ram Prasad Narayan Sahi* v. *State of Bihar*, AIR 1953 SC 215, 217.
17. *Administrative Law*, 2nd Edn., 1984, 32.
18. See *Administrative Law* by Takwani, Ch. 1.
19. *Soma Raj* v. *State of Haryana*, (1990) 2 SCC 653.
20. Chief Settlement Commr., *Punjab* v. *Om Prakash*, AIR 1969 SC 33 : (1968) 3 SCR 655.

standard will be set aside if the aggrieved person brings the appropriate action in the competent court."

2. Indian Position prior to Constitution

(a) Hindu Period.— According to Dharma Shastra in ancient India what prevailed was the "Rule of Dharma". The idea of Rule of Dharma is wider in its connotations than what we understand by the expression rule of law or due process of law. Dharma included within its ambit not only what was just and legal but what was moral and natural as understood in Neeti Shashtras. Before the origin of the state (Rajya) and creation of Kingship there was an ideal stateless society but on account of influential, powerful and avaricious people, wickedness increased. Fall in standard of behaviour gave birth to a system of legal proceedings for enforcement of rights and punishment of wrongs. And the King who was appointed did this task. From this arose Rajyadharma, that is, the law laying down the powers, duties and responsibilities of the king. Side by side courts with their powers, functions and procedure as part of Dharma were established. And this marks the commencement of legal and constitutional history of India.[21]

The word Dharma in Ancient India touched wide varieties of topics and its essence has been described in various works.[22] The importance of Dharma was so much that it sustained the life of an individual, the society and the world. That is why Manu forcefully stressed its scrupulous observance.[23] As noted by Rama Jois[24] when the word Dharma is used in context of the word Rajya it only means law and Dharmarajya means Rule of Law and not religion or a theocratic state. In the context of legal and constitutional history Dharma means Rajya Dharma evolved by the Society through ages and *it is binding both on the King, the ruler, and the people, the ruled.* That the King was not the fountain of law and was not above law depicts that law was held in great esteem. Herein lie embedded the germs of Administrative law in Ancient India. Rules of natural justice similar to those existing at present were in vogue at that time as expressed by Vasishta. They were:[25] (*a*) no decision should be taken singly; (*b*) the business of deciding disputes should be transacted—(*i*) on the dias, (*ii*) in the open, (*iii*) without bias, (*iv*) by giving reasons for findings, and (*v*) after hearing both the parties.

(b) Muslim Period.—Like the Hindus, the Muslims never regarded the King as the fountain of law, he was only the fountain of justice. This was so because the underlying fundamental concept under Muslim law, like the Hindu law was that the authority of the king was subordinate to that of law. As noted[26] the Mughal Kings also observed the principles of natural justice, heard the parties in open court (darbar), gave fair and open hearing and pronounced judgment in open court. The fair justice (*adal insaf*) of Jehangir is remembered by people like the one administered by Hindu Chola King M.N. Kondacho who allowed a bell of justice to be rung by anyone who wanted justice. Thus the precedent started in Ancient India by

21. M. Rama Jois: *Legal & Constitutional History of India*, Vol. 1, 8-9.
22. See *Mahabharat*, Shanti Parv 60, 7-8 ; *Manu Smriti*, X-63 ; *Yagnavalkye*, 1-122 ; *Vasishta*, 26-4 ; *Vishnu* 13-17.
23. Manu: VIII-15 : Dharma *protects* those who protect it. Those who destroy Dharma get *destroyed*.
24. *Legal & Constitutional History of India*, 8-9.
25. S. Vardachari. J.: *Hindu Judicial System*, (1946), 52.
26. Ramachandran: *Administrative Law*, 1984 Edn., Ch. 1.

Hindu Kings was continued by the Mughals. However we may not put this practice of deciding disputes on par with that of the administrative tribunal because the comparison is out of place.

(c) **British Period.**—The British entered India as traders and slowly and surreptitiously by their shrewdness, craft and cunning they held sway over this vast country. With their advent the rule of Dharma withered. They discharged only the primary task of governing the people and collecting revenues neglecting their essential duties. However the British gave to this country a system of administration of justice which deserves our respect. The history of their efforts to evolve a system has been given step by step in previous chapters. From 1600 onwards to 1858 no significant achievements are noticed except preparation of some codes and digests. The struggle for independence in 1857 by the Indians opened the eyes of the British and made them act for the good government in India. Law Commissions were appointed and some important Acts were enacted. Between 1834 and 1939 certain measures by enacting Acts and Regulations in the field of public safety,[27] public health,[28] public morality,[29] transport,[30] labour[31] and economy[32] were taken. As a result of these enactments, administrative licences were granted, trade, transport and traffic in explosives were regulated and this made the executive powerful which did give rise to disputes and injustice for remedying which some device was needed which was absent.

The period of 1939 to 1947 was a period when the Second World War started which lasted up to 1945. During this period the Defence of India Act and the Rules were enacted. These gave vast unguided and absolute powers to the executive which interfered with the life, liberty and property of individuals. Uncontrollable power of the executive without safeguards for the interests of the affected persons marked an acute need for its control.

3. Post-Independence Period

India won independence on 15th August, 1947 and it became a welfare State (Sovereign Democratic Republic) having a mixed economy. The Indian nation on 26th January, 1950 gave a Constitution to itself. It undertook a vast programme of social and economic upliftment and reconstruction. National planning was resorted to. The Government of India, since it was wedded to the objectives of *Justice* — social, economic and political; *Equality* — of status and opportunity; *Liberty* — of thought, expression, belief, faith and worship; and *Fraternity* — assuring the dignity of the individual and the unity of the nation, passed a number of legislations[33] in

27. The Sarais Act, 1867 ; The Arms Act, 1878 ; The Indian Explosives Act, 1884 ; The Indian Petroleum Act, 1899 ; The Indian Boilers Act, 1923.
28. The Opium Act, 1878 ; The Epidemic Diseases Act, 1897 ; The Dangerous Drugs Act, 1930 ; The Indian Medical Council Act, 1933.
29. The Dramatic Public Performances Act, 1876 ; The Cinematograph Act, 1918.
30. The Stage Carriage Act, 1961; The Bombay Port Trust Act, 1879. The Indian Motor Vehicles Act, 1914 ; The Railways Acts of 1854, 1879, 1890 ; The Indian Merchant Shipping Act, 1923.
31. The Indian Trade Disputes Act, 1929 ; The Workmen's Compensation Act, 1923 ; The Payment of Wages Act, 1936 ; The Factories Act, 1934 ; The Indian Mines Act, 1923.
32. The Indian Tariff Act, 1934 ; The Indian Companies Act, 1913 ; The Cotton Transport Act, 1923 ; The Reserve Bank of India Act, 1934 ; The Tea Control Act, 1938 ; The Indian Rubber Control Act, 1933 ; The Tariff Commission Act, 1951.
33. Industrial Disputes Act, 1947 ; Minimum Wages Act, 1948 ; Factories Act, 1948 ; Employees' State

this direction. The various Acts depict the social security measures, fixation of minimum rates of wages, regulation of private enterprises so as to avoid disparities of income and wealth, to have a planned industrialisation, decentralisation of economic power and curbing of anti-social activities. This progress is all towards establishing a Rule of Law.

(a) Affirmation of Rule of Law by the Constitution.—The Constitution embodies within itself the concept of Rule of Law as could be observed from the following provisions.

The Preamble declares the ideals of justice, liberty, equality and fraternity. Part III enshrines fundamental rights of citizens. *Right to Equality* (Articles 14 to 18), *Right to seven freedoms* (i.e. freedom of speech, expression, association, movement, residence, property, profession and personal liberty (Articles 19 to 22), *Right against exploitation* (Articles 23-24), *Right to freedom of religion* (Articles 25 to 28), *Cultural and Educational rights* (Articles 29-30), *Right to enforce fundamental rights* (Articles 32 and 226). These fundamental rights are a restriction on the law-making power of the Indian Parliament. Of course reasonable restrictions can be imposed on these rights in times of emergency. Part IV of the Constitution regarding Directive Principles of State Policy, guarantees protection of the same liberties to an individual considered as a part of the community and the State can pass measures strengthening them. In the words of Ramachandran these are like the antidotes against the fungus that may be created by too much insistence on fundamental rights. Against breach of fundamental rights High Court or Supreme Court under Article 226 or 32 could be moved. Part III of the Constitution indicates the present basis of the Rule of Law while Part IV is the pointer for the future law.

In India the Constitution is supreme and the three organs of government — legislature, executive and judiciary are subordinate to it. Every organ is independent in its field and has to act within the framework of the Constitution. However the doctrine of judicial review has been accepted by the Constitution so that mala fide actions of the executive and ultra vires actions of the legislature could be challenged. This is provided by Articles 32 and 226 whereunder an individual wronged can move the High Court or the Supreme Court for the purpose. The President of the Indian Republic has to take an oath to preserve, protect and defend the Constitution. No person is to be deprived of his life and personal liberty *except according to procedure established by law* or of his property *save by the authority of law* (Articles 21 and 31). No person is above the law, not even the Government. The maxim that "*The King can do no wrong*" has not been made applicable to India because there is *equality before the law* and *equal protection of laws* (Article 14). Doctrine of equality is also maintained in public service (Article 16). The Union and the State Governments can be sued in ordinary Courts like individuals for breach of contracts and for committing wrongs (torts) against an individual. This, then affirms the Rule of Law by the Constitution of India. The Fourteenth Report of the Law Commission of India rightly projects this position.[34]

Insurance Act, 1948 ; Industrial (Development & Regulation) Act, 1951 ; Requisitioning & Acquisition of Immovable Property Act, 1952 ; Essential Commodities Act, 1955 ; Companies Act, 1956 ; Maternity Benefit Act, 1961 ; Payment of Bonus Act, 1965 ; Banking Companies (Acquisition & Transfer of Undertakings) Act, 1969 ; Equal Remuneration Act, 1976 ; Urban Land (Ceiling & Regulation) Act, 1976 ; Bidi Workers' Welfare Fund Act, 1976 etc.

34. See Ramachandran : *Administrative Law*, 1984, 11, quoting from (1958) 14th Report, 671.

There is a large scale delegation of legislative and judicial power to administrative authorities which extend their tentacles into social, economic and political domain and interfere with the actions of the individuals, companies and other corporate and non-corporate bodies[35]. For the purpose of national planning the executive possesses wide powers in respect of land ceiling, control of basic industries, taxation and mobilisation of labour etc. Amidst these circumstances one should be soon disillusioned about the fact that individual liberty can be protected only by traditional doctrines laid down in high sounding words. If we pause to look and think, we find some demonic statutes like the Preventive Detention Act, or Maintenance of Internal Security Act, 1971 (MISA), National Security Act, 1980 (NASA) and the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) passed by the Parliament which encroach upon the liberty of citizens.

Though the President and Governor under Articles 53 and 154 are to act in accordance with the Constitution, this alone by itself cannot protect and save the doctrine of rule of law. It is the people and people alone whose constant vigilance would save the rule of law. Moreover, since the fundamental rights of citizens flow from the Constitution, it would be by zealously guarding those rights by the judiciary by interpretation to save the rule of law, that can aid the firm establishment of the concept in India. And that is what is done by the Judiciary in India as would be evident from some landmark cases that follow this short discussion.

(b) Landmark Decisions.—The central and the most characteristic feature of our Constitution is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent Court.[36] This basic truism has been affirmed by the Supreme Court of India as and when it had the opportunity to do so.

(*i*) **Kesavananda Bharati**[37].—In this case Kesavananda filed a writ on 21-3-1970, under Article 32 to the Supreme Court for enforcement of his fundamental rights under Articles 25, 26, 14 and 19(1)(*f*), for declaring the Kerala Law Reforms (Amendment) Act, 1969 as ultra vires and challenged the validity of the Constitutional Amendment Act, 1971, passed after he filed his writ. The 24th Amendment Act was passed with a view to supersede the majority decision of the Supreme Court in *Golaknath's case*.

It was once canvassed in this case[38] that the fundamental rights could not be taken away or abridged even by a constitutional amendment. *Kesavananda's* case overruled this decision. The court observed that the objectives specified in the Preamble contain the basic structure of the Constitution and that cannot be amended in exercise of the power under Article 368. (This theory of basic structure was exploded by the 42nd Amendment Act of 1976 but as it stands today the Supreme Court adheres to the doctrine of basic structure[39] as was observed in *Minerva Mills*

35. Ramaswamy J. in (1958-59) 1 J.I.L.I. 31-32.
36. *Chief Settlement Commissioner, Punjab* v. *Om Prakash*, AIR 1969 SC 33.
37. *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 : AIR 1973 SC 1461.
38. *Golaknath* v. *State of Punjab*, AIR 1967 SC 1641.
39. Some of the basic structures identified in this case (were and) are: (i) Supremacy of the Constitution; (ii) Federal structure; (iii) Democratic system of the Government; (iv) Equality and personal liberty

case.[40] However the fundamental rights may be amended according to the procedure laid down in Article 368).

It was laid down that there is no disharmony between the fundamental rights and the directive principles. They are supplements of one another to bring about a social revolution and to establish a social welfare State. Any of the fundamental rights may be abrogated or overriden for enabling the State to achieve the goal of the Directives. The court has a responsibility to interpret the Constitution so as to ensure the achievement of the goal abovesaid. The mandate addressed in Article 37 is not only to the legislature but to the judiciary too. Judicial review is the basic feature of the Constitution and it cannot be taken away by amendment in law. This judgment thus stresses the need for fundamental rights, the importance of Directives and Supreme Court's responsibility in carrying out the same by suitably interpreting them and the need for judicial review. Our goal in framing the Constitution is to lay down the form of *political democracy* and to lay down that our ideal is *economic democracy*. All these point to the existence of rule of law in this country.

(*ii*) **Indira Nehru v. Raj Narain**[41].—In this case election of Shrimati Indira Nehru as a Member of Parliament from Rae Bareilly constituency was challenged by Raj Narain on account of various irregularities practised by her and on her behalf in her election. The Allahabad High Court by its judgment on 12-6-1975 declared her election to be void and disqualified her for six years for election. Shrimati Gandhi preferred an appeal to the Supreme Court. Raj Narain also had made a counter appeal to Supreme Court to the extent that the Allahabad High Court judgment was against him. While the appeal was pending disposal, an emergency under Article 352 of the Constitution was declared (on 25th June, 1975) by the government and immediately after this by the 39th Amendment to the Constitution. Mrs. Gandhi's election was validated. By amending Article 71 the Parliament took away Supreme Court's jurisdiction to decide disputes regarding election of a President or a Vice-President and vested it in a separate body to be formed. This ex parte decision was without following judicial procedure, was autocratic and rendered the Supreme Court meaningless. On and after August 10, 1976 the Janta Government headed by Morarji Desai did away with this anti-democratic step of replacing the highest judicial tribunal by a non-judicial body. By 44th Amendment the jurisdiction of the Supreme Court was restored. Thus even a Constitutional amendment may be void if it excludes a matter from judicial review. This reiterates the rule of law.

(*iii*) **The Habeas Corpus case**.—The case of *A.D.M., Jabalpur* v. *Shivakant Shukla*[42] is known as the *Habeas Corpus case*. On June 25, 1975, as a result of internal disturbances, emergency was proclaimed and seven freedoms under Article 19 stood suspended. Many leaders were arrested under MISA. Writ petitions by writ of Habeas Corpus were filed in a number of High Courts. On June 27, 1975, the President (Fakhruddin Ali Ahmed) issued under Article 359, an order, suspending

of individual citizens and dignity of individual as following from fundamental rights; (v) Powers of judicial review; and (vi) Distribution of sovereign power between the Legislature, Executive and Judiciary. For discussion see Ch. 18 (supra) para 4.

40. (1980) 3 SCC 625.

41. 1975 Supp SCC 1.

42. (1976) 2 SCC 521.

enforcement of the Articles 14, 21 and 22. The question before the Court was whether the right to personal liberty could be enforced in a Court of law since it was suspended. Could it be ignored, trampled upon and curtailed? And whether there is a Rule of Law apart from Article 21 for which the Court should stand as the guardian of liberty of citizens. The state argued that since the enforcement of the Article 21 was suspended the petitions were to be dismissed outright. Various High Courts rejected this argument and the Government of India filed an appeal to the Supreme Court which was heard by a bench of five judges: Ray, C.J., Khanna, Beg, Chandrachud and Bhagwati, JJ.

The Supreme Court by a majority of four to one held that even if a person is detained without following the law by which he is detained or if the executive exercises the power mala fide the Court cannot set him free. Thus judicial protection against illegal arrest and detention would be zero and petitioners did not have any standing to approach the Court. In the words of the Court itself, which answered the question, "whether there was any "rule of law" in India apart from Article 21," in negative[43].

It was only Mr. Justice Khanna who sounded a very powerful note of dissent with the majority view. He observed: "Rule of law is the antithesis of arbitrariness. It is accepted in all civilised societies. It has come to be regarded as a mark of a free society. It seems to maintain a balance between the opposite notions of individual liberty and public order". Going further he said that "Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning.... As observed by Friedmann in *Law in a Changing Society*, absence of rule of law would nevertheless be absence of rule of law even though it is brought about by a law to repeal all laws."[44]

The observations of Khanna, J. thus affirm the Rule of Law and describe it in a striking manner. The concept of Rule of Law has been affirmed and reiterated by the Supreme Court of India in subsequent cases.[45]

(iv) **Maneka Gandhi** v. **Regional Passport Officer**[46] (*A new approach*).—In this case the petitioner's passport was impounded by the authorities without giving reasons. In the interest of the general public no reasons could be supplied, they replied. The petitioner challenged this on grounds of illegality, equality clause of the Constitution and on absence of opportunity to be heard. The Court held that the procedure prescribed to impound the passport must be reasonable, fair and just and not arbitrary, fanciful or oppressive. It was argued that although there are no positive words in the Statute requiring that the party shall be heard, yet the justice of Common law will supply the omission of the legislature. Thus even in an administrative

43. This was the majority decision. The majority consisted of Ray C. J. and Beg, Chandrachud and Bhagwati JJ.
For a bitterly severe criticism of this majority view see—H.M. Seervai : Habeas Corpus Case : Emergency and Future Safeguards, 1977.

44. (1976) 2 SCC 521, paras 525-536, 575, 593.

45. *Soma Raj* v. *State of Haryana*, Supra.

46. (1978) 1 SCC 248.

proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable. The powers assumed and exercised by the government were therefore excessive and suffered from the vice of "over-breadth". Section 10(3)(*c*) of the Passport Act, 1967 was held ultra vires since it provided impounding without procedure. This case thus strengthens the rule of law concept with reference to personal liberty and right to freedom of movement by injecting the principles of natural justice because, as it is, natural justice cannot be fitted into rigid moulds.[47]

(*v*) **S.P. Gupta** v. **Union of India**.—Similarly "The Right to Know" has become an integral part of the citizen's right in our democracy. As held in *S.P. Gupta* v. *Union of India*[48] "No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government".

(*vi*) **Minerva Mills Ltd.** v. **Union of India (Power to amend the Constitution)**[49].—The petitioner in this case challenged the validity of some provisions of Sick Textile Undertakings (Nationalisation) Act as well as the constitutionality of the 39th Amendment Act of the Constitution which inserted the impugned Nationalisation Act as Entry 105 in the Ninth Schedule of the Constitution. The Supreme Court held that Article 368 does not enable the Parliament to alter the basic structure or framework of the Constitution. Parliament's power to amend the Constitution is limited and under the exercise of that limited power it cannot enhance or enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution... *the donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one*. The newly inserted Clauses (4) and (5) of Article 368 were therefore held to be unconstitutional. The decision thus fortifies the idea of the rule of law.

"Fundamental rights" constitute the ark[50] of the Constitution". The Court remarked that the nature and quality of the 42nd Amendment is such that it virtually tears away the heart of basic fundamental freedoms. "Three Articles of our Constitution and only three stand between the heaven of freedom, into which Tagore wanted his country to awake, and the abyss of unrestrained power. They are Articles 14, 19 and 21."[51]

(*vii*) **A.S. Rao** v. **State of A.P.** (*The de facto doctrine*).—In *Achanti Sreenivasa Rao*[52] a question was raised whether the judgments rendered by the judges whose appointments were quashed by the Supreme Court were valid. If void they were required to be set aside (*see* Articles 233, 233-A and 21 of the Constitution). The court held that they were valid. "A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit

47. See also *A.K. Gopalan* v. *State of Madras*, 1950 SCR 88 ; *Kharak Singh* v. *State of U.P.*, (1964) 1 SCR 332 ; *Satwant Singh* v. *A.P.O.*, AIR 1967 SC 1836.
48. 1982 Supp SCC 87.
49. (1980) 3 SCC 625.
50. *Kesavananda Bharati*, (1973) 4 SCC 225.
51. (1980) 3 SCC 625.
52. *A.S. Srinivasa Rao* v. *State of A.P.*, (1981) 3 SCC 133.

unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine borne of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule based on public policy: the defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge, except as a judge".

The Court further observed that "the de facto doctrine is not a stranger to the Constitution or to the Parliament and the Legislatures of the States". It saves such acts. Articles 71(2) of the Constitution and Section 107(2) of the Representation of the People Act, 1951 are the instances of the application of this doctrine. It therefore cannot be said that the procedure prescribed by law has not been followed.[53]

(*viii*) **All Saints High School case** (*Autonomy of Minority Institution*).—In *All Saints High School* v. *Government of Andhra Pradesh*[54] the question was whether certain provisions of the Andhra Pradesh Recognised Private Educational Institutions Control Act offend against the fundamental right conferred on minorities by Article 30(1). The Court held that the fundamental right enshrined in Article 30(1) was completely in consonance with the secular nature of democracy and Directives in the Constitution. However this right does not give a free licence for maladministration so as to defeat the avowed object of the Article. The State has the right to take measures to promote the abovesaid objects but under cover of such measures the State etc. cannot destroy the autonomy, personality and individuality of the institution and render the right of the administration of the management nugatory or illusory. The concept of rule of law thus marches on in the welfare State.

(*ix*) **Air India case** (*Excessive delegation*).—It is true that a discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to decide matters of moment without laying down any guidelines or principles or norms the power has to be struck down as being violative of Article 14. Accordingly in *Air India case*[55] Regulations 46 and 47 of Air India Employees' Service Regulations and Regulation 12 of the Indian Airlines (Flying Crew) Service Regulations were challenged as being discriminatory and ultra vires. The court struck down the provisions as invalid, the same being violative of Article 14 and suffering from the vice of excessive delegation of powers.

(*x*) **M.C. Mehta** v. **Union of India**[56] (*Strict Liability of Enterprise*).—In this case important questions of law relating to the interpretation of Articles 21 and 32 arose. There was a gas leak in one of the plants and a writ petition was filed against Shriram Foods and Fertiliser Industries in order to obtain a direction for closure of the various units on the ground that they were hazardous to the community and therefore the same should be removed from their present place and relocated in another place where they would not be dangerous to the health and safety of the people. A three-judge bench gave its judgment on 17-2-1986 and allowed the industry to continue. However, during the pendency of the petition there was an

53. (1980) 2 SCC 478 ; *A.S. Srinivasa Rao* v. *State of A.P.*, (1981) 3 SCC 133.
54. AIR 1980 SC 1042.
55. *Air India* v. *Nargesh Meerza*, (1981) 4 SCC 335.
56. (1987) 1 SCC 395; see also (1986) 2 SCC 176 & (1986) 2 SCC 325.

escape of oleum gas on 4-12-1985 from one of the units and an application for award of compensation to the victims of oleum gas was filed. The following questions were considered:

(1) Whether the application for compensation such as this could be made at this stage, (2) Its scope and ambit under Article 32, (3) Whether a letter could be entertained as a writ, (4) Scope and ambit of epistolary jurisdiction and the locus standi in Public Interest Litigation, (5) The doctrine of State Action in America and its application in India, (6) The forward march of human rights and the development of the new Human Right Jurisprudence, and (7) Strict liability of the enterprise engaged in hazardous activities.

Question number 1 and 3 were answered in affirmative; regarding number 5 the court replied in negative but accepted that the American expositions may provide a useful guide. After the historic case of *Rudal Sah*[57] this is another historic case wherein the court awarded compensation for enforcement of the fundamental right of life under Article 21. The Court expressed that throughout the last few years the horizon of Article 12 had been expanded. Its purpose is to inject respect for human rights and social conscience in our corporate structure. The apprehensions of the defendants that this would give a death blow to private entrepreneurial activity are out of place. Similarly in *Ramanna Shetty* v. *Indian Airport Authority*[58] such apprehensions were raised but the public sector corporations were brought within the scope and ambit of Article 12 and were subjected to the discipline of fundamental rights. It is through creative interpretation and bold innovation that the human rights jurisprudence have been developed in our country to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded apprehensions expressed by status quoists. However, the question whether private corporation like Shriram would fall within the scope of Article 12 was left open by the Court.[59]

Regarding the liability of the corporation for its hazardous activities if harm results, the enterprise is strictly and absolutely liable to compensate all the affected persons and the exceptions under the rule in *Rylands* v. *Fletcher*[60] would not operate here. The measure of compensation the Court held, must be co-related to the magnitude and capacity of the enterprise because it should have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable.

The judgment of the case is certainly an indicator of the trend of liberalisation of locus standi rules. Moreover the process has set in for making the fundamental rights under Article 21 applicable to private sector, with the assistance of public policy doctrine under the law of contracts[61] and by including the right to livelihood in the right to life.[62] In the opinion of Dr. Jain the fundamental rights should be

57. (1983) 4 SCC 141 : AIR 1983 SC 1086 (*affirmed*).
58. (1979) 3 SCC 489.
59. For deciding whether a body is a state within the meaning of Article 12, test has been laid down in *Som Prakash Rekhi* v. *Union of India*, (1981) 1 SCC 449. See also *Dr. P.C. Jain* v. *Ind. Insti. of Technology, Bombay*, (1987) 4 Reports (Del) 381 wherein the said institute was held to be a state instrumentality and hence a statutory authority under Art. 12.
60. (1868) LR 3 HL 330.
61. *Central Inland Water Board case*, (1986) 3 SCC 156.
62. *Olga Tellis case*, (1985) 3 SCC 545.

enforced not only against the State but also against a citizen, or a person or a private sector so as to lay a firm foundation of human rights. We cannot permit private corporations and the multitude of citizens and person collectively and individually to flagrantly disregard and violate the spirit of the constitutional provisions and flourish as an imperium in imperie.[63]

(*xi*) **Central Inland Water Transport Corporation Ltd.** v. **Brojo Nath**[64] (*Service clause held void*).—In *West Bengal State Electricity Board*[65] the Supreme Court struck down a service regulation providing that a permanent employee's services may be terminated by serving three months' notice or on payment of a salary for the corresponding period in lieu thereof. The provision was held violative of Article 14 and was held void. It was a naked hire and fire rule viciously discriminating. The Supreme Court, as it seems, has thought it fit to banish such a rule altogether and very recently in *Central Inland W.T. Corporation case* it has held that not only is such a clause violative of Article 14 but also void under Section 23 of the Indian Contract Act. Being wholly against right and reason, it is wholly unconscionable and against public interest and public policy. The rule of law thus marches onward.

(*xii*) **Shah Bano case**

(*xiii*) ***Mary Roy* v. *State of Kerala***

(*xiv*) **National Anthem case—see infra para 4 at (ix) for details.**—See also "Rule of Law" heading in Supreme Court Yearly Digest, 1994, p. 660, and the following cases in the footnote.[66]

4. Recent Developments

Amongst the new areas of legal development the main movements regarding government liability for gross breach of fundamental rights, liability for return of seized property, liability for performance of promises; the Social Action Litigation, Lok Adalats and Legal Aid Programmes; The Consumer Protection Movement and environmental control measures and the move towards a Common Civil Code are worth mentioning.

(*i*) **Government Liability for gross breach of Fundamental Rights: Compensation cases.**—In an article by the late Shri S.N. Jain, Director, Indian Law Institute it was submitted that everyone who successfully obtains a writ of habeas corpus, a hoarder, a blackmarketeer, a smuggler or an anti-social element would be able to assert a claim for compensation by way of damages for deprivation of his personal liberty by the functionaries of the State, who appear to have acted either in excess of authority or whose action was found not to be lawful.

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63. Dr. D.C. Jain: *Case analysis, Article section*, (1987) 14 Reports 289-91.

64. (1986) 3 SCC 156.

65. (1985) 3 SCC 116.

66. Supreme Court, *Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441 (on appointment of Judges of the S.C. and the H.Cs.) ; *Food Corporation of India* v. *Kamdhenu Cattle Feed Industries*. (1993) 1 SCC 71 (on principle of non-arbitrariness and rule of law) ; *D.K. Yadav* v. *J.M.A. Industries Ltd.*, (1993) 3 SCC 259 (on principles of natural justice) ; *Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746 (on rights of prisoners and under trials and compensation) ; *Vinay Chandra Mishra*, (1995) 2 SCC 584 (Contempt of Court).

This very aspect surfaced in *Sebastin M. Hongray* v. *Union of India*[67]. An officer attached to the Baptist Church and a Headmaster, in this case, were taken away by Army Authorities for questioning and since then they were found missing. In a writ of habeas corpus the Authorities failed to produce them and also failed to offer any rational explanation for their disappearance. There was thus a violation of Article 21 of the Constitution (deprivation of personal liberty and life) and a contempt of court in not obeying the writ. The Supreme Court therefore ordered that the wife of each of the persons be paid rupees one lakh by the Union of India. Violation of personal liberation and unlawful detention compensated for the idea of awarding compensation for violation of fundamental rights was invented and carried to new dimensions first in case of *Rudal Sah* v. *State of Bihar*[68]. Finding that detention (14 years) of the petitioner after his acquittal by a court of competent jurisdiction was wholly unjustified, the Supreme Court awarded Rs. 35,000/- to Rudal Sah as compensation. In the opinion of the Court this was one of the telling ways in which gross violation of that right could reasonably be prevented and due compliance with the mandate of Article 21 secured. This bold and breakthrough-from-the-past-judgment was still carried further in *Bhim Singh* v. *State of J.K.*[69], where the Court awarded Rs. 50,000/- as compensation for a five-day detention of MLA for preventing him from attending the assembly session. Similarly court has awarded compensation in cases of death in police custody, rape on domestic working women and tribal woman while in police custody and death of an army officer in mysterious circumstances. It has thus upheld the rule of law.[70]

(*ii*) **Liability of the Government in Contract and Tort.**—As said before the maxim that "*The King can do no wrong*" is inapplicable in India, because its existence and application is quite contrary to the Rule of Law.[71] Here the Union and the States are legal persons and can be sued for breach of contract and for committing a tort. They can file suits and proceedings can be filed against them.[72]

Prior to coming into force of the Constitution of India, the Britishers ruled this country. Britishers carried trade with India through the East India Company until the East India Company was abolished and the Crown assumed direct responsibility of the Government of India in 1858.

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67. (1984) 3 SCC 82.
68. (1983) 4 SCC 141.
69. (1985) 4 SCC 677.
70. *Nilbati Behra* v. *State of Orissa*, (1993) 2 SCC 746 (death in Police custody ; rule of sovereign immunity not applicable): *Delhi Domestic Working Women's Forum* v. *Union of India*, (1995) 1 SCC 14 (rape of domestic working women) ; *P. Rathinam* v. *State of Gujarat*, (1994) SCC (Cri) 1163, (rape of tribal women in police custody, interim compensation Rs. 50,000 granted) : *Sawinder Singh Grover, Re*, Death of 1994 SCC (Cri) 1464 (custodial death & compensation) ; *Arvinder Singh Bagga* v. *St. of U.P.*, (Police atrocities,—Compensation) ; *Charanjit Kaur (Smt.)* v. *Union of India*, (1994) 2 SCC 1 (Death of Army Officer).
71. In England, wherefrom this maxim originated, the Crown Proceedings Act, 1947, has now reduced King's position to that of an ordinary litigant. *See* Garner, Administrative law. 1985, 199.
72. *State of Rajasthan* v. *Vidyavati*. AIR 1962 SC 933 : 1962 Supp (2) SCR 741 citing *Bank of Bengal* v. *East India Co.*, (1831) 1 Bign. Rep. 120 (Co. liable to pay interest) ; *Moodalay* v. *Morton*, (1875) 1 Bro CC 469 : 28 ER 1245 (Co. subject to the jurisdiction of the municipal Courts in all matters and proceedings undertaken by them as private trading company.) ; Basu : Administrative Law. 1986, 344. See also *Jain Laxmi Salt Works case*, (1994) 4 SCC 1 and *N. Nagendra Rao case*, (1994) 6 SCC 205 wherein the Government's liability in tort is explained rejecting the outdated doctrine of sovereign immunity.

Previous cases show that the East India Company was liable in law as a private person. The Supreme Court of Calcutta rightly observed and reiterated the above proposition in *Steam Navigation Co. case*[73], that there is a great and clear distinction between *acts done in the Exercise of what are usually termed sovereign powers* and *acts done in the conduct of the undertakings which might be carried on by private individuals* without having such powers delegated to them.[74]

Articles 294, 298, 299 and 300 of the Constitution of India recognise this liability.

For contracts the Government would be liable if (1) it is *in writing*[75], (2) executed *on behalf*[76] of the government by a person authorised in this behalf, and (3) is *expressed* in the name of the President or the Governor, as the case may be.[77] If this is not so, that is, if this mandatory requirements are not complied with, the contract would not be legal and cannot be enforced. *Fernandez* v. *State of Karnataka*[78] supports this proposition.

The Government is also made liable under the principles of *quasi-contract* or restitution. Putting the situation in a simple way the Government can be made liable under Section 70 of the Indian Contract Act on the *principle of Unjust Enrichment*.[79] In *B.K. Mondal case*[80] the court observed that if it was held that Section 70 was inapplicable in regard to dealings where officers of government enter into contract orally or without strictly complying with the provisions of Section 175 (3) of the Act, it would lead to extremely unreasonable consequences and may even hamper if not wholly bring to a standstill the efficient working of the Government from day to day. The Court said that in such cases the State Government, like ordinary citizens is subject to provisions of Section 70. If it has accepted the things delivered to it or enjoyed the work done for it, such acceptance and enjoyment would afford a valid basis for compensation against it. Section 70 should be read as supplementing the provisions of Section 175(3) of the Act.[81]

In the area of contractual rights the Supreme Court will entertain petitions if arbitrariness, absence of fair play and breach of the principles of natural justice on the part of the government is proved. *Mahabir Auto Stores*[82] is a case on the point. Here, the corporation suddenly and abruptly stopped supply of materials to the applicant which was clearly against the principles of natural justice. Relying on

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73. *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State*, (1861) 5 Bom HCR App. I : Bourke AOC 166.
74. *Id.*, 14 ; *Kasturilal* v. *State of U. P.*, AIR 1965 SC 1039 : (1965) 1 SCR 375.
75. *Karamshi* v. *State of Bombay*, AIR 1964 SCD 4 : (1964) 4 SCR 984, *Union of India* v. *Ralia Ram*, AIR 1963 SC 1685 : (1964) 3 SCR 164 ; *Union of India* v. *N.K.(P) Ltd.*, (1973) 3 SCC 874 : AIR 1972 SC 915 ; *Davecos Garments Factory* v. *State of Rajasthan*, (1970) 3 SCC 874 : AIR 1971 SC 141.
76. *Bhikh Raj Jaipuria* v. *Union of India*, (1962) 2 SCR 880 : AIR 1962 SC 113 ; *State of Bihar* v. *Karam Chand Thapar*, AIR 1962 SC 110 : (1962) 1 SCR 827.
77. *Karamshi Jetha* v. *State of Bombay*, supra; *Davecos Garments Factory*, supra.
78. (1990) 2 SCC 488 : AIR 1990 SC 958 ; *Ram Gajadhar* v. *State of U.P.*, (1990) 2 SCC 486.
79. *Tinsukhia Electric Supply Co.* v. *State of Assam*, AIR 1990 SC 123 : (1989) 3 SCC 709 ; *Mahabir Kishore* v. *State of M.P.*, (1989) 4 SCC 1 : AIR 1990 SC 313 ; *West Bengal* v. *B.K. Mondal*, AIR 1962 SC 779 : (1962) Supp (1) SCR 876.
80. Supra.
81. *B.K. Mondal case*, 789 of AIR. See also *Chatturbhuj Vithaldas* v. *Moreshwar Parasram*, AIR 1954 SC 236 : 1954 SCR 817 (Observations of Bose, J. to this effect).
82. *Mahabir Auto Stores* v. *Indian Oil Corporation*, (1990) 3 SCC 752 : AIR 1990 SC 1031.

Radhakrishna Agarwal[83] the Supreme Court observed that every action of the State organ must be informed by reason and if not in appropriate cases it may be questioned, as in this case, as arbitrary and may be struck down because it does not meet the test of Article 14.

These and other cases[84] go to show that the law had brought the State activity in contractual matters also within the purview of judicial review. This is but logical. This position holds good in grant of Government largesse also.[85]

So far as tortious liability is concerned the State had been held to be vicariously liable for the tortious acts of its servants. It stands on the footing of two well-known doctrines : (*i*) *Respondeat Superior*, and (*ii*) *Qui facit per alium facit per se*.

Social convenience and rough justice are the basis of vicarious liability. *The Pennisular and Oriental Steam Navigation Co.* v. *Secretary of State*[86] is the first leading case in this area. The Court in this case made the Secretary of State liable for damages occasioned by the negligence of the servants in the service of the government. The negligence should however, be such as would render an ordinary employer liable.[87]

One may say that the classification of acts of the Secretary of the State into sovereign and non-sovereign acts was a misnomer and the meaning given to it in *Hari Bhanji case* was a correct one. *Hari Bhanji*[88] case was decided by the Madras High Court which held that the immunity of the East India Company extended only to what are known as "Acts of State" strictly so called. The distinction based on sovereign and non-sovereign functions was not well founded. Consequently, in *Vidyawati*[89] it was held that the immunity based on the English law had no validity in India. After independence there was no justification in principle or in public interest that the State should not be held liable vicariously for the tortious acts of its servants. Thus the feudalistic notion of Justice that the "King can do no wrong" was rejected by the Indian Supreme Court.

This development of law was unfortunately hindered by *Kasturilal*[90] case but subsequent cases[91] point to a stand consistent with holding the State liable vicariously for the acts of its servants. The Law Commission of India, in its First Report[92] has recommended to remove this distinction which has no justification.

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83. *Radhakrishna Agarwal* v. *State of Bihar*, (1977) 3 SCC 457 : AIR 1977 SC 1496. See also *E.P. Royappa* v. *State of T.N.* (1974) 4 SCC 3 ; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 ; *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722 ; *R.D. Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489 ; *Dwarkadas Marfatia & Sons* v. *Board of Trustees of the Port of Bombay*, (1989) 3 SCC 293.
84. *Shrilekha Vidyarthi* v. *State of U.P.*, (1990) 3 SCC 752 (per Mukherjee J.); *Shrilekha Vidyarthi* v. *State of U. P.*, (1991) 1 SCC 212.
85. *R.D. Shetty case*, supra.
86. (1861) 5 Bom HCR App I.
87. *Id*. at 14.
88. *Secretary of State* v. *Hari Bhauji*, (1882) ILR 5 Mad 273.
89. *State of Rajasthan* v. *Vidyawati*, AIR 1962 SC 933 : 1962 Supp 2 SCR 741.
90. *Kasturilal* v. *State of U. P.*, AIR 1965 SC 1039 : (1965) 1 SCR 375.
91. *State of Gujarat* v. *Memon Mahomed Haji Hasan*, AIR 1967, SC 1885 : (1967) 3 SCR 938 ; *Smt. Basavva Patil* v. *State of Mysore*, (1977) 4 SCC 350 : AIR 1977 SC 1749.
92. 1956, Liability of the State in tort.

The recent judicial trend is undoubtedly in holding the State liable in regard to tortious acts committed by its servants.[1] These acts include police brutalities, wrongful arrest and detention, keeping the undertrials in jail for long periods, committing assault and or beating prisoners etc. In suitable cases compensation has been awarded. Thus the test developed, in words of Professor Friedmann is :

"The proper test is not an impracticable distinction between governmental and non-governmental function, but the nature and form of the activity in question".[2]

The State is also bound by the statute, as decided in *Corporation of Calcutta (II) case*.[3] The Common law rule in England that the State is not bound by a statute is not only archaic but incongruous at any rate after January 26, 1950.[4]

(*iii*) **Doctrine of Promissory Estoppel : Traditional view given up.**—A marked development is reached in case of the doctrine of promissory estoppel.

Estoppel is a concept of Common Law. Equity Courts developed it. It is a principle which precludes a party from alleging or proving in legal proceedings that a fact is otherwise than it has appeared to be from the circumstances. Doctrine of estoppel came to be expressed in two forms called "promissory estoppel" and "proprietory estoppel". The doctrine of "promissory estoppel" is known by various names: promissory estoppel, equitable estoppel, quasi estoppel, or estoppel in pais(by conduct).[5]

Often described as a rule of evidence, more correctly it is a principle of law[6] and justice here prevails over truth.

Originated in equity, first pressed into service by Calcutta High Court[7] in 1880 and thereafter by the Supreme Court of India in 1951 and onwards till today the doctrine has been applied in various cases and fields, especially in the field of public law. Its starting point may be considered to be the *case of Collector of Bombay* v. *Municipal Corpn. of the City of Bombay*[8].

The essential elements of this doctrine are :

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1. *Saheli* v. *Police Commr., Delhi*, (1990) 1 SCC 422 : AIR 1990 SC 513 ; *PUDR* v. *Police Commr., Delhi*, (1989) 4 SCC 730 ; *Pushpa Thakur* v. *Union of India*. AIR 1986 SC 1199 ; *Kadra Pahadiya* v. *State of Bihar*, (1983) 2 SCC 104 : AIR 1982 SC 1167 ; *Khatri* v. *State of Bihar*, (1981) 1 SCC 627 : AIR 1981 SC 928 ; *Sebastin* v. *Union of India*, (1984) 3 SCC 82 : AIR 1984 SC 1026 ; *Rudal Shah* v. *State of Bihar*, (1983) 4 SCC 141 : AIR 1983 SC 1086 ; *State of Haryana* v. *Darshana Devi*, (1979) 2 SCC 236 : AIR 1979 SC 855 ; *Rajasthan State Rd. Transport Corpn.* v. *Narain Shankar*, (1980) 2 SCC 180 : AIR 1980 SC 695 ; *Union of India* v. *Mohd. Nazim*, (1980) 1 SCC 284 : AIR 1980 SC 431 ; *Shyam Sunder* v. *State of Rajasthan*, (1974) 1 SCC 690 : AIR 1974 SC 890 ; *Veena Shethi* v. *State of Bihar*, (1982) 2 SCC 583 : AIR 1983 SC 339 ; *Sheela Barse* v. *Union of India*, (1985) 1 SCC 41 : AIR 1984 SC 1995 ; *Sheela Barse* v. *Union of India*, (1986) 3 SCC 596 : AIR 1986 SC 1773 ; *PUDR* v. *State of Bihar*, (1987) 1 SCC 265 : AIR 1987 SC 355 ; *Hussainara Khatoon* v. *State of Bihar*, (1980) 1 SCC 81 : AIR 1979 SC 1360 ; *Sunil Batra (II)* v. *Delhi Admn.*, (1980) 3 SCC 488 : AIR 1980 SC 1579 : (1980) 2 SCR 557 ; *Munna* v. *State of U. P.*, (1981) 3 SCC 671 : AIR 1981 SC 939.
2. Friedmann : *Law & Social Change*, 273.
3. *Supdt. and Remembrancer of Legal Affairs, W. B.* v. *Corporation of Calcutta (II)*, AIR 1967 SC 997 : (1967) 2 SCR 170.
4. *Director of Rationing* v. *Corporation of Calcutta(I)*, AIR 1960 SC 1355 : (1961) 1 SCR 158.
5. For details see Gandhi B. M. : *Equity, Trusts and Specific Relief*, 2nd Edn., 1993, 45 to 52.
6. *Express Newspaper Pvt. Ltd.* v. *Union of India*, (1986) 1 SCC 133.
7. *Ganges Mfg. Co.* v. *Sourujmull*, ILR (1880) 5 Cal 669.
8. AIR 1951 SC 469 : 1952 SCR 43 : 54 Bom LR 122.

(1) There must be representation by one party before another;[9] (2) The other party must rely thereon[10]; and (3) must act to his detriment relying upon the representation.[11]

After *Motilal Sugar case* the principal has been extended to various fields in order to do justice.[12]

Overruling *Jit Ram case*[13], *Motilal Sugar*[14] put the law of promissory estoppel on sound basis, establishing that the application of the principle is a necessary instrument in the hands of the court to control arbitrary exercise of discretion by government departments. The *Godfrey Philips case*[15] bears great importance for it not only applied the doctrine but reiterated that *besides a weapon of defence it is a weapon of offence*. It is now *not only a shield but a sword too*. The narrow and technical approach to the doctrine which was encouraged by its rather misleading nomenclature is now cast off and the doctrine has now full play. Its powerful exponent was, Bhagwati J.(as he then was).[16] The doctrine is a significant judicial contribution towards the rule of law.[17]

(*iv*) **New Enforcement Direction : The Ratlam Municipality case**[18].—The dynamic approach is also seen in the *Ratlam Municipality case* wherein the Supreme Court did not accept defence of the municipality that it had no money to chalk out a plan to remove a public nuisance. The Court observed that the dynamics of the

9. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U. P.*, (1979) 2 SCC 409, 424.
10. *D.R. Kohli* v. *Atul Products Ltd.*, (1985) 2 SCC 77 ; *Delhi Cloth & Gen. Mills Co. Ltd.* v. *Rajasthan S.E. Bd.*, (1986) 2 SCC 431.
11. *Satish Sabharwal* v. *State of Maharashtra*, (1986) 2 SCC 362.
12. *Century Spinning and Mfg. Co. Ltd.* v. *Ulhasnagar Municipal Council*, (1970) 1 SCC 582 (applied to municipality) ; *Bhim Singh* v. *State of Haryana*, (1981) 2 SCC 673 (to executive functions of the State) ; *Kothari Oil Products Co.* ; *Rajkot* v. *Govt. of Gujarat*, AIR 1982 Guj 107 (to administrative directions and orders) ; *Hardwarilal* v. *G.D. Tapase*, AIR 1982 P&H 439 (to universities) ; *Atam Nagar Co-op. House Bldg. Society Ltd.*, v. *State of Punjab*, AIR 1979 P&H 196 (to a trust) ; *Rama Nath Pillai* v. *State of Kerala*, (1973) 2 SCC 650 (where there is manifest injustice) ; *Gujarat State Financial Corporation* v. *Lotus Hotels Pvt. Ltd.*, (1983) 3 SCC 379 (to financial corporation) ; *Satish Sabharwal* v. *State of Maharashtra*, (1986) 2 SCC 362 (applied to a land case, compensation and interest on investment) ; *Garments International Pvt. Ltd.* v. *Union of India*, AIR 1991 Kant 52 (applied in expert assistance scheme announced by the Central Government) ; *Surya Narain Yadav* v. *Bihar State Electricity Board*, (1985) 2 SCC 38 (in case of service jurisprudence) ; *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369 (in case of charging excise duty on secondary packing) ; *Express Newspapers Pvt. Ltd.* v. *Union of India*, (1986) 1 SCC 133 (decision taken by Minister of previous government binds the successor government : area of Administrative Law) ; *Sureshlal*, (1983) 2 SCC 445 to education) ; *Delhi Cloth & Gen. Mills* v. *Union of India*, (1988) 1 SCC 86 (to Railway department) ; *Tara Singh* v. *Kehar Singh*, (1989) Supp SCC 316 : AIR 1989 SC 1426 (Grant of Land) ; *Vij Resins (P) Ltd.* v. *State of J. & K.*; (1989) 3 SCC 115 (setting up of industry) ; *Ashok Chand* v. *Uni. of Jodhpur*, (1989) 1 SCC 399 (Admission granted by mistake) ; *State of M. P.* v. *Orient Paper Mills*, (1990) 1 SCC 176 (Payment of electricity duty) ; *Asstt. Commr. of C. T.* v. *Dharmendra Trdg. Co.*, (1988) 3 SCC 570 ; *Pine Chemicals Ltd.* v. *Assessing Authority*, (1992) 2 SCC 83 ; *Theatre Sangmesh* v. *Entertainment Tax Dy. Commr., Kurnool*, AIR 1993 AP 137 (Principle does not apply) ; *Miss Rita* v. *Behrampur Uni.*, AIR 1993 Ori 27 Education — Benefit of the principle extended in peculiar circumstances) ; *Tilak Chitra Mandal* v. *State of U. P.*, AIR 1993 All 30 (Principle where not applicable) ; *A. J. Joy* v. *Govt. of Tamil Nadu*, AIR 1993 Mad 282 (principle does not apply to change of government policy made in larger public interest).
13. *Jit Ram Shiv Kumar* v. *State of Haryana*, (1981) 1 SCC 11.
14. Supra.
15. Supra.
16. Supra, at 442-43.
17. *Home Secretary, U. T. of Chandigarh* v. *Darshjit Singh Grewal*, (1993) 4 SCC 25 (Education).
18. 1980 Supp SCC 598.

jurisprudential process has a "*new enforcement*" direction[19] not merely through some of the provisions of CrPC[20] as here but also through activated tort consciousness. Similarly in *L.R. Koolwal*[21] it had been reiterated by court that sanitation and clearing of public streets are the primary duties of a municipality which its bound to perform. In carrying out these duties paucity of funds or staff is no ground for its non-performance.

(*v*) **Public Interest Litigation**.—From what has gone before and from the landmark cases which are but samples, it would be easy to perceive that the Courts are moulding their interpretation for the protection of fundamental rights of citizens by establishment of the Rule of Law which is the backbone to a democratic system.

The Supreme Court and High Courts treat letters from citizens as writ and try to give speedy justice. It is also called Social Action Litigation (SAL). The heart of the SAL proceedings in the words of Dr. Upendra Baxi is rather "that gross violation of fundamental rights that has actually occurred in the exercise of state powers, either by commission (repression) or omission (lawless disregard of statutory or constitutionally imposed duties). The facts relied upon initially by the SAL petitioner, in most cases, are as stated in the Press. And the SAL petitioner is himself often not the victim of repression or lawlessness, but a public citizen". This movement has the blessings of the Supreme Court and High Courts and Chief Justice Bhagwati, Justice Krishna Iyer (retired long back) and others are its exponents. According to Dr. Agrawala, "Perhaps, the concept of SAL (without giving it a nomenclature) was initiated in India by Krishna Iyer J. in 1976 in *Mumbai Kamgar Sabha case*[22] wherein rules of standing were liberalised. Krishna Iyer J. for the first time used the word '*epistolary' jurisdiction*." The Gujarat High Court through Justice M.P. Thakkar (now Judge, Supreme Court) has been a pioneer in this connection.

This type of litigation is not limited to Habeas Corpus petitions but it has been spread in all directions where gross violation of rights occur.

Public Interest Litigation is a novel feature and a new chapter in Indian Judicial System.[23] As observed by Bhagwati J. in the *Judges' Transfer case*[24] "It is..... a new jurisprudence which the court is evolving, a jurisprudence which demands judicial statesmanship and high creative ability. The frontiers of public are expanding far and wide and new concepts and doctrines which will change the complexion of the law and which were so far embedded in the womb of the future, are beginning to be born". It is thus a highly effective weapon in the armoury of the law for

19. Arts. 38 & 47, Constitution.
20. IPC, S.188 & M.P. Municipal Act, S. 123.
21. *L.R. Koolwal* v. *State of Rajasthan,* (1987) 4 Reports 53.
22. *Mumbai Kamgar Sabha* v. *Abdulbhai,* (1976) 3 SCC 832 ; his other important decisions in this area are: *Sunil Batra* v. *Delhi Admn.,* (1980) 3 SCC 488 ; *Municipal Council, Ratlam* v. *Vardhichand,* (1980) 4 SCC 162 ; *Akhil Bharatiya Soshit Karmachari Sangh* v. *Union of India* ; (1981) 1 SCC 246 ; *Fertilizer Corpn. Kamgar Union* v. *Union of India,* (1981) 1 SCC 568 : AIR 1981 SC 344 ; *Azad Rickshaw Pullers' Union, Amritsar* v. *State of Punjab,* 1980 Supp SCC 601 ; *see* S.K. Agrawala : *Publication Interest Litigation in India,* 1985, 8.
23. *See* Balancing the Scales of Justice—Financing Public Interest Law in America (A Report by the Council for P.I. Law (1976), 6, 7 quoted by Prof. S.K. Agrawala : Public Interest Litigation in India, A critique, 2.
24. (1981) Supp SCC 87 (219).

reaching social justice to the common man. Role played by the court is more assertive here ; it is creative rather than passive. The traditional rule in regard to *locus standi* is becoming obsolescent and the principle is broadened.[25]

Husainara Khatoon v. *State of Bihar*[26], *Upendra Baxi* v. *State of Uttar Pradesh*[27], *Chinnamma Sivdas* v. *State (Delhi Administration)*[28] student of a 3rd year Law of Delhi Law Faculty and a worker suing as SAL group; *Kadra Pahadiya* v. *State of Bihar*[29] (young tribals growing up in Sub-jail, awaiting trial) ; *Association for Social Action and Legal Thought (Assalt)* v. *State of M.P.*[30] (petition by law teachers' group for inhuman torture of young prisoners in Chhatarpur Jail) ; *Azad Rickshaw Pullers* v. *State of Punjab*[31], are some of the instances.

Three principal groups are working for SAL: Citizens For Democracy (CFD), The People's Union of Civil Liberties (PUCL) and The People's Union for Democratic Rights (PUDR).

In *A.V. Nachane* v. *Union of India*[32], *Begulla B. Raju* v. *State of A.P.*[33] and *Olga Tellis* v. *Bombay Municipal Corporation*[34] the Supreme Court has ruled that right to life includes right to livelihood. The defence of necessity was explained by the Court. This is a new and dynamic interpretation by the Court in public interest. Justice Bhagwati gave a comprehensive exposition to the concept of SAL in *S.P. Gupta* v. *Union of India*[35], while in *PUDR* v. *Union of India*[36] known as "Asiad Case", he observed that the Court would be moved for this purpose if only a letter is addressed to it drawing its attention to legal injury. The Court is thus concerned with "little man"[37]. In *R.L. & E. Kendra, Dehradun* v. *U.P.*[38] the Supreme Court ordered the closure of all but eight limestone quarries because of the reckless destruction of the habitat and the grave ecological imbalance it produced. Similarly for the cause of old and infirm retired pensioners,[39] for the release of bonded labourers working in stone quarries,[40] against unjustifiable police atrocities and for compensation,[41] against ragging a junior student of a medical college,[42] against the practice of issuing promulgation of Ordinances on a large scale which amount to a fraud on the Constitution of India,[43] against police brutalities in jail,[44] for causing

25. *PUDR* v. *Union of India*, (1982) 3 SCC 235 : AIR 1982 SC 1473.
26. 1980 SCC (Journal) 35.
27. (1983) 2 SCC 308.
28. W.P. 2526 of 1982.
29. W.P. 5943 of 1980.
30. W.P. 8332 of 1981.
31. 1980 Supp SCC 601.
32. (1982) 1 SCC 205.
33. (1984) 1 SCC 66.
34. (1985) 3 SCC 546.
35. 1981 Supp SCC 87.
36. (1982) 3 SCC 235.
37. See also *Bihar Legal Support Society* v. *Chief Justice of India*, (1986) 4 SCC 767 : AIR 1987 SC 38. (Court is concerned with "small men" as much as "big industrialists".).
38. (1985) 2 SCC 431.
39. *D.S. Nakara* v. *Union of India*, (1983) 1 SCC 305 : AIR 1983 SC 130.
40. *Bandhu Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 : AIR 1984 SC 802.
41. *PUDR* v. *State of Bihar*, (1987) 1 SCC 265 : AIR 1987 SC 355.
42. *State of H.P.* v. *A Parent of a Student of Medical College*, (1985) 3 SCC 169 : AIR 1985 SC 910.
43. *D.C. Wadhwa* v. *State of Bihar*, (1987) 1 SCC 378 : AIR 1987 SC 579.
44. *Sunil Batra (II)* v. *Delhi Admn.*, (1980) 3 SCC 488 : AIR 1980 SC 1579.

irreversible damage to the patients in an eye camp,[45] for "need for immediate help and relief to the victims" of the Bhopal Gas Leak Disaster,[46] and for issuing a direction to the Government that every injured citizen brought for medical treatment should instantaneously be given aid to preserve his life and only thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death of injured,[47] a petition can be filed and writ or an appropriate order can be issued.

In some cases exemplary costs[48] and provisional compensation[49] have been awarded. The concept though a latecomer, as compared to the American concept of Public Interest Law is moving slowly but steadily in the direction of awarding economic justice. The courts by their judicial activism[50] are trying hard to mould their exposition and interpretation of law in such a way as to fulfil the Directives contained in the Constitution of India which in fact asserts the Rule of Law and predominance of legal spirit. A silent social revolution with a new kind of enforcement of economic rights is thus supporting and expanding the Rule of Law.

(*vi*) **Quality Control Measures and the Consumer Protection Movement.**—The quest of the State is the welfare of inhabitants within the country demanding statutes which have consumerist orientations. Thus, the public controls on the freedom of trade assume greater importance and various legislations aimed at the Consumer Welfare have taken shape. Quality control is one measure which aims at consumer protection and the producer welfare too.

During pre-independence period certain laws[51] were made in this direction but they served only a limited purpose of service to people and the major beneficiary was the British Colonialism.

The post-independence economy being a shattered economy full of deficits, a number of important legislations[52] have been passed to protect the consumer interest in a big way.

The concept of quality control[53] received significant attention during the British rule in India and the AGMARK impressed under this Act has now become a mark

45. *A.S. Mittal* v. *State of U.P.*, (1989) 3 SCC 223 : AIR 1989 SC 1570.
46. *Charanlal Sahu* v. *Union of India*, (1989) 4 SCC 286 : AIR 1989 SC 2039.
47. *Paramanand Katara* v. *Union of India*, (1990) 1 SCC 613. See also *Kishen* v. *State of Orissa*, 1989 Supp (1) SCC 258 ; *Sanjay Suri* v. *Delhi Admn.*, 1989 Supp (2) SCC 511 ; *Sheo Nandan Paswan* v. *State of Bihar*, (1987) 1 SCC 288 ; *Shivaji Rao Patil* v. *M.M. Gosavi*, (1987) 1 SCC 227.
48. *Devki Nandan Prasad* v. *State of Bihar*, (1983) 4 SCC 20; *Sebastin* v. *Union of India*, (1984) 3 SCC 82.
49. *Rudal Sah* v. *State of Bihar*, (1983) 4 SCC 141.
50. *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 1 SCC 608 (right to life includes the right to live with human dignity) ; *Dr. P.N. Thampy Thera*, (1983) 4 SCC 598 (right to life connotes not merely animal existence but the finer graces of human civilisation) ; *Board of Trustees of the Port of Bombay* v. *Dilip R. Nadkarni*, (1983) 1 SCC 124 ; *Dronamraju Satyanarayana* v. *N.T. Rama Rao*, (1988) 20 Rep (AP) (Spl Bch) 128.
51. Poison Act, 1919 ; Sale of Goods Act, 1930 ; Agriculture Produce (Grading & Marketing) Act, 1937 ; Defence of India Act, 1939 ; Essential Supplies (Temporary Powers) Act, 1946 ; etc.
52. Forward Contracts (Regulation) Act, 1957 ; the Emblem & Names (Prevention of Improper Use) Act, 1950 ; the Drugs Control Act, 1950 ; the Indian Standards Institution (Certification of Marks) Act, 1952, the Prevention of Food Adulteration Act, 1954 ; the Essential Commodities Act, 1955 ; the Standards of Weight & Measures Act, 1976 ; etc.
53. Based on "*Role of Quality Control Legislations in Consumer Protection*" by Pandey & Khanorker, Legal News & Views, (1993), Vol. VII, No. 9, 299 to 306.

of quality. The AGMARK[54] has thus a direct bearing with the consumer protection by working as a third party guarantee of quality. The provisions of the Export Inspection (Quality Control) Act, 1963 further strengthens this standard.

Besides the Agricultural Produce (Grading and Marketing) Act the Prevention of Food Adulteration Act, 1954 (protecting the consumers against the menace of sale of sub-standard edible items), the Essential Commodities Act, 1955[55] (securing equitable distribution and availability of the essential commodities at fair prices in the interest of the general public, i.e. consumers), the Food Products Order, 1955 (ensuring production of quality products of fruit and vegetable products), the Cold Storage Order, 1964, (ensuring hygienic and proper refrigeration conditions in cold stores), the Meat Food Products Order, 1973 (aiming at hygienic production and maintenance of control in slaughter), the Monopolies and Restrictive Trade Practices Act, 1969 (known as MRTP Act) (aiming at the ideal that the operation of economic system does not result in the concentration of economic power to the common detriment) etc.[56] are the public welfare measures. Similarly the Standard of Weights and Measures Act, 1976 and the Standard of Weight and Measures (Packaged Commodities) Rules, 1977 ensure correctness of weights and measures. The Bureau of Indian Standards Act, 1986 aims at promoting harmonious development of the activities of standardisation, marking[57] and quality certification of goods and its related matters.

In spite of these measures the interest of the consumers were not satisfactorily protected and under these legislations the onus for redressal of the grievances lie on the Authority enforcing or implementing the Act. With increasing awareness, it was felt necessary to have the participation of the consumers themselves in the process of consumer protection. Consequently the Consumer Protection Act 1986 was passed to provide better protection to consumers. This aim is sought to be achieved through a establishment of the Consumer Protection Council at the Central and State levels and Consumer Disputes Redressal Agencies at the Central, State and district levels. The objects of the Central and State Consumer Protection Councils are to promote and protect the rights of the consumer.[58]

54. So far 101 commodity grading and marking rules covering about 142 commodities have been notified under the Act. ghee & butter, vegetable oils, ground spices, honey, wheat, atta & K.V.T. are some of the important commodities.

55. This legislation essentially was replacement for the earlier legislations in the series. viz. Defence of India Act, 1939 and Essential Supply (Temporary Powers) Act, 1946.

56. The Act has been amended in 1984 and 1986.

57. The confusion between ISI mark and AGMARK need not exist because the former is applicable to articles and processes of industrial nature, whereas the latter is exclusively for raw and semi-processed produce of agriculture, horticulture, forestry, etc.

58. These rights are :

(*i*) The right to be protected against the marketing of goods which are hazardous to life and property ;

(*ii*) The right to be informed about the quality, quantity, potency, purity, standard and price of goods so as to be protected against unfair trade practices ;

(*iii*) The right to be assured, wherever possible to have access to a variety of goods at competitive prices ;

(*iv*) The right to be heard and to be assured that consumers' interests will receive the consideration at appropriate forums ;

(*v*) The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and

(*vi*) The right to consumer education.

The Consumer Protection Act, 1986 offers an organisational set up to the consumers at national level, state level and district level to redress their grievances. As per recent amendment consumer organisations can now file complaints in the courts. "Consumer Cells" established at various levels in an organisation attend to consumer complaints.

The message for consumer welfare is being brought home to masses through various publicity measures. However, this is not enough. These efforts require acceleration.

To supplement the Government efforts, the Consumers have organised and formed a strong force to work as a watch-dog for efficient serving of their problems.

In the case of *Lucknow Development Authority* v. *M.K. Gupta*[59] the court ordered the State to recover the amount, paid by the State to the aggrieved person, from the public servant whose mala fide and oppressive acts gave rise to such a liability of the State. The Court expressed that the Consumer Protection Act, 1986 has to be construed in favour of the consumer to achieve its purpose as it is a social benefit oriented legislation. This strengthens the Rule of Law.

Medical Profession and the Consumer Protection Act :

A question most vigorously urged by the medical profession all over India is that they should not be covered under the Consumer Protection Act as the services rendered by them are not commercial.

There are now scores of cases[60] regarding negligence of doctors. Numerous cases[61] have been filed against doctors for negligence. The NCDRC in 1986 held that the doctors were covered under section 2(*o*) of the Consumer Protection Act, 1986.[62] The decisions of the various forums are however not uniform.[63]

As observed by Justice Aladi Kuppuswami, *a balance has to be struck between the right of the patient to be well attended to, and the duty of the doctor to show*

59. (1994) 1 SCC 243, 251-254 : AIR 1994 SC 787.

60. (*i*) The Andhra Pradesh State Consumer Forum awarded a compensation of Rs. 9,70,000 to one R. Rama Laxmi. She was wrongly operated for syphilis in the uterus by the doctors : Gujarat Samachar Daily, 18th June, 1992.

(*ii*) The Maharashtra State Consumer Forum ordered two doctors of Bombay to pay Rs. 7 lacs as compensation to one Arvind Kumar S. Shah. After operation the patient in this case never regained consciousness. All complaints made to Indian Medical Council, the Maharashtra State Medical Council & Medical Council of India fell on deaf ears: Gujrat Samachar Daily dt. 17th July, 1992.

(*iii*) Dr. Sudhanshu Battacharya of Municipal Rajavada Hospital, Bombay was made to pay compensation to a boy-patient for operating on a wrong leg : Gujrat Samachar, dt. 17th July, 1992.

(*iv*) One Dilip Sen's wife at Calcutta was subjected to a fertility test. She was given anaesthesia. After 2 hours she died. Mr. Sen filed complaint and demanded Rs. 25 lacs as compensation : India Today, June 21, 1993 : Doctor, heal thyself, 26-29.

61. In 14 District Forums of Kerala. There are 1800 such cases. In Tamilnadu and Maharashtra, 100 cases in each are pending. Case for compensation above Rs. 10 lacs before National Redressal Commission are 30. The biggest case from view point of compensation is a complaint from Amritsar wherein compensation of Rs. 3 crores is demanded.

62. India Today, June 21st, 1993, supra. Doctors held liable : *D.P. Bhandari* v. *Gangaram Hospital*, 2 (1991) CPJ 409 ; *Vasantha P. Naik* v. *Cosmopolitan Hospitals*, 2 (1991) CPJ 444 ; *Mapuna* v. *Dr. Premavathi Elango*, 2 (1991) CPR 460 (Mad). Doctors not held liable : *Subhash N. Pandya* v. *Secy., Baroda City Consumers Association*, 1991 (2) CPR 537 (Guj) ; *Y. Minakshi* v. *D.H. Nandish*, 2 (1991) CPJ 533 (Karnataka) ; *Moribai Dabri Hospital* v. *M.I. Govilkar*, 2 (1991) CPJ 684.

63. *Ibid.*

due care to the patient. He said this while inaugurating a seminar on "medical negligence and C.P. Act" at Hyderabad, recently.[64]

Since the medical and legal professions are interconnected Justice Kuppuswamy suggested the basics of law should be included in the medical course and vice versa. He also said that *the judicial system in India was not in favour of poor litigants as it was cost-heavy, time-consuming and uncertain.* In America, the law was more in favour of patients, whereas in U.K. it was more in favour of doctors. Specialists have therefore a greater duty than the general practitioners, as they possess greater skills.[65]

Government Hospitals[66] and the Consumer Protection Act : A disappointment!

Services rendered free of charge, in government hospitals do not come within the sweep of the C.P. Act.

A high powered working group has recently suggested to bring the government hospitals under the Act. by an amendment of the Act, but the cabinet reportedly struck down this particular provision.

It is suggested that there could be a moratorium for 2 or 3 years on implementation of the recommendations of the high-powered working group. This device would keep the pressure on government hospitals to improve their services within a limited time-frame.

It is now left to the collective wisdom of the members of the Parliament to decide whether the poor, who may be victims of medical negligence, deserves any justice and compensation at all.[67]

The consumer protection movement in India thus strengthens the Rule of Law.

(vii) **Environmental Control Measures.**—Section 2 of the Environment (Protection) Act, 1986 defines "environment," "environment pollutant", "environmental pollution", "ecology" etc.[68]

The problem of environmental pollution is as old as human civilisation. A vivid picture of remedies thereof is given by our ancient Sanskrit literature.[69] "*Smritis*" of India have specific provisions to ensure the purity of water.

The problem of pollution is the outcome of urbanisation, over-population and industrialisation. The I.P.C. has a few provisions on the subject, but when faced with such a giant problem its provisions are felt ineffective. *Water pollution* first attracted attention of certain State legislatures and it was only in 1974 that a Central Act was enacted to combat pollution. This was followed by the Water (Prevention and Control of Pollution) Cess Act, 1977 and the Air Pollution Act. The latest and the most drastic law on the subject is Environment (Protection) Act, 1986.

64. Legal News & Views, 1993, Vol. VII, No. 5, May 1993, 180.
65. *Ibid.* And this is what the "Law of Negligence" says.
66. Legal News & Views, 1993, Vol. VII, No. 4, Apr. 1993, 133-135.
67. Pushpa Girimaji : "Letting Doctors Off the Hook" LN&V, 1993, Vol. VII, No. 4, 133-35. The Consumer Protection Act Amendment Bill in the current session of the Parliament is awaiting its entry (Apr. 1993).
68. Armin Rosencranz, Diwan & Noble : *Environmental Law & Policy in India*, 1991 Edn., Ch. 1.
69. "Environmental Consciousness and Continuing Education", 13 to 18, publisher : South Gujarat University, Surat. *See also* Jain & Jain : *Environmental Laws in India*, 563-64 for details this problem in Europe and America.

It can be safely said that most of the pre-1980 "environmental cases" were either actions in tort or standard agency prosecutions under environmental statute and were therefore unremarkable. They also did not receive any special protection from the judiciary. But the latest enactment Environment (Protection) Act, 1986, was the result of a necessity felt by the government on account of two catostrophes that befell India : *the Bhopal Tragedy* that occured in 1984 and the *leakage of oleum gas* in Shri Ram Fertiliser Plant in 1985.[70]

The Oleum gas leak provided an opportunity to the Supreme Court of India to enunciate certain important doctrines on tort law and corporate law (particularly, the civil liability of directors for wrong committed by the Corporation).

These developments are quite important and the process, one should say, is far from completed. The spate of new laws, as observed,[71] cover hitherto unregulated fields, such as *noise, vehicular emissions, hazardous waste, hazardous micro-organisms and the transportation of toxic chemicals.* Cost of non-compliance with these laws has been raised due to stringent penalties. The Environment (Protection) Act, 1986 is not just confined to any particular element; it deals with every aspect of it.

Legislation of protect *wild-life* has also been enacted. The use of *insecticides and pesticides* is also regulated by separate laws. State laws also exist to regulate pollution. To combat pollution some provisions of the I.P.C., Cr. P.C. ; C. P. C. and Law of Tort also can help.[72]

One may say that[73] a governmental effort to fight the pollution with an array of new regulatory techniques is discerned in these new laws.

Enforcement strategy for these laws is changed in such a way that the burden of initiating a court action now rests on an aggrieved polluter, who must challenge the enforcement agency's order in court. Consequently, from a lawyer's standpoint, the agency merely has the task of defending its administrative order.

A marked change in the enforcement of environmental improvement is the Ganga Action Plan — a gigantic project to restore the quality of the water in the river Ganga. This *non-legislative initiative* suggests the Central government's willingness to support result-oriented schemes when the implementation of environmental laws has been slack or ineffective. The new legislation has spawned new enforcement agencies[74] and strengthened the older ones.

The judicial role is also remarkable during past years. In *Dehradun Quarrying case*[75] by appointment of several expert committees the Supreme Court supervised the regeneration of the valley which had been devastated by limestone quarrying. On another occasion, functioning like a super-agency, the Supreme Court endeav-

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70. *M.C. Mehta* v. *Union of India*. AIR 1987 SC 965 : (1986) 2 SCC 176 ; AIR 1987 SC 982 : (1986) 2 SCC 325.
71. Environmental Law & Policy in India, Edn. 1991. supra, 1-2.
72. I.P.C. Ss. 268 to 290 ; Cr. P.C. Ss. 133, 143 ; C.P.C., S. 91 ; Law of Tort (Negligence) ; See *Surendra Kumar* v. *Dist. Board, Nadia*, AIR 1942 Cal 360 ; *Ardeshir* v. *Aimai*, AIR 1929 Bom 94.
73. Environment Law & Policy in India, Edn. 1991, 2.
74. New authorities constituted :
    (*i*) Under the Hazardous Micro-organisms Rules of December, 1989.
    (*ii*) The Recombinant DNA Advisory Committee.
    (*iii*) The Review Committee on Genetic Manipulation.
    Moreover the Central and State Pollution Control Boards are set up.
75. *Rural Litigation & Entitlement Kendra* v. *State of U.P.*, AIR 1985 SC 1259.

oured to reduce pollution of the Ganga by closing down polluting tanneries[76] and directing municipalities to take immediate remedial action to prevent municipal wastes from flowing into the river.[77]

The National Environment Engineering Research Institute has been entrusted with the work of preparing a report on pollution in the port area by industries.[78]

Steps for prevention of gas leakage after the Bhopal Tragedy have been tightened. In *M.C. Mehta case*[79] a new rule of "*absolute*" or "*no fault*" *liability* was invented and presented declaring further by the court that the measure of compensation would be correlated to the magnitude of the enterprise and its capacity to pay. This is a new development because the process of making the fundamental rights under Article 21 applicable to the private sector has been started with assistance of public policy doctrine under the law of contracts. Private Corporations thus cannot now transgress and violate the spirit of the constitutional provisions.

Article 48-A of the Constitution enjoins the State that it "*shall endeavour to protect and improve the environment and safeguard the forest and wild life of the country*. Under the Constitution[80] it is also a fundamental duty too.

"Inevitably," observes Armin Rosencranz[81] "these reforms have altered the complexion of environmental politics. Non-governmental organisations, active in lobbying and environmental litigation, have certainly benefitted from the changes.

It must however be noted that Environment Act, 1986 and the Water and Air Acts (1974 and 1981) contain only penal provisions but do not provide for any compensation to the victims because of some accident or disaster syndrome, once the casual connection is provided. This bitter truth was highlighted when the century's worst industrial disaster took place at Bhopal in Madhya Pradesh in December 1984."[82]

(*viii*) **Lok Adalats and Legal Aid Programmes.**—Lok Adalats, which is a peculiar process of deciding disputes by negotiations via a benevolent middle agency, is a recent successful movement started first in Gujarat and now spread all over the country. This movement has the inherent capacity latent in it to lessen the burden of arrears of cases in the courts. This movement now has covered within its fold motor accident cases. Gujarat held as many as 130 Lok Adalats clearing more than 21,300 cases. Rajasthan, Maharashtra, Orissa and other states following suit have held Lok Adalats and speeded up the catering of justice. Very recently a Bill in this connection giving a legal status and a statutory basis to the Lok Adalats has been presented and it has been passed, as the reports go. This strengthens the Rule of Law.

Under Article 39-A the state has to promote justice on the basis of equal opportunity and to provide free legal aid by suitable legislation or schemes so that

76. *M.C. Mehta* v. *Union of India*, AIR 1988 SC 1037.
77. *M.C. Mehta* v. *Union of India*, AIR 1988 SC 1115.
78. The Water Pollution Control Cell of Bombay Port Trust fined 197 ships Rs. 17 lacs for polluting water and atmosphere.
79. *M.C. Mehta* v. *Union of India*, (1987) 1 SCC 395. For details see supra. para 3(*b*)—landmark decisions.
80. Article 51-A(*g*).
81. Environment Law & Policy in India, Edn. 1991, 3.
82. A. Laxminath, Dr., Pratibha Upasani, Smt., Dr. : Damages in the Law of Torts : Some Reflections : AIR April, 1993 (Journal Section), 53 to 58.

opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Though the Codes of Civil and Criminal Procedure have been amended for this purpose and Legal Aid Committees (LAC) have been set up by various High Courts and other subordinate courts unless the lawyers are seriously involved, good results would not come out.

The Constitution enjoins the State and the courts to give free legal aid to the poor. But now there is an extension awarded to this idea by the Supreme Court. As expressed by the Supreme Court[83] in *Hoskot's* case, "Free legal assistance at state cost is now treated as part of the fundamental rights of a person accused of an offence which may involve jeopardy to his life or personal liberty, if he is unable to engage a lawyer due to his indigence, or unable to secure legal services on account of other reasons."[84] The earlier policy was to confine legal aid only to those persons who could not secure services on account of poverty or indigence. But the Supreme Court through its interpretative power, extended the scope of providing free legal aid to those who are in "incommunicado situation". This was sounded by the Supreme Court as a mandate in *Hussainara Khatoon's case*[85]. The position was improved further when the Supreme Court in *Khatri* v. *State of Bihar*[86] and in *Suk Das* v. *Arunachal Pradesh*[87] further stated that free legal aid at state cost is the fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and that right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21 of the Constitution. Free legal aid must be provide without the accused applying for it[88] and the State Government is bound to pay for the counsel.[89] Thus the final position that emerges is that persons whose means of communication to the outside world remain snapped on account of incommunicado situation[90] are also entitled to the aforesaid right. However much depends on the initiative and response of the Bar[91] because courts alone cannot do much in the absence of information.

The Future of Lok Adalat

In words of Dr. Baxi, Lok Adalats, on the whole, constitute an innovation in the administration of justice. The idea is very old and richly developed part of the tradition of communitarian justice in India. But in India every new idea is either eulogised to absurdity or condemned beyond invective. We are not yet ready to fossilise this innovation into a statutory enactment. Dr. Baxi, therefore believes that there should be *social audit* of each Lok Adalat and the concerned people should

83. *M.H. Hoscot* v. *State of Maharashtra*, (1978) 3 SCC 544.
84. Referred to in *State of Kerala* v. *Kuttan Mohanan*, (1987) 2 Reports (Ker) 187, 189.
85. (1980) 1 SCC 98.
86. (1981) 1 SCC 635.
87. (1986) 2 SCC 409.
88. Supra n. 90, at 189.
89. (1987) 2 Reports (Ker) 187, 189, *supra* n. 90.
90. *See* Harchand Singh Longowal's case and Upendra Baxi's Article: "*Let the Body be Produced*". Indian Express of 5-8-1984, quoted by Gandhi B.M.: *Law of Tort*, Ed. 1987, Ch. 22, 913, 914.
91. For a fascinating information on legal aid movement and the groups that are wedded to its implementation the student is advised to go through, J.S. Gandhi: *Sociology of Legal Profession, Law and Legal System—The Indian Setting* (1987) especially 140-62.

unlearn and learn from this audit. If they do not show this capacity, the idea of Lok Adalat will die an unnatural death.[92]

(*ix*) **The Common Civil Code.**—Article 44 of the Constitution of India requires the State to strive to secure for its citizens a Common Civil Code throughout India. In the Constituent Assembly when debates were going on[93] the Muslim leaders apprehended that their personal law would be abrogated by having a Common Civil Code. But these fears and doubts were dispelled by pointing out that at present India has achieved an uniformity of law over a vast area and though there was diversity in personal laws there was nothing sacrosanct about them. The secular activities, such as inheritance covered by personal laws should be separated from religion. A uniform law thus prepared and made applicable to all would on the contrary promote national unity. It was pointed out at that time that, firstly, a Common Civil Code would infringe the fundamental right of freedom of religion as mentioned in Article 25 and secondly, it would amount to a tyranny to the minority. The first objection as noted by Dr. Jain and Dr. V.N. Shukla in their treatises on Constitution[94] is misconceived. Regarding the second point Dr. K.M. Munshi, Member of the Constituent Assembly observed that "nowhere in advanced Muslim countries the personal law of each minority has been recognised as so sacrosanct as to prevent the enactment of a civil code". In Turkey and Egypt no minority is permitted to have such rights. In the time of British regime the Khojas were also dissatisfied when the Shariat Act was passed in the Central legislature, but the reformist carried the point and they had to submit to it. Going further Dr. K.M. Munshi said, "where were the rights of minorities then? When you want to consolidate a community, you have to take into consideration the benefits which may accrue to the whole community and not to the customs of a part of it. It is not therefore correct to say that such an act is tyranny of the majority. If you will look to the countries in Europe which have a civil code, everyone who goes there from any part of the world and every minority has to submit to the Civil Code. It is not felt to be tyrannical to the minority..... Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors — and important factors — which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible we may be able to say, 'We, we are not merely a nation because we say so, but also in effect; by the way we live, by our personal law, we are a strong and consolidated nation.' "[95] Dr. K.M. Munshi, like Dr. B.R. Ambedkar was a visionary. Both dreamt of one, united and strong India.

As observed by no less a person than the President Dr. Shankar Dayal Sharma[96] in his Republic Day address on 26 January, 1993 *the difference between religion and communalism is "as far as sacred is from profane and good is from evil"*.

92. 1987 (14) Reports (News & Views) 37.
93. CAD. Vol. VII, 540-42; also see H.R. Khanna: *Making of India's Constitution*, 1981, 36.
94. Jain, M.P.: *Indian Constitutional Law*, Ed. 4, 1987, Ch. 29, 746; V.N. Shukla: *Constitution of India*, Ed. 7, 1987, 218.
95. CAD. Vol. VII, 547-48.
96. *The Lawyers*, March 1993, Vol. 8, No. 2, 22-23.

Communalism breeds discrimination at two levels : one, between people of different religious and two, between the two sexes. This dangerous and ruinous effect should be done away with, possibly by introducing a uniform civil code. For women who constitute almost half the population of India, the uniform Civil Code provides with equality and justice in courts of law — irrespective of their religion in matters pertaining to marriage, divorce, maintenance, custody of children, inheritance rights, adoption etc.

The Committee on the status of women in India, in its report[1] has bewailed on this matter saying that "the absence of a uniform civil code... is an incongruity that cannot be justified with all the emphasis that is placed on secularism, science and modernisation. The continuance of various personal laws which discriminate between men and women violates the fundamental rights and the Preamble of the Constitution which promise to secure to all citizens "equality of status," and it is also against the spirit of national integration and secularism. Our recommendation regarding amendments of existing laws are only indicators of the direction in which uniformity has to be achieved.

Matters pertaining to the family as argued by fundamentalists are personal and therefore within the parameters of religion. But religions practices being man-made, they curtail the freedom and equality of women. Thus the fate of women will be left not to the Gods, but to the fundamentalists. The examples of the unfair practices of these fundamentalist authorities are : ill treatment of widows[2], polygamy practised by men, child marriages, untouchability and other caste disabilities, human sacrifices (practised by some tribals), purdah, etc.

Examples of Roop Kanwar and Shah Bano indicate that women are in many cases trapped as they are often wedded (literally as well) to their oppressors and their subordination is thus clothed in religious rhetoric or fundamentalism. The right of the citizens under Article 25 could well turn out to be a guaranteed right to State supported communalism unless there is a check on Article 27 (which prevents the State from entanglement with any religion). This State-supported communalism must go, and the religion should not survive at the cost of women's freedom and equality.[3] If a Common Civil Code is enacted and enforced it would help and accelerate national integration ; overlapping provisions of law could be avoided, litigation due to personal law would decrease, sense of oneness and the national spirit would be roused and the country would emerge with new force and power to face any odds finally defeat- ing the communal and the divisionist forces. Israel, Japan, France and Russia are strong today because of their sense of oneness which we have yet to develop. and propogate.

The only step taken forward in this direction was the codification of the Hindu law in spite of great protest; but the codification of Muslim law or enacting a Common Civil Code is a sensitive issue owing to its politicisation. Enlightened Muslim opinion is, however, in favour of codification[4]. Finally the Supreme Court

1. Published in 1975, by the Central Government.
2. For example (*i*) in September 1987, Roop Kumar committed Sati, an obsolete, inhuman and defeatist practice. (*ii*) The Muslim woman became non-persons upon divorce under the Muslim Women's (Protection of Rights on Divorce) Act.
3. "*Towards Uniformity*" by Heera Nawaz : *The Lawyers*, Vol. 8, No. 2, 22-23 (March 1993).
4. For further reading see, S.S. Nigam: *A Plea for a Uniform Law of Divorce*, 5 JILI 47 (1963); S.S. Nigam: *Uniform Civil Code & Secularism in India: ILI, Secularism: Its implications for Law & Life in India* 153 (1966); *Minorities and the Law*, 385-476 (1972); Smith: *India as a Secular State*, 277 et seq (1963); Gajendragadkar: *Secularism & the Constitution of India*, 117-143 (1971); M.P. Jain: *Indian*

has issued a directive to the Union of India in *Sarla Mudgal* v. *Union of India*[5], to "endeavour" framing a uniform civil code and report to it by August, 1996 the steps taken. The Supreme Court opined that : "Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one nation — Indian Nation — and no community could claim to remain a separate entity on the basis of religion."

The cases noted below reflect the concern of the Supreme Court in this area.

(a) The Shah Bano case[6].—The question in this case was whether the respondent was entitled to maintenance. In application for revision filed by the respondent the High Court enhanced the amount of Rs. 25/- as maintenance fixed by the Magistrate to Rs. 179.20 per month. In appeal a two-Judge bench of the Supreme Court referred the matter to the present bench. The husband's appeal was dismissed with costs.

The Court, referring to a number of authorities, writers[7] and the clear cut provisions of the section ruled that Shah Bano was *entitled to take recourse to Section 125 of the Code and that the term Mahr in its real (Islamic) sense is an amount payable by the husband to the wife on marriage and not on divorce*, whatsoever be its variety. Moreover its payment is not occasioned by the divorce.

The Court reiterated the promise given by or the ideal laid down by the people of India in their Constitution as incorporated in Article 44 under the caption "Directive Principles of State Policy" and said that the State should take lead to effectuate the principle enunciated in the Article as it is the State which is charged with the duty of securing a uniform Civil Code for the citizens of the country and, unquestionably, it has the legislative competence to do so.

That the first wife is entitled to maintenance when a Muslim husband contracts a second marriage is now affirmed recently in *Begum Subanu (Saira Banu)* v. *A.M. Abdool Gafoor*[8] by the Supreme Court. There was a great hue and cry in the country against the *Shah Bano* decision and to minimise the political pressures and to pamper the Muslim minority in this country with an ultimate end of vote catching and thereby to maintain its power the ruling party by a brute majority passed a bill in 1986, to become an Act immediately, entitled Muslim Women (Protection of Rights on Divorce) Bill. The Act as criticised in newspapers by jurists[9] has a number of flaws. However as expressed by Shri Noorani[10] what is there to prevent a divorced wife from suing in a civil court for maintenance and claiming interim relief? The bill is therefore

Constitutional Law. Ed. 4, 1987, 746.

5. (1995) 3 SCC 635. See also *Ms. Jorden D* v. *S.S. Chopra*, 1985 Supp SCC 377.
6. (1985) 2 SCC 556.
7. Mulla: *Mohamedan Law* (Ed. 18, 301); Tyabji: *Muslim Law*, Ed. 4, 268-69; Dr. Paras Diwan: *Muslim Law in Modern India*, Ed. 1982, 130; *The Quran* Interpreted by Arther J. Arberry; Muhammad Zafrullah Khan: *The Quran*, 38; *The meaning of the Quran*, Vol. I publishers—Bd. of Islamic Publications, Delhi: Dr. Allamah Khadim Rahmani Nuri: *The Running Commentary of the Holy Quran*: Marmaduke Pickthall (Translation & explanations): *The Meaning of the Glorious Quran* (published by Taj Co. Ltd., Karachi). Referred to: *Hamirabibi* v. *Zubaida Bibi*, 43 IA 294; *Syed Sabir Husain* v. *Farzand Hasan*, 65 IA 119; *Affirmed*: *Bai Tahira* v. *AHF Chothia*, (1979) 2 SCC 316: 1979 SCC (Cri) 473: *Fuzlunbi* v. *K. Khader Vali*, (1980) 4 SCC 125: 1980 SCC (Cri) 916. Mahr: Meaning of Mahr is also explained in *Fuzlunbi* case (Supra) wherein Justice Mahmood [in *Abdul Kadir* v. *Salima*, (1886) 8 All. 149], Baillie, Tyabji and others are quoted by Krishna Iyer. J.
8. (1987) 2 SCC 285.
9. A.G. Noorani: *Glaring Flaws in New Bill*, Ind. Express Daily, 21-3-1986.
10. *Ibid.*

ill-considered and is exposed to sheer ridicule. An appeal is therefore filed against this decision and it is lying before the larger bench of the Supreme Court for disposal.

(b) Mary Roy v. State of Kerala[11].—Mary Roy's decision by the Supreme Court on the Travancore Christian Succession Act, 1916 has brought Christian women on a par with men under the Indian Succession Act which does not make any distinction between sons and daughters. In this case Mrs. Mary Roy challenged the provisions of the Travancore Christian Succession Act, 1916 which discriminated between sons and daughters in case of succession to father's property. Her father died intestate and she could claim only Rs. 5000 though the property was worth more than a crore. The Constitutionality of the Act itself was challenged. The Supreme Court held that on the coming into force of Part-B States (Laws) Act, 1951 Travancore Christian Succession Act, 1916 stood repealed and Chapter II of Part V of the Indian Succession Act, 1925 became applicable and intestate succession to the property of members of the Indian Christian community in the territories of the erstwhile State of Travancore was therefore governed by Chapter II of Part V of the Indian Succession Act, 1925. No opinion as to whether Sections 25, 28 and 29 were unconstitutional and therefore void, was expressed, as it was unnecessary.

(c) The National Anthem case[12].—During the morning assembly at school the appellants while respectfully standing during the recitation of the National Anthem, "*Jana Gana Mana*" refused to sing it on the ground that it is against the tenets of their religious faith. The Director of Public Instruction (DPI), Kerala expelled the children from the school for not singing the same. The Single Judge of the Kerala High Court rejected the writ and so did the Division Bench of the High Court. The High Court said, that all rights fundamental or otherwise must therefore subserve the sovereignty, integrity and unity of the nation and the mere possession of the religious convictions which run counter to the relevant concerns of political society does not absolve the citizen from his political responsibility. On appeal the Supreme Court held that *this was their religious belief and tenet and leads to no disrespect to the National Anthem since the boys stood up respectfully and silently when the same was sung. It also does not lead to a breach of fundamental duties under Article 51-A(a)*. No one can be compelled to sing National Anthem. Non-refusal to sing National Anthem did not violate the provisions of the Prevention of Insults to National Honour Act, 1971. In fact the DPI's instructions violated Article 19(1)(*a*) and 25(1). The real *test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution.*

Against this decision of the bench of two judges of the Supreme Court the Union Government has gone into appeal and like the *Shah Bano* case the same is awaiting a final decision.

The case of Bijoe Emmanuel and Mary Roy point at the hurdles in establishing the rule of law. Religious freedom in this country is not absolute. In fact no right is absolute, all rights are relative and compared with the national interest and the fundamental duties as enumerated in Article 51-A(*a*), other rights have to submit to it lest the unity of India be in jeopardy. *As has been noted*[13] *what weighed with the*

11. (1986) 2 SCC 209. See also *Mary Sonia Zachariah* v. *Union of India*, (1995) 1 KLT 644 (FB), holding S. 10 of Indian Divorce Act, 1869 unconstitutional on the ground that Christian wives suffered discrimination under S. 10 when compared to wives of other religions.

12. (1986) 3 SCC 615.

13. Editor, S.C.C. in (1986) 3 SCC 618.

Supreme Court is the fact that the appellants were well-behaved and respectful to the National Anthem when it was sung. But what would happen if they hitherto refused to stand up when the National Anthem is sung? Does this decision bind all the other Jehovah's Witnesses in India — Legally? Morally? What would happen if a member of the JW refused to take a form of oath as prescribed in the Third Schedule of the Constitution if required to do so? Lastly a negative of a fundamental right cannot be recognised as a fundamental right. What is protected is freedom of speech but the right to remain silent is not a fundamental right.... This line of protection, therefore, seems to be not only faulty but a dangerous one apt to disintegrate India and its unity. What happened to the JW in America according to U.S.A. Constitution should not be a guiding factor in this country. It is a land of hippies and there are associations of the nudes, in England male having sex with a male (I.P.C. Sec. 376, sodomy) is no offence, but we do not and can never permit this under the name of freedom.

(d) Sarla Mudgal v. Union of India.—A serious matter of Hindu husbands escaping prosecution for bigamy by converting to Islam came before the Supreme Court. The first wife felt helpless since Islam permitted polygamy. The Supreme Court, holding that such marriage was against the provisions of a law, namely, the Hindu Marriage Act, 1955, the necessary ingredients of S. 494, IPC making bigamy punishable were satisfied. Conversion to Islam by itself did not dissolve the first marriage and so the second marriage during its subsistence was punishable. To such a situation the Muslim Personal Law was not attracted. It was to be judged by the rule of justice, equity and good conscience.

Why a Common Civil Code ?—These four cases expose the domination of religion over a community, be it Muslim, Syrian Christian or Jehovites. The unity of India would be at stake if religion is allowed to tighten its grip over Indian society. We have been a Sovereign Socialist Secular Democratic Republic and the State has no religion; it favours none and is a foe to none. Humanism is our creed and a Common Law for all Indians is our ideal. We believe and subscribe to rule of law and it is only a Common Civil Code that would help establish the rule of law. It is the panacea for all our ills.

As observed by the former Chief Justice M. Hidayatullah[14] till 1935 the Muslims of NWFP followed the Hindu Law. The Shariat Act was applied to them only in 1939. Similarly up to 1934 the Muslims in U.P., C.P. and Bombay were governed by Hindu Law in matters of succession. The Shariat Act was applied to them only in 1939. In North Malabar, the Marumakkathayam law applied both to Hindus and Muslims. The Khojas and Cutchi Memons followed the Hindu customs and were highly dissatisfied when the Shariat Act was applied to them. The enactment of the Dissolution of Muslim Marriages Act, 1939 (an important law reform by legislation) was passed in spite of a great deal of opposition from Muslim orthodoxy, but it went through and today no one questions it. Moreover the courts by judicial review contribute their share in reforming Muslim law. The *Shah Bano* judgment is to be viewed by the Muslims in this light. *Two major communities of Indian federation cannot take a leap forward in the twenty first century if one is limping and unwilling to move forward.* The Muslim law, if we subscribe to the concept of rule of law,

14. *Constitutional Law of India*, Vol. I (edited): Indian Express Daily. dt. 7-1-1986 in an article by L.K. Advani, M.P.

should be reformed. "*A Common Civil Code*", writes[15] Mr. M.H. Beg, the former Chief Justice, "*will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is therefore the State which is charged with the duty of securing a uniform civil code for the citizens of the country and unquestionably it has the legislative competence to do so*".

According to Dr. Ambedkar, the provision relating to a uniform civil code should be included in the fundamental rights chapter and thus should be made justiciable. He was not satisfied with the acceptance of a Uniform Civil Code as an ultimate social objective set out in Clause 39. According to him, *one of the factors that has kept India back from advancing to nationhood has been the existence of personal laws based on religion which keeps the nation divided into water-tight compartments in many aspects of life*... a uniform civil code should be guaranteed to the Indian people within a period of five to ten years."[16] Mr. Madhu Limaye[17] was also in favour of Uniform Civil Code.

Dr. Ambedkar in this regard once expressed[18] that to proceed in direction of Common Civil Code the Government should first prepare it and like the application and enforcement of the Shariat Act, 1937 make a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage its application may be purely *voluntary*. Tahir Mahmood's[19] views and views of Prof. Imtiaz Ahmed[20] and V.D. Tulzapurkar[21] also subscribe to this approach.

Uniform Civil Code Bill[22].—A Bill on voluntary Uniform Civil Code is almost ready for introduction in the session of Parliament. A voluntary uniform civil code is a contradiction in terms.[23] The moment it is made optional it ceases to be uniform. Distinction is being made between "uniform code" and "common code" suggesting that Article 44 does not use the expression "common". Such ingenuous refinement will only lead to greater confusion. The Constituent Assembly debates clearly show that by *uniform civil code* the founding fathers meant a family code uniformly applicable to members of all the communities living in the country. Any attempt to make the code voluntary or optional must be opposed. Instead of framing such optional civil code, the government would do well to take immediate steps to codify each set of personal laws incorporating therein the requisite reforms making them uniformly applicable to all the members of the concerned community.

The Bill covers personal law relating to marriage, divorce, minority, maintenance, guardianship and succession. The bill would be applicable to those who opt for it. If the Bill is passed it would repeal the Special Marriage Act, 1954. Detailed provisions have also been made for the restitution of conjugal rights and judicial

15. Minorities and the Law: Indian Express, dt. 7-1-1986 in an article by L.K. Advani, M.P.
16. Indian Express, dt. 7-1-1986 in an article by L.K. Advani, M.P.
17. *Indian Express*, 11-1-1986. Shri Limaye is a leader "Hindustani Andolan". Office: National Headquarters, 84-A, Napean Sea Road, Bombay-8.
18. Constituent Assembly Debates, Vol. VII, 551. 23rd Nov., 1948: Ind. Express, 3-2-1986.
19. One should, for this, refer to Tahir Mahmood's "Personal Law in Crisis", and find out how, why and to what extent this respect was true.
20. See Prof. Imtiaz Ahmed (JNU) *Modernisation & Social Change among Muslims*.
21. V.D. Tulzapurkar : "*For A Commom Civil Code*", Times of India. 19th October, 1986.
22. (1987) 14 Reports (News & Views) 24.
23. "*For a Common Civil Code*" : V.D. Tulzapurkar, in Times of India, daily, dated 26-10-1986.

separation. The bill also regulates all consequences of solemnisation of marriage including maintenance, minority, guardianship of any person (or his dependants) whose marriage is solemnised under the Bill. Succession to property of persons whose marriage is solemnised under the Bill and to the property of the issues of such a marriage will be regulated by the provisions of the Indian Succession Act, 1925. The Bill provides for maintenance to wife, widowed daughter-in-law, children and aged and infirm parents. The wife is to be maintained by the husband for her lifetime and she will have a right to live separately without forfeiting her claim to maintenance, where the husband is guilty of desertion or has treated her with cruelty or the husband is suffering from a virulent form of leprosy or for any other justifiable cause. A wife and sons and daughters whether legitimate or illegitimate are also entitled to maintenance after the death of her husband.

The Bill provides for minority and guardianship of a boy or unmarried girl whether legitimate or illegitimate and also for custody of a minor and regarding the power of a natural guardian with reference to the estate of a minor. In all other matters not provided in the Bill, the Guardians and Wards Act, 1890 will apply; however welfare of the minor shall be of paramount consideration.

The family courts established under the Family Courts Act, 1984, shall be exercising jurisdiction in respect of matters dealt with in the uniform Civil Code.

The provisions contained in the Adoption Bill of 1980 are also included in the code.[24]

(x) Article 124(4) and Motion of Impeachment against a Supreme Court Judge.—[25] *Justice* v. *Ramswamy's* case stands unparallel in the Constitutional History of India. This case put to a test not only the honesty and character of a judge but also the firmness of the Parliament to stand by the side of truth.

Justice Ramaswamy, a sitting judge of the Supreme Court had in his capacity as the Chief Justice of the Punjab and Haryana High Court committed numerous financial irregularities. This was found out from an audit report of the Accountant General's office. In April 1990 this news came to light. On 23rd July, 1990 the Chief Justice of India ordered an inquiry in this regard. The Committee of the Supreme Court gave their report in November 1990. Mr. Rabi Ray, the Lok Sabha Speaker on 12th March, 1991 admitted a motion signed by 108 MPs to impeach Mr. Ramaswamy. He appointed a Committee under the Judges Enquiry Act, 1968. Immediately thereafter the Lok Sabha was dissolved and against a plea that the impeachment motion had failed, the Supreme Court on 27th October, 1991 by a majority judgment held[26] that it did not lapse and the inquiry must proceed. The Committee thereafter charge-sheeted[27] the Judge.

In the meantime, in March 1992 the proceedings under the Judges Enquiry Act, 1968 were challanged by one Mr. Krishnaswamy, an M.P. by a writ[28] on three grounds requesting to quash the proceedings. This petition was also challanged. The Court dismissed Mr. Krishnaswamy's petition. Again by another writ petition[29] the Judge's wife Mrs. Sarojini Ramaswamy challanged the proceedings[30]. The Judge

24. (1987) 14 Reports (News & Views) 24.
25. *Lawyers* 1990, 1991, 1992, 1993.
26. *Sub-Committee for Judicial Accountability (SCJA)* v. *Union of India*, (1991) 4 SCC 699.
27. 14 charges were levelled against him. For details see *The Lawyers*, Vol. V, No. 4, and Vol. VIII, No. 1, 7-10 & 8-11, respectively.
28. W.P. No. 149/1992.
29. W.P. No. 514/1992.

wrote a letter[31] to the SCJA questioning credibility of its members but against the complaint of the SCJA before the Supreme Court nothing was done. On 20th July, 1992, the Committee held the Judge guilty of "proved misbehaviour and on the basis of 10 out of 14 charges against him. In spite of this the desparate Judge wrote another letter repeating his allegations and appealing the M.Ps. not to impeach him.

As the Judge refused to resign his office he was on 10th May, 1993 summoned before the Parliament to explain why he should not be impeached for corruption charges which were upheld by the Committee. All the parties ensured the presence of their members by issuing a whip. To succeed the motion had to be supported by a majority of the total membership of the House and a majority of not less than 2/3rds of the members present and voting. The Judge's advocate refuted all the charges. Up to this point it seemed alright but when the motion was finally put to vote, all that was reduced to a naught. It became clear that it had all been a mere formality as the result had already been predetermined. The Congress (I) party en masse abstained from voting.[32]

Congress (I) defended the abdiction of its responsibility by saying that the penalty of removal by impeachment was excessive and disproportionate to the acts committed by the judge, as the judge had not been found guilty of any criminal misappropriation or judicial misconduct but only of certain administrative lapses.[33] The party spokesman said that impeachment was the "brahmastra", the ultimate weapon to be used on "the rarest of rare occasions".

Had the members voted as they willed there would have been 266 votes in favour of the motion to be passed. Thus the motion lapsed due to technical reasons and not on merit.

In the end the motion failed. The real implications of this failed impeachment motion lie not in the particular facts of the case but in the signals that it has sent out. And it is for them that Justice Ramaswamy's image and the image of the aborted impeachment against him, will stay alive in public eyes.[34]

Implications of lapse of motion : As for his impeachment, because of the very fact that the motion failed due to technical reasons and not on merits, and that there was not a single vote against the motion, *the judge stands morally impeached.* His persistently intransigent stance has already undermined the stature of judiciary in public perception, apart from diluting people's faith in the rule of law. It is bound to cast a dampening effect on the morale of the members of judiciary and other institutions as well as of society at large.

Justice Ramaswamy's case which seems to be an instance of political patronage, raises a number of problems which require immediate solution. The most demanding question is whether the judges of the High Court and the Supreme Court are totally immune from any formal accountability. Why so ?

On the plus side, the most positive effect of this case, writes The "Lawyers", lies in that it has made it unavoidable that a search be launched for an alternative mechanism to bring guilty judges to book, having glaringly exposed the utter

30. (1992) 4 SCC 506.
31. In January, 1992.
32. Total effective strength 529 members. 196 voted for the motion & there were 205 abstentions. No vote cast against the motion.
33. Emphasis supplied.
34. *The Lawyers*. Vol. 8, No. 5, 22.

inappropriateness of the current impeachment procedure in which the Parliament has the last word. *When Article 124(4) of the Constitution had come up for discussion before the Constituent Assembly, its members had expressed fears that if the matter was ultimately left to the two Houses, political manoeuvering by the majority party in Parliament would make it very difficult to remove a judge, even if he was guilty. The present case has confirmed their apprehensions and it has amply demonstrated that the present procedure can never really allow judicial misconduct the impartial scrutiny it demands.*

Hopefully *Justice Ramaswamy's case* will lead to an amendment of the Constitution, changing the procedures for appointment and removal of a judge, leading to the setting up of a grievance settlement procedure against the judiciary, a mechanism of accountability.

Merely introduction of the impeachment motion against Justice Ramaswamy had cost the nation Rs. 66 lakhs. If one adds to this the prior expenditure and the cost paid in terms of moral loss, it does seem a stupendous price. But if the case does succeed in leading to a consciousness that a critical inspection be undertaken at all levels, the cost would be miniscule. That will be a service so great, that the nation cannot pay so dearly for it![35]

(*xi*) **The Eventful Ayodhya Problem and its Constitutional Aftermath**.—This problem which in the beginning (A.D. 1528) existed as a simple land-grab dispute[36] has now acquired dangerous proportions giving rise to some Constitutional questions which cannot be neglected.

During A.D. 1528 to 1992 a number of riots broke out and thousands of innocent persons lost their lives. The British made use of this dispute in affirming and strengthening their "divide and rule policy". After Independence the Indian leaders also toed the line chalked without exhibiting courage to solve the real issues. What started as a civil dispute in late nineteenth century has now grown hydra headed with several cases pending[37] in the High Court of Allahabad and the Supreme Court.

Following the 6th December, 1992[38] incident a dramatic change took place in the course of litigation. On 7th January, 1993 the President of India for the first time sought the Court's opinion on a pure question of fact, namely :

35. *The Lawyers*, Vol. VIII, No. 5, 23.

36. In 1528 Babar snatched Oudh from its ruler. Mir Baqui, his *Suba*, grabbed the land in Kot Rama-Chandra in Ayodhya (a place known as "*Rama Janmabhoomi*") and constructed a mosque thereon against severe opposition from Hindoos. The dispute continued. Nawab of Oudh, Wajid Ali Shah promised to return the disputed land but due to uprisings in 1857 he could not carry out his promise.

37. (*i*) Original suit by Raghubir Das Mahant of the Janmabhoomi in court of Sub-judge Faizabad in 1885, (*ii*) Suit No. 2 of 1950 by Gopal Singh Visharad in Faizabad on 16-1-1950, (*iii*) Suit No. 26 of 1959 by Nirmohi Akhada of Ayodhya, (*iv*) Suit No. 12 of 1961 by Sunni Central Waqf Board, (*v*) Suit No. 236 of 1989 filed in Allahabad H.C. by Deoki Nandan Agarwala with RAMA as plaintiff and he as his next friend. Suit No. 12 of 1961 has been indicated as a leading case. On 12 July, 1989, the H.C. directed to hear all these five suits together by a full bench of the H.C. On 1st February, 1986 locks of the gates were ordered to be opened by the District Judge. Against this two writs (746 of 1986 and 3106 of 1986 dated 12th May 1986) were filed and they are pending. However, due to demolition of the structure nothing survives in these proceedings. Central Government in the end of 1989 allows shilanyas to take place on 9-11-1989. On 2-11-1990 Kar Sevakas damage the structure wall.

38. Notification of BJP Government acquiring 2.77 acres of land surrounding the structure on 7th and 10th October, 1991. State Government takes possession of notified land. Against this Writs No. 1000 & 977 of 1991 filed, challenging the *vires* of the notification. Writs transferred to H.C. the State Government undertakes to protect Ram Janma Bhoomi-Babri Masjid structure. Notification quashed by a Full Bench of the H.C. in 1992. Demolition of structure on 6-12-1992.

"Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Rama Janma-Bhoomi Babri-Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood?"

All this when whether the court should answer the reference at all is still in doubt. When the reference is taken up for hearing this question will have to be answered first. In none of the references made to it so far has the court refused to answer although it has explained time and again that it has the discretion to do so. In *Re* the Special Courts Bill, 1978[39], the Supreme Court explained that *irrespective of different phraseology used in clause* (1) (*"may"*) *and clause* (2) (*"shall"*) *of Article 143 "the Court may be justified in returning the reference unanswered if it finds for a valid reason that the question is incapable of being answered*" (para 20). In the same decision, the court while commenting on the binding nature of its opinions in its advisory jurisdiction said (para 1010) "... *it would be strange that a decision given by the Supreme Court on a question of law in a dispute between two private parties should be binding on all courts in this country, but the advisory opinion should bind no one at all...*".

The Ayodhya Act challenged.—The Central Government on 7th January, 1993 promulgated the Acquisition of certain area at Ayodhya Ordinance, 1993 (No. 8 of 1993) which became an Act. This Act was challenged by *M. Ismail Faruqui and Ors.*[40] in separate writ petitions. The Supreme Court held that Ss. 3, 4 and 8 which are the core provisions of the Act are unconstitutional and therefore the entire Act is invalid and is struck down. The court also held that Special Reference No. 1 of 1993 made by the President under Article 143(1) of the Constitution is superfluous and unnecessary and does not require to be answered. Consequently, all the pending suits and legal proceedings relating to the disputed area within which the structure (including the premises of the inner and outer courtyards of such structure), commonly known as Ram Janam Bhumi-Babri Masjid stood, stand received for adjudication of the dispute relating therein. Status quo ante as on 7-1-1993 is to be maintained as regards puja and namaz.

The litigation shows how law and law-courts can be made to complicate the issues rather than resolve them. The litigation spells out a number of problems besides the importance of the rule of law in an organised society. Besides these questions the question of use and misuse of Article 356, the question of Secularism and the legislation to delink religion from politics have come into forefront.

(a) Use and Misuse of Article 356 :

As a result of demolition of the Babri-Masjid the Narasimha Rao government at the centre dismissed the four state governments of U.P., H.P., M.P. and Rajasthan by misusing the provisions of Article 356.

The makers of the Constitution merely picked up the idea contained in Article 356 from the Government of India Act, 1935[41] and introduced it in our Constitution.

39. (1979) 1 SCC 380.

40. *M. Ismail Faruqui (Dr.)* v. *Union of India*, (1994) 6 SCC 360.

41. S. 93, where similar power to assume sole responsibility of administration of the Province had been conferred on the Governor in case of a breakdown of the machinery of the Provincial Govt. in whole or in part.

This was a great irony as they adopted what they (The National Congress) once wanted to destroy.[42] Our Constitution is federal and a federal constitution has to take care of the legitimate interest both of the federal government and constituent units and safeguard the limited autonomy of the constituent units. Articles 356 and 355 represent this idea. However the powers conferred by these Articles go to the extent of even destroying the autonomy of the constituent units in administrative sphere. This naughty problem was discussed in the Constituent Assembly[43] and fears were expressed by Dr. Ambedkar, Dr. P.S. Deshmukh and Shri H.V. Kamath that the provisions would be misused and the idea of pious duty would be converted into a concept of power and authority arbitrary and unauthorised by law. Shri H.V. Kamath remarked that "This is a foul transaction, setting at naught the scheme of even the limited provincial autonomy which we have provided for in this Constitution". Dr. Deshmukh pointed out, "If we mean this Constitution to work, the Centre will have to respect the autonomy of the provinces[44] whether we specifically say so or not..." Dr. Ambedkar agreed that many provisions contained in the Constitution gave powers to the Centre to override the Provinces[45] but he defended by saying that "..we ought to expect that such Articles will never be called into operation and they would remain a dead letter."[46]

One must however remember that Article 356 was brought into operation on more than 80 occasions upto 1993 and the warning[47] as cautioned by Dr. Ambedkar was not resorted to even in a single instance. His hopes were thus dashed to pieces by all political parties that wielded power at the Centre.

Naked abuse of this power was started when the Communist Government in Kerala was dismissed by Jawaharlal Nehru. This process of abuse of power under this Article was clearly seen in recent use of this Article by Narasimha Rao in case of states of U.P., H.P., M.P., and Rajasthan.

As pointed out by Dr. Rajeev Dhavan,[48] in Nehru era there were six cases, in Lal Bahadur Shastri era two cases, in Indira Gandhi era twenty-eight cases, in Janta Rule twelve cases were there. The latest figure about the use of Article 356 is more than 86. In none of these 86 cases, the procedure mentioned by Dr. Ambedkar was followed. It was reported in the press that the President Dr. Shankar Dayal Sharma was reluctant to sign the Proclamation under Article 356 with respect to these four states in 1992. His disapproval was however watered down. As there was no other

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42. See (1993) 4 SCC Journal Section, 1-7 : T.K. Tope : "Dr. Ambedkar and Article 356 of the Constitution".
43. Constituent Assembly Debates, vol. IX, 133, 148, 175, 176, 177.
44. Now, states.
45. As Dr. Tope in the article at 5 in (1993) 4 SCC Journal Section, points out quoting Dr. Ambedkar, "...I may say that I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes". Thus Ambedkar's vision saw the future.
46. *Ibid.*
47. "If at all these Articles are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions, before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail that he would resort to this Article".(Constituent Assembly Debates, vol. IX, 177.)
48. Rajeev Dhavan : President's Rule in India, 1979, N.M. Tripathi, Bombay.

way he had to sign.[49] Dr. S.D. Sharma should have asserted himself and should have invited Prime Minister's attention to Dr. Ambedkar's memorable observations in the Constituent Assembly on November 25, 1949.[50] And this was not done too.

In majority of the cases under Article 356, observes Dr. Tope, it was the intolerant and dictatorial attitude of the party in power at the Centre that was at the root of the use of Article 356. The Constitution does not provide a specific remedy against the abuse of power or mala fide use of power. However the Proclamation made by the President can be challanged in a court of law. In fact there is a decided case[51] of the Supreme Court on this point wherein it was said that if the satisfaction of the President is mala fide or based on extraneous or irrelevant grounds, the Proclamation would be justiciable. However the strange thing in this case was that having laid down this principle, the Court did not strike down the Proclamation, for reasons best known to the Judges who delivered the judgment. In *Rajasthan case*[52] The Proclamation was both mala fide and based on irrelevent grounds. In the case of Proclamation issued in 1992 regarding the four state governments the same seems to have been based on irrelevant grounds and is also mala fide. It deserved to be struck down and the Court should have restored the dissolved assemblies and the ministries. In Pakistan, a parallel case occured and the dismissed government was restored by the Court. This deserves our commendation. However, to the country's misfortune our trusted Desh Sevakas and the apex Court lack the will and power of assertion to set right the things.

The demon of Article 356 worked havoc in the past and the best and effective remedy would be striking down the Proclamation in appropriate cases and restoring the dissolved assemblies and ministries, thus establishing the Supremacy of the Constitution.[53]

(*b*) *Secularism and the Constitution Amendment Bill, 1993* :

Consequent upon the demolition of the structure and dismissal of the four state governments the Central Government decided to introduce a Bill in Parliament delinking religion from politics. This step was to strengthen the secular character of the Indian society, but the remedy seems far more worse than the disease.

As observed by the Supreme Court in various cases[54] a *religion* is not merely an opinion, doctrine or belief, it has its outward expression in acts as well. It might prescribe rituals and observations, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observations might extend even to matters of food and dress.[55]

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49. Is "duty" first or "self-security and self-interest" first? Lust of power makes the mind misty and dim.
50. See F.N. 40 ante.
51. *State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592 : AIR 1977 SC 1361. The Proclamation in this case was both mala fide and based on irrelevant grounds. In this regard see *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918, wherein this problems has been discussed.
52. (1977) 3 SCC 592 : AIR 1977 SC 1361.
53. See (1993) 4 SCC Journal Section, 1 to 7.
Note : It is now too late. Elections were held in these four states recently and elected governments are now working (Jan. 1994).
54. *Commr. Hindu Religious Endowments, Madras* v. *L.T. Swamiar*, AIR 1954 SC 282, 290 ; *Ratilal P. Gandhi* v. *State of Bombay*, AIR 1954 SC 388, 392 : 56 Bom LR 1184 : (1954) 1 MLJ 718 ; *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra*, (1976) 2 SCC 17, 32 : AIR 1975 SC 1788.
55. 56 Bom LR 1184 : AIR 1954 SC 388, 392, *supra*.

Secularism is a system of utilitarian ethics, seeking to maximise human happiness or welfare quite independently of what may be either religious or the occult.[56] A secular State does not prohibit all religions, on the contrary it permits all religions. But the State itself has no religion. A *secular State* looks with an equal eye towards all religions and religion has no place in the matter of management of political society. Nationalism is superior to secularism. Religions has thus no place in politics because to link religion with politics or vice versa is a dangerous game. Political instruction must be based on economic and social interests of the entire community without reference to religion, race or sex. All must enjoy equal rights and at any rate no privileges should flow from subscribing to any particular religion. *In short religion is only a matter of individual faith and it has no relevance in the matter of national issues.*

Constitution of India envisages a classless, casteless, egalitarian society. The word "secular" was inserted by the Constitution (42nd Amendment) Act, 1976. In the Indian context it means tolerence, generosity and mutual understanding among the majority and minorities regarding the freedom and rights.

One may recall the *constitutional origins of the Indian republic and Pakistan.*[57] Pakistan came into being as a two-nation doctrine, i.e. Hindus and Muslims can only be accomodated in two nation States. As the Preamble of 1973 Constitution of Pakistan States "*The Universe belonging to the almighty Allah*" and as it specifically provides that "Islam shall be the state religion of Pakistan" (Article 2), Pakistan is a theocratic state. On the other hand our Constitution makers rejected this two nation theory and propounded secularism. This is what is incorporated in Articles 14, 15, 16 (equality irrespective of religion) and Articles 25 to 30 (religious and cultural rights and freedoms). As a matter of fact no religion is given any preference. This means and implies that even a law by a legislature cannot be made to abrogate such a right and if such a law is made it will have to be struck down by the courts. Besides, the Constitution cannot be amended to give preference to any particular religious denomination. As declared by Keshavanand Bharti equality guaranteed under the Constitution is part of the basic structure of the Constitution and cannot be amended even under the amending provisions of the Constitution.

The event of 6th December, 1992 shows that though we adopted secularism as our founding faith, religionism is our way of life. We mix religion and politics and fight elections on communal basis. There is a big gap between our actions and our preaching.[58] To stop this the Constitution (Eightieth Amendment) Bill, 1993 was prepared by the government.

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56. *Z.B. Bukhari case*, supra. For description, meaning and role of secularism see *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918.

57. Based on : 'Ayodhya : Coming to terms with Secularism', *the Lawyers*, 1993, Vol. 8, No. 1, 4 to 7.

58. On August 17, 1993, inauguarating a rupees ten crores facility for devotees of Sai Baba (a religious function), the P.M. of India reiterated the need to separate religion from politics (Canvassing Secularism). Consequent upon *Shah Bano case* judgment the ruling party enacted Muslim Women (Protection of Rights on Divorce) Act and bowed down before the Muslim fundamentalists, snatching upon the vested rights of the Muslim women. Such unsecular conduct of our so-called secular government is the real hurdle in the path of Common Civil Code. The P.M. has also promised the Muslims to construct the mosque and the temple. He promised the Mullahs and Maulvis to increase their remuneration for religious work and the government would pay for it. T.A., D.A. of these persons attending the conference was paid by the government. Every political party, observes the LAWYER (in Vol. 8, No. 1, 1993, Cover story, 7) uses the minority as fodder in their pursuit of power unmindful

(c) A critique of the Legislation to delink religion from politics :[59]

As could be seen from the Constitution (Eightieth Amendment) Bill, 1993 it has the following three main clauses :

(*i*) A clause reiterating the secular nature of the State (Article 24-A);

(*ii*) A clause giving Constitutional sanction to a law for banning certain organisations (Article 35-A); and

(*iii*) A clause adding a disqualification for membership of legislatures (Article 102-A and 191-A).

Though India is a secular State the word "secular" is defined nowhere in the Constitution. Article 24-A tries to define it by stating that the State shall have *equal respect for all religions*[60] and shall not profess, practice or propagate any religion. The expression "equal respect for all religions" is a creator of constant disputes bringing the courts in between to solve them. Moreover the expression is pregnant with a hidden meaning that the State will extend full protection, monetarily and otherwise to temples, maths, masjids, churches, gurudwaras and a host of other religious institutions who control immense wealth and property. This results in negation of India's secular character and retards it progress. For example if the practice of triple talaq is declared illegal, the muslim fundamentalists may well challange such a reform on the ground that their religion is not respected. This would be the result of applying Article 24-A.

The powers are given under Article 35-A to ban by law any association if it promotes or attempt to promote disharmony or feelings of enmity or hatred between different religious groups on ground of religion. Enaction of this clause is redundant in so far as a law for banning organisations that promote communal hatred already exists.[61] All what is required is the existence of the political will to implement these provisions; and that is lacking.[62] Moreover astonishing enough, Article 35-A bestows a fundamental right on the State against its citizens to legislate for a ban on organisations of its people.[63] This clause, it is evident, is arbitrary and unconstitutional since it is without any safeguards and puts high handed powers in hands of Parliament and the State legislatures.

Lastly, the provisions under Article 102-A and 191-A which prescribe pre-poll disqualifications of a candidate for M.P. or M.L.A. are open to several objections. The amendment is quite unnecessary and repetitive since existing laws[64] if properly implemented are capable of producing the result sought to be achieved. Under Article 329 of the Constitution nothing should be done to impede or thwart the election process once it has commenced and to let matters be decided only by an election

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of the progress of the country. Innumerable such examples are available if we look into the conduct of State C.Ms. and Ministers.

59. Source : Cover Story : *The Lawyers* : Vol. 8, No. 1, 1993, 4 to 8.
60. Emphasis supplied.
61. The Unlawful Activities (Prevention) Act. 1967 : See also Ss. 153-A and 153-B of I.P.C.
62. Instances of Bal Thackerey of Shiv Sena and Abdullah Bukhari of the Jama Masjid. advocating violence by one community against the other are many but they are neither prosecuted nor punished.
63. Its right place, if at all, should be in Part xv of the Constitution, and not in the Chapter on Fundamental Rights.
64. Ss. 8, 29-A, 123 and 125 Representation of People Act, 1951; Ss. 153-A, 505(2) and (3) of I.P.C.; S. 6 of the Places of Worship (Special Provisions) Act, 1991; Religious Institutions (Prevention of Misuse) Act, 1988.

petition. Even the High Courts and the Supreme Court cannot interfere. However, the present amendment overrides all this, putting power to disqualify into the hands of a petty bureaucrat who may have leaning towards a particular party. This will erode the whole electoral process. Moreover one does not know whether the disqualification will be for a particular term or for ever. These amendments together with the Representation of the People (Amendment) Bill, 1993 will stifle democracy. *It is a grave assault on democracy.* One should not forget that *Hitler used the democratic constitution of the Weimar Republic to become a dictator.* According to Akali Dal and the Muslim League these bills are an anti-minority move.[65]

These two bills are a hypocritical exercise on the part of the ruling party to root out communalism from the Indian political scene. One however, should not forget that, the political parties are responsible for such a situation. *Laws cannot root out such evils. Had it been so, the practice of untouchability, the evil of dowry and sati would have been rooted out long before. What we tend to passover is that these challanges are ideological in their nature, and in the battle of ideas, laws are of secondary importance, if at all.*" *Ideologies must be countered ideologically and not through legislative oppression....* These battles will have to be fought in the streets by the common man, in the minds and hearts of the Indian people.[66]

(*xii*) The Kashmir Problem and Article 370 :[67]

According to some jurists Article 370[68] of the Constitution is one of the most controversial but least studied provisions. Our Constitution is studded with provisions conferring "special status" on certain states[69]. In regard to Nagaland and Mizoram Parliament is barred not only from altering "religious or social practices" but also "customary law and procedure", administration of civil and criminal justice according to such law, and "ownership and transfer of land".

Only *two authorities acting together* can amend or abrogate Article 370. These authorities are the President of India and the Constituent Assembly of Jammu and Kashmir. That body ceased to exist after it had enacted the State's Constitution on November 17, 1956, to come into force on January 27, 1957.

Article 370 was adopted by the Constituent Assembly of India in 1949 and it was dubbed in the marginal note as "Temporary Provision with respect to the State of J. & K. This figured in Part XXI as "Temporary and Transitional Provisions". All this was for reasons stated in the preceeding para. The other reason for this temporary character is that in 1949 India was committed to a plebiscite. Neither reasons for the temporariness is valid any longer. Plebiscite is rightly ruled out and the State's constituent assembly is gone.

From this, two consequences follow unavoidably. They are : That all the amendments to the Constitution of India in relation to the State and of the State Constitution itself made by recourse to Article 370 after November 17, 1956 are unconstitutional.

65. Unanimous opposition has compelled the ruling party to shelve the bills for the present.
66. See foot note 52 ante.
67. Source : A.G. Noorani's Article in Ind. Express, April 11, 1991.
68. See Text of Article 370
69. Nagaland (Art. 371-A), Sikkim (Art. 371-F), Mizoram (Art. 371-G), Arunachal Pradesh (Art. 371-H).

What does the Article provide :

Article 370, in brief, made five special provisions for Kashmir.

First, it exempted the State from the provisions of the Constitution providing for the governance of the States. It was allowed to have its own Constitution as a federating unit.

Secondly, Parliament's Legislative power over the State was restricted to the three subjects only. The President could extend to it other provisions of the Constitution to provide a constitutional framework if they related to the matters specified in the Instrument of Accession. For all this, only "*consultation*" with the State Government was required since the State had already accepted them in 1947.

But, *thirdly,* if other constitutional provisions or other Union powers are to be extended to Kashmir the prior "*concurrence*" of the State Government was required.

The *fourth feature* is that even that concurrence alone did not suffice. It had to be ratified by the State's Constituent Assembly. Article 370 (2) is clear on this point: "If the concurrence of the Government of the State... be given before the Constituent Assembly for the purpose of framing the Constituent of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon."

This clearly shows that the President could not exercise his power to extend the Constitution to Kashmir indefinitely. The power had to stop at the point the State's Constituent Assembly drafted the State Constitution. Once it finalised the scheme and dispersed, the President's extending process stopped.

Fifthly, Article 370 (3) empowers the President to make an Order abrogating or amending it. But for this, too, "the recommendation" of the State's Constituent Assembly "shall be necessary before the President issues such a notification". That body vanished without making any such recommendation. Article 370 cannot be abrogated or amended by recourse to the amending provision of the Constitution which applies to all the other States: namely, Article, 368.

For, in relation to Kashmir, Article 368 has a proviso which says that no constitutional amendment "shall have effect in relation to the State of Jammu and Kashmir" unless applied by Order of the President under Article 370 — which requires the concurrence of the State's Government and ratification by its Constituent Assembly. It is sheer constitutional illiteracy, therefore, to talk of abrogating Article 370.

Article 1 (1) of the Constitution says that India shall be a Union of States. Sub-clause (2) adds that the States shall be specified in the First Schedule which certainly mentions the State of Jammu and Kashmir. But it is also extended to the State through Article 370(*1*)(*c*) which says: "The provisions of Article 1 and of this Article shall apply in relation to that State : "This is not without legal significance and consequence.

Consequently it would be totally wrong to assume that with the repeal of the Article all constitutional provisions would automatically apply to Kashmir. The consequences are not difficult to imagine.

Finally when the State's Constituent Assembly has "taken its decision, both, on the Constitution for the State and on the range of federal jurisdiction over the State, the President may, on the recommendation of that Constituent Assembly, issue

an order that this Article 306-A (370 in the draft) shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified. But before he issues any order of that kind, the recommendation of the Constituent Assembly will be a condition precedent.

Delhi Agreement :

The next major step was the Delhi Agreement between Nehru and Abdullah in July 1952 on topics like the Supreme Court's jurisdiction, financial integration, limited emergency powers, and conduct of elections to Parliament, etc.

Under the Indira Gandhi-Abdullah Accord of February 1975 the State could review only those post-1953 Central laws which were in the Concurrent List and related to welfare measures, cultural matters, social security, personal law and procedural laws.

Meanwhile, the Supreme Court had delivered judgment in 1968 in *Sampat Prakash case*[70] which is as palpably, outrageously wrong as the habeas corpus judgment in 1976. It ruled that even after the State Constituent Assembly had ceased to exist, the President could, with the concurrence of the State Government — unratified by that body, of course,—add to the Union's powers. Three flaws stand out in the judgment. First, the Attorney-General cited Sir Gopalaswami's speech, but only on the Indo-Pak war of 1947, the UN and the conditions in the State. In 1968 the Court opined that "the situation that existed when this Article was incorporated in the Constitution has not materially altered." It ignored completely his exposition of Article 370 itself — that the Assembly alone had the final say. It brushed aside Article 370 (2) which provides that and said that it spoke of "concurrence given by the Government of the State before the Constituent Assembly was convened and makes no mention at all of the completion" of its work or its dissolution! This was surely necessarily implied. Clause (3) on the ceasing of Article 370 makes it clear beyond doubt. The Court picked on that to say that since the Assembly made no recommendation that Article 370 be abrogated, it should continue. This is right. But it does not follow that after that body dispersed the Union acquired the power to amass powers through the decisive ratificatory body was gone.

The Supreme Court totally overlooked the fact that on its interpretation Article 370 can be abused by collusive State and Central Government's to override the State's Constitution.

Sheikh Abdullah had warned in 1952 that "any suggestions of altering arbitrarily this basis of our relationship with India would not only constitute a breach of the spirit and letter of the Constitution, but it may invite serious consequences for a harmonious association of our State with India." All he wanted was "maximum autonomy" for Kashmir as a unit of the Federation. It is yet not too late to assure the people that we are prepared to restore that position while combating the Pak-aided armed insurgency.[71]

The other opinion :

The other opinion in respect of Article 370 is its abrogation[72]. The reasons advanced may be succinctly considered as follows :

70. *Sampat Prakash* v. *State of J.K.*, AIR 1970 SC 1118.

71. A.G. Noorani, Ind. Exp., Apr. 11, 1991.

72. Digant Oza : *Political History & Analysis of Kashmir Problem*, 1992 Edn. ; See also *Gujarat Samachar* Daily 17/8/93, 24/8/93—Articles by Arun Shourie.

(*i*) The Article without imposing any control on the State of J.K. simply provides how to apply the article. (*ii*) As observed from Article 371, 371-A to 371-D and 371-F to 371-I the words "*Special provisions*" used in these Articles do not appear in Article 370. (*iii*) Since India and Pakistan were formed in 1947 and the areas which abound in Muslim community were given over to Pakistan the matter should have been over but ignoring this Pakistan invaded Kashmir which is an integral part of India.[73] (*iv*) The circumstances which existed in 1947 are not only changed but also the invasion of Pakistan on Kashmir must required us to reconsider our position. (*v*) The Kashmiri leaders have not remained faithful to the above arrangement (at no. (*iii*) above) but have been constantly intriguing against India at the instance of Pakistan which requires them to break away from the Instrument of Accession[74]. This situation must justify either a suitable amendment or total abolition of Article 370, so as to destroy and nullify the evil designs of traitorous instrumentalities of Pakistan. It is rightly said that "those who do not learn from history[75] are condemned to repeat it". (*vi*) Other states that have merged with India have no "*special status*" like J & K (without any speciality). We cannot pamper this emotional outburst and a blunder of our past leader about whom it is remarked that he was "English by education, Muslim by culture and Hindu by accident of birth."[76] (*vii*) Along with this special status, creation of "*special identity*" of Kashmiris is another fallacy working against our National interest. (*viii*) A volley of concessions have been conferred on J & K. For example,

> (*a*) India has no powers to declare emergency under Article 352 or Article 360. (*b*) The Union is powerless to take any action under Article 356 in case of failure of constitutional machinery. (*c*) No direction under Article 365 could be issued. (*d*) No army could be sent into J & K for help. (*e*) No branch of the Central Bureau of Intelligence could be opened or established. (*f*) Many subjects[77] on which the Union can legislate have been cancelled from the concurrent list. (*g*) Right to property is a fundamental right in Kashmir, and no landed property could be acquired there by any outsider.

Kashmir has enacted its own Constitution, it has its own flag, it has its own separate administration, Indian laws do not apply to it and it has its own laws, its judges and magistrates, ministers and M.Ps. take oath in the name of its own Constitution (as if they have nothing to do with Indian Constitution)—all these things have encouraged them to nurse an impression that they are independent of India and India is their treasury wherefrom they may draw as much as they wish without accountability.

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73. Constituent Assembly of J & K in its Constitution (Sec. 1, Part III) has declared that J & K is an integral part of India and no change would be effected therein (S. 147 of J.K. Constitution).
74. See Appendix F.
75. Three wars fought with Pakistan and one with China in 1962.
76. Emil D'Cruz : Indian Secularism—A fragile myth, 1988, 20.
77. e.g. Administration of Justice, Constitution and arrangement of courts, forests, protection and preservation of wild animals, family planning etc. etc.

It would be better to have a national debate on the issue and come to a consensus instead of sweeping problems under a carpet. One must understand that our so-called secularism is at test in Kashmir.

Granting prerogatives to Kashmir has ruined India. Prerogative is a monarchial concept and a monarch has not to assign any reasons for his actions under prerogatives. Such prerogative rights can be abridged or modified even in England by Act of Parliament[78]. India feels shy or guilty in doing so. We are a republic and a democracy, it is the Rule of Law and due process which matter here ; we cannot maintain a Monarchy at the cost of our democracy.

(*xiii*) **The Mandal Commission case and the Reservation Policy.**—On 8th September, 1993 a notification announcing the implementation of one of the major recommendations of the Report of the Mandal Commission was issued. This may be said to be a mammoth Indian experiment in social engineering.

Reservation is not a new idea[79]. The concept is old enough. It existed in 1885. However the concept has always remained controversial. The Constitutional provisions for backward classes lay down broad contours leaving the contents largely vague and undefined.[80]

The *First Backward Classes Commission* was appointed under Article 340 under the Chairmanship of Kaka Kalelkar in 1953, met with an ignonimous end. The Janta Government in 1979 appointed the *Second Backward Class Commission*. Its Chairman was Bindeshwar Prasad Mandal. It submitted its report in 1980 which was published in 1982.[81]

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78. Walker : *The Oxford Companion to Law*, 1980 Edn., 982-983.

79. For History of this concept see *Lawyers*, Vol. VIII, No. 9.

80. *Constitutional Scheme of Compensatory Discrimination towards Backward Classes*

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

Article 15(4)—Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes.

Article 16(1)—There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Article 16(4)—Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Article 29(2)—No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 338(1)—There shall be a special officer for SCs and STs to be appointed by the President.

Article 338(3)—In this article, references to the SCs and STs shall be construed as including references to such other backward classes as the President may, on receipt of the report of a commission appointed under clause (1) of Article 340, by order specify and also to the Anglo Indian Community.

Article 340(1)—The President may by order appoint a commission... to investigate the conditions of socially and educationally backward classes of citizens within the territory of India... and to make recommendations.

Article 342(2)—A commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

Article 340(3)—The President shall also cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

Also see Articles 38, 39, 39-A, 41, 46.

81. On 7th August, V.P. Singh announced the recommendations of the Report and on 13th August, 1990 formal official memorandum was issued.

The issuance of the memorandum of the Report caused mass disturbances and riots across the entire nation. The Report contained a number of flaws and the intentions of the Government were suspected as trying to construct backwardness as a political resource and that the compensatory discrimination would turn from being a temporary and exceptional device into a regime of communal quotas.

As usual, the burden was placed on the shoulders of the Judiciary to clear the situation. In the beginning the Judiciary was unwilling to handle the question, it being political one. Thereafter on 13th August, 1990 it proclaimed the Official Memorandum as valid but on 1st October, 1990 it stayed its operation till the final adjudication of the matter.

The change of government at the Centre brought another Official Memorandum into being on 25th September, 1991 modifying the previous one. This was also challanged. The stay continued.[82]

This brings us to *Indira Sawhney case*[83] which held the official memorandum of 13th August, 1990 valid and enforceable and issued directions to the Government of India etc., to constitute a permanent body so that it could examine complaints regarding inclusion or over and under inclusion in the OBC lists, exclude socially advanced sections or persons (creamy layer) from OBCs and submit all those objections and its report before the Supreme Court only.

Thus the 13th August, 1990 official memorandum was held valid and enforceable, subject to the exclusion of the socially advanced members or sections from notified OBCs as explained in the directions. As to the second official memorandum of 25th September, 1991 (that part of it which provided for giving preference to poorer sections), it was said that, to be upheld as valid, that part was required to be interpreted as intending a distinction between backward and more backward classes on the basis of degrees of social backwardness and a rational and equitable distribution of benefits on that basis. The other part of the Second official memorandum, which provided for additional 10% reservation to the economically backward, was held invalid and inoperative. Now just two hurdles remained before the finishing line could be touched and these were— (*i*) identification of the creamy layer by the government of India, and (*ii*) the setting up of a body to look into the requests and complaints regarding inclusion and over and under inclusion respectively.

There were differences of opinion about the identification and test of the creamy layer[84] and how and on that basis the identification was to be actually effected.

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82. *Indra Sawhney* v. *Union of India* (stay Order dated 1-10-1990), 1992 Supp 3 SCC 210 : 1992 SCC (L&S) Supp 477 ; *Indra Sawhney* v. *Union of India*. (ROP, dated 8-8-1991) 1992 Supp (3) SCC 212 : 1992 SCC (L&S) Supp 479.
83. *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385—delivered by a special nine judge bench. Six Judgments were handed down. Leading judgment is by Justice B.P. Jeevan Reddy, the then Chief Justice M.H. Kania, Justice M.N. Venkatchaliah, Justice A.M. Ahmadi, with Justices Ratnavel Pandian & P.B. Sawant concurring by separate judgments. Minority judgment given by Justices Dr. T.K. Thommen, Kuldip Singh and R.M. Sahai.
84. Suggested tests : (*i*) "Means Test" or "Economic Ceiling Test" (by Justice Kuldip Singh); (*ii*) "Social Capacities Test" (by Justice Sawant); (*iii*) Income Property or Status Test (by J. Sahai); (*iv*) "Social Advancement Test" by (J. Jeevan Reddy).

After a lull period of three months on 22nd February, 1993 the Government of India resolved to set up an expert committee for the purpose abovesaid. The Committee was also to give recommendations on such other matters relating to the implementation of the judgment of the Supreme Court. This Committee submitted its report on 10th March, 1994 showing a list of categories and the persons who are to be excluded.[85]

National Commission for Backward Classes Act, 1993 :

However, coming back to the story of implementation of the Mandal report, with the Expert Committee's report on creamy layer having been submitted, one might legitimately think that the countdown had begun. In the meanwhile, a permanent body had been set up (to look into requests for inclusion into the backward classes list and complaints regarding over or under inclusion), as the National Commission for Backward Classes, under the National Commission for Backward Classes Act, 1993 passed in April 1993.[86] All the pre-conditions for the implementation had thus been met. But another six months elapsed before the government woke from its slumber to announce the implementation[87] on 8th September, 1993,

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85. For Recommendations of the expert committee for specifying the criteria for identification of the creamy layer see Lawyers; Vol VIII, No. 9.

86. *The National Commission for Backward Classes Act, 1993*

It is an Act to constitute a National Commission for Backward Classes other than the scheduled castes and scheduled tribes and to provide for matters connected with it.

It defines backward classes as backward classes of citizens other than the SCs and STs as may be specified by the Central Government in the lists prepared by it from time to time for making provisions for preferential treatment to those backward classes which it thinks are not adequately represented.

The National Commission for Backward Classes shall be appointed by the Central Government and shall consist of—(*i*) a chairperson who is or has been a judge of the Supreme Court or of High Court; (*ii*) a social scientist; (*iii*) two persons who have special knowledge in matters relating to backward classes; and (*iv*) a Member-secretary, who is or has been an officer of the Central Government in the rank of a Secretary to the Government of India.

If a person so abuses his position in the Commission that his continuance in office shall be detrimental to the interests of backward classes, it shall be one of the grounds for his removal from office.

The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate.

The Commission shall have all the powers of a civil court while performing its functions.

The advice of the Commission shall ordinarily be binding on the Central Government.

The Central Government may at any time and shall at the expiration of 10 years from the coming into force of this Act and every succeeding period of 10 years thereafter undertake revision of lists and in this exercise it shall consult the Commission.

The Central Government shall cause an annual report and a memorandum of action taken on the Commission's advice, and the reasons for the non-acceptance, if any, of any of the Commission's advice, to be laid before each House of Parliament as soon as they are received.

87. *Contents of the final notification dated 8th September, 1993 issued by Government of India, announcing reservation for socially and educationally backward classes in civil posts and services under Government of India.*

Consequent to the consideration of the Expert Committee's recommendations, the M. O. dated 13th August, 1990, has been modified as follows:—

(*i*) 27% of the vacancies in civil posts and services under Government of India to be filled through direct recruitment, shall be reserved for OBCs.

(*ii*) Candidates belonging to OBCs recruited on the basis of merit in an open competition on the same standards prescribed for general candidates, shall not be adjusted against the reservation quota of 27%.

(*iii*) (*a*) The aforesaid reservation shall not apply to persons/sections identified as part of the creamy layer according to the expert committee's report.

(*b*) The rule of exclusion will not apply to persons working as artisans or engaged in hereditary

just when the elections are round the corner! Nonetheless it is the successful end of a long drawn match.

Much remains to be done :

But the ball is still in the government's court which must remember that the 27% quota was always supposed to be a modest initial start and a mere palliative. The other recommendations like the affirmative action programmes for radical land reforms, educational and financial assistance, business and entrepreneurial schemes for the BCs which are waiting in the docks, also need to be implemented.

Indeed there is little done, much still to be done!

(*xiv*) **Miscellaneous.**—It must be noted that in 1989, Fatima Beevi became the first ever woman Judge of the Supreme Court of India and the year 1991 saw the appointment of the first woman as the Chief Justice of Himachal Pradesh High Court.[88]

In 1990 the "Security Scandal" shook the whole country. It was the greatest fraud ever practised in this country.[89] In 1993 the Government attempted to prepare and introduce a bill[90] in order to delink religion from politics and thereby to amend the Constitution. The said bill was accompanied by another bill[91] in order to further amend the Representation of the People Act, 1951. These bills were much criticised[92] Even after the presentation of the Bill and finally its postponement the Rashtrapati, the Prime Minister of India and ministers of states continued to back the religious functions and visit temples in their official capacity as such, thus defeating the very purpose of amending the Constitution.

The year 1993 also witnessed the Hazrat Bal Masjid event sponsored by Pakistan and the traitors. This put our State policy to test and proved us once more to be prisoners of indecision.

The Ministry of Environment brought in the Public Liability Insurance Act, 1991, which lays down that all owners handling notified hazardous chemicals[93] are required to take insurance policy to meet liabilities under Section 4(1) of the Act. The enactment gives a legal tool to the common man of which he can make use when accidents occur or highways or in other populated areas.

On new year's day 1993 the Lucknow bench of the Allahabad High Court delivered a historic judgment that has few parallels in the history of the Indian judiciary. The judgment is known as "darshan judgment". The Vishwa Hindu

occupations and callings. A list of such occupations and callings will be issued separately.

(*iv*) The OBCs for the purpose of the aforesaid reservation would comprise in the first phase, the castes and communities which are common to both the lists in the report of Mandal Commission and the State Government's list.

(*v*) Reservations will be available to the OBCs in a similar manner, in respect of Public Sector Undertakings & Financial Institutions, including public sector banks. Based on "Cover story" in *The Lawyers*, Vol. VIII, No. 9.

88. During the span of 43 years (1947-1990) 800 judges were appointed in various High Courts. Out of this there were only 17 women judges, i.e. 2.12% only.
89. See Gurdas Gupta : *Security Scandal : A Report to the Nation*.
90. The Constitution (Eightieth Amendment) Bill, 1993 (No. 73 of 1993).
91. The Representation of the People (Amendment) Bill, 1993 (No. 74 of 1993).
92. *See* Supra, para XI (c) in this chapter for details.
93. Till today 179 chemicals and three categories of flammable substances have been identified as hazardous.

Adhivakta Sangh (VHAS), the Akhil Bharatiya Nehru Brigade (ABNB) and Maharshi Avadhesh were the petitioners. The petitioners sought for a writ of mandamus commanding the Union of India and the State of Uttar Pradesh not to create hurdles, obstructions in the performance of Darshan, Pooja, Aarti and Bhog of Shri Ramji virajman (विराजमान) at Rama Janmabhoomi and to allow the Pujaris to perform the same and to preserve and protect the material of "historical importance found in the debris of the demolished structure at Sri Ram Janmabhumi, Ayodhya." Moreover it was prayed to direct the opposite parties to define secularism, minority and majority, in order to save Hindu religion and Hindu temple from being destroyed or thrashed by clubbing these three expressions together, as Hindus in general are being denied their rights including right of religion and faith.

The Hindus, as the petitioners say, were being deprived from 6th December, 1992 of their right to faith and worship as recognised by the orders dated 26th April, 1955 and 1st February, 1986 passed by the High Court. This petition was therefore to enforce the fundamental rights enshrined in Articles 25 and 26 of the Constitution. Its denial would be tantamount to violation of Article 25 and an obstruction in the discharge of the fundamental duty under Article 51-A.

While allowing the petitions the High Court adopted an unprecedented approach making extensive reference to the illustrations found in the original copies of the Constitution. The honourable judges opined that due to this illustration of Lord Rama being present in the original Constitution, the Lord has become a constitutional entity and admittedly a reality of our national culture and fabric, and not a myth.

This reference by the judges has probably opened the Pandora's box.

The Darshan judgment is perhaps the first to use the illustrations in the original constitution as aids to interpretation of the Constitution. The High Court used these illustrations for three purposes:

(*i*) to interpret the word "secularism" to establish that Rama is a constitutional entity and to decipher the name "Hindustan";

(*ii*) more importantly the High Court recognises the right to worship as a sequitur to the recognition of Rama as a Constitutional entity; and

(*iii*) taking the Darshan judgment as it stands, it would perhaps be possible to content that the illustrations are themselves the source of certain fundamental rights particularly the right to worship.

There are two opinions about these illustrations[94] : one explaining that the illustrations are a part of the Constitution and the other saying that the illustrations

94. The original Constitution of India, as adopted by the Constituent Assembly on 26th November, 1949, contain 22 sketches or illustrations including one sketch of Lord Rama. But as the facts stand, the original copy of the Constitution was passed on 26-11-1949 by the Constituent Assembly and work of the calligraphed version was entrusted to an artist, Prem Raizada, only on 28-11-1949. This date has been stated by the publishers. Thus the copy of the Constitution with 22 sketches is a decorative edition of the Constitution. See *Lawyers Collective*, Vol. 8 No. 3 and no. 4 for details. 21-24 & 11-12 resp. List of Illustrations in the original Constitution:

(1) Mohanjo daro seal, (2) Scene from Vedic Ashram, (3) Scene from Ramayan—(Conquest of Lanka and recovery of Sita by Rama. Laxman is also seen, (4) Scene from Mahabharat : Shri Krishna propounding Gita to Arjun, (5) Scene from Buddha's life, (6) Scene from Mahavir's life, (7) Scene depicting the spread of Buddhism in India, (8) Scene from Gupta Art, (9) Scene from Vikramaditya Court, (10) Scene depicting an ancient University (Nalanda), (11) Scene from Orissa culture, (12) Image of Natraj, (13) Scene from Mahabalipuram Sculptures, (14) Portrait of Akbar with Mughal

are only decorative and there is no particular logic behind it. Of course, the matter is not so simple as to dismiss it abruptly. A question as to why these particular illustrations were included in the original copy remains unanswered. The High Court's use of the illustrations as the very basis of the Darshan judgment may be very questionable but the issues which the judgment raises will continue to engross the lawyers and law researchers for quite some time to come.

Finally, the Ayodhya Judgment[95] (1994) has put an end to many problems and brought the status quo ante as on 7-1-1993. (See para 4(*xi*)-the Ayodhya Problem.)

Architecture, (15) Shivaji, Guru Govind Singh, (16) Laxmi Bai, Tipu Sultan, (17) Mahatama Gandhi : Dandi March, (18) Bapuji—The Peace maker : His touring of the riot-affected Noakhali area, (19) Netaji Subhash Chandra Bose with other patriots, (20) Scene from Himalayas, (21) Scene from Desert, (22) Scene from the Ocean.

95. *M. Ismail Faruqui (Dr.)* v. *Union of India*, (1994) 6 SCC 360. This case returned the reference under Article 143(1) unanswered and allowed puja and namaz to continue as before.

21

Legal Profession, Legal Education and Law Reporting

"Unless legal activists emerge, the gulf between courts and poor must remain almost the same."

Upendra Baxi: *"Legal Mobilisation and the Needs of the Rural Poor"*, 1982, p. 12 (Pt. III)

"If law must serve life—the life of the many million masses whose lot has been blood, toil, tears and sweat—the crucification of the Indo-Anglican system and resurrection of the Indian system is an imperative of Independence."

V.R. Krishna Iyer: *Indian Justice*, (1984) 6-7

"...no occupation becomes a profession without antagonism and struggle."

Goode W.J. quoted by K.L. Sharma: *Sociology of Law and Legal Profession*, (1984) Ch. 1

"Legal Education is where law begins development of legal learning and legal sciences also occur through the law schools. Neither the UGC nor the Bar Council of India nor the Universities behave as if they understand the fundamental significance of legal education to achievement of a just society in India."

"In a computer age, the horse and buggy style of law reporting is an insult to the nation."

Upendra Baxi, interviewed: 1987(14) Reports 22

SYNOPSIS

- A. Legal Profession
  - 1. Profession
  - 2. The Legal Profession
  - 3. Position up to 1926
    - (*a*) The Regulating Act, 1773
    - (*b*) The Bengal Regulations, 1793 and 1833
    - (*c*) The Legal Practitioners Act, 1846 and 1863
    - (*d*) The Indian High Courts Act, 1861
    - (*e*) The Legal Practitioners Act, 1879
      - (*i*) Classes of lawyers
      - (*ii*) Practitioners on the Original & Appellate side
    - (*f*) The Indian Bar Committee (Chamier Committee), 1923
  - 4. The Indian Bar Councils Act, 1926
  - 5. All India Bar Committee, 1951
    - (*i*) Recommendations
    - (*ii*) Law Commission's 14th Report, 1958
  - 6. The Advocates Act, 1961
  - 7. The Pathology of Legal Profession
  - 8. The Future of Legal Profession
- B. Legal Education
  - (*a*) The Aims of Legal Education
  - (*b*) History
  - (*c*) Reasons for Stagnation
  - (*d*) The New Scheme
  - (*e*) Future of Legal Education
  - (*f*) Recent Developments
- C. Law Reporting
  - (*a*) The Doctrine of Precedent: History and development
  - (*b*) Advantages
  - (*c*) Law Reporters: Supreme Courts
  - (*d*) Law Reporters: High Courts
  - (*e*) Law Reporters, P.C., Federal Court & Supreme Court
  - (*f*) Private Reporters
  - (*g*) Principles for Law Reporting

A—LEGAL PROFESSION

1. Profession

As the explanation goes a business is a trade or profession at which one works regularly; an occupation is what one happens to be engaged in, and may be continuous or temporary. Business is ordinarily for profit, while the occupation may

be a matter of learning, philanthropy or religion. A profession usually implies scholarship; as the profession of law.[1]

2. The Legal Profession

The legal profession is thus an important part of legal administration. It is not possible for the State to administer justice effectively without a well-organised legal profession, because in its absence who would marshal the facts and present them before a Court, who would put forth the best legal arguments for and against the litigating parties before the Court? It is therefore rightly said[2] that "A well-organised system or judicial administration postulates a properly equipped and efficient Bar;" and a well-regulated profession for pleading causes is a great desideratum to tone up the quality of justice. A community of professionals is different from other communities based on socialisation and social control and client choice or the evaluation of the professional.[3] According to Goode the process of professionalisation is the "climax job pattern" of occupational environment and no occupation becomes a profession without antagonism and struggle.[4]

The history of the legal profession in India is therefore a history of struggle: a struggle for recognition, characterised by prestige, power and income. In this short chapter we would be tracing the history and development of the legal profession in India.

3. Position up to 1926

Law, as a profession, appears to have been in vogue in ancient[5] and medieval[6] India though its concept was quite different from what it is today. The legal profession as it exists in India today had its beginnings in the first years of British rule. The Hindu Pandits, Muslim Muftis and Portuguese lawyers who served under earlier regimes had little effect upon the system of law and legal practice that developed under the British administration.

The Charter Act, 1726 contained no provision whatsoever regarding the qualification for the persons desirous of practising law. The courts were the sole judges in this regard. This position continued up to 1753. During this time the persons who practised law were devoid of the knowledge of law. As Dr. Jain notes "they had adopted the profession in the absence of anything better to do. Quite a few of these so-called lawyers were the dismissed servants of the Company".[7] Long, describing the condition of Calcutta says that "Calcutta is a place where the profession of law is exercised by men who seem to derive all their knowledge by inheritance, or to possess it by intuition, without previous study or application".[8] This state of affairs

1. Fernald: *Synonyms and Antonyms*, 1947, 102.
2. Law Commission, 14th Report (1958), 556.
3. Goode W.J.: *Community within a Community: The Professions, American Sociological Review*, Vol. 22, Apr. 1957, 194 quoted by K.L. Sharma: *Sociology of Law & Legal Profession*, 1984, Ch. 1.
4. *Ibid.*, 2.
5. *Supra* Ch. 1, 7: For an interesting additional reading on this topic see *The Indian Bar Review*, Vol. XIII (3 & 4) 1986, an article, captioned *"Lawyers" in Classical Hindu Law* by Ludo Rocher (Uni. of Pennsylvania) 353-72; & *"A Note on Lawyers in Muslim India"*, by Phillip B. Calkins (Uni. of Chicago), 373 to 376; Samuel Schmittheener: *A Sketch of the Development of the Legal Profession in India*, 308-352.
6. *Ibid.*, 30.
7. *Indian Legal History*, 3rd Edn., 622.
8. Long, *Selections from Unpublished Records*, I, xxxi.

was due to the belief of the Company that the advocates "foment disputes" and are of "litigious nature".[9] Calcutta Court, under the circumstances referred several questions to the directors for guidance. This was the state of affairs of the legal profession before 1774 at all the three places : Bombay, Calcutta and Madras.

(a) The Regulating Act, 1773.—The first real step in the direction of organising a legal profession in India was taken in 1774 when the Supreme Court was established in Calcutta pursuant to the Regulating Act of 1773. Clause 11 of the Supreme Court Charter empowered the Court "to approve, admit and enrol such and so many advocates and attorneys at law" as the Court "shall seem fit". They were to be attorneys of record and were authorised "to appear and plead and act for the suitors" of the Court. The Court could remove the said advocates and attorneys "on reasonable cause". No other person whatsoever, but such advocates and attorneys so admitted and enrolled were to be "allowed to appear and plead or act" in the Court, for or on behalf of such suitors. The "advocates" entitled, thus, to appear were only the English and Irish barristers and members of the Faculty of Advocates in Scotland; the attorneys referred to were the British attorneys and solicitors. The Court was thus an exclusive preserve for members of the British legal profession. The same powers of enrolment were later conferred on the Supreme Courts established at Bombay and Madras. An Indian lawyer had no right to appear before the Courts.

At its inception the legal profession in India had two features of English law, one, the English language, and two, the concepts of 'Justice and right' as understood in English Common Law and rules of Equity. And there were two categories of legal professionals—(1) Advocates in Scotland, and (2) Attorneys who were the British Attorneys or Solicitors. Consequently by the end of the 18th century, the British norms of the legal profession were firmly entrenched in Indian Society. But the fact remains, that they were of a discriminatory nature as they did not apply to British subjects.[10]

(b) The Bengal Regulations, 1793 and 1833.—The Bengal Regulation VII of 1793 created, for the first time, a regular legal profession for the Company's Courts. Its credit goes to Lord Cornwallis. The regulation gave power to Sadar Diwani Adalat to enrol pleaders for all Company's Courts. Only Hindus and Muslims would be enrolled as pleaders. Before this the suitors could either plead their own causes personally or could appoint agents who could either be their servants or dependants—or the vakils who followed the profession for livelihood. But these people knew nothing of the law. This led to confusion and delay. Not only this but these ignorant and creditless vakils often betrayed their clients by accepting bribe from the opposite party. The system and the profession both thus slipped into inefficiency and became too costly for litigants.[11]

However Regulation VII brought order and some measure of quality to pleading and endeavoured to establish it as a respectable profession. Only the persons well versed in Hindu and Mohammedan law and persons of character and education were

9. Long, *Selections from Unpublished Records*, I, 46, 83; See Dodwell: *Bengal, Past and Present*, VIII, 15 quoted by Jain *supra* n.6; also *supra* n. 4, 310.
10. K.L. Sharma: *Sociology of Law & Legal Profession*, 104-05 (1984).
11. *Cf.* Jain: *Indian Legal History*, 1972, Ch. XI, 186-88.

allowed to plead in courts. A number of rules were laid down to regulate the profession. Yet, the professional respectability was hard to come by. Malbari[12] described the moffusil vakil as "a column of vapour issuing from an Ocean of Emptiness... brought alive by the Chief Justice...and the successful vakil as one in the hands of Marwari broker".

The Bengal Regulation XII of 1833 was the next important legislation which modified the provisions of the earlier Regulations in that only persons duly qualified, to whatever nationality or religion they might belong, could be enrolled as pleaders of the Sadar Diwani Adalat.

(c) **The Legal Practitioners Act, 1846 and 1863**.—The Legal Practitioners Act, 1846, made important innovations, namely, (1) the office of pleaders was thrown open to all persons of whatever nationality or religion duly certified by the Sadar Courts; (2) attorneys and barristers of any of Her Majesty's Courts in India were made eligible to plead in any of the Sadar Courts; (3) the pleaders were permitted to enter into agreements with their clients for their fees for professional services.

The Legal Practitioners Act, 1863, also permitted barristers and attorneys of the Supreme Court to be admitted as pleaders in the Courts of the East India Company. Thus barristers and attorneys were empowered to practise in the Company's Courts while the Indian legal practitioner could not appear before the Supreme Courts.

(d) **The Indian High Courts Act, 1861**.—The position clearly underwent a change after the British Crown took over the administration of the country from the Company in 1858. The separate systems of the Company's courts in the moffusil and the Royal Courts in the Presidency towns were consolidated into a unified judicial system in all the three presidencies. At the apex of the new system were High Courts chartered by the Crown. The Indian High Courts Act, 1861, authorised the setting up of High Courts in several Presidencies in place of the Supreme Courts and Sadar Adalats. Clause 9 of the Letters Patents of 1865 which replaced the earlier Letters Patent creating a High Court in Calcutta, authorised it to approve, admit and enrol advocates, vakils and attorneys. The persons so admitted were entitled to appear for the suitors of the High Court and to plead or act according to rules made by the High Court or directions issued by it. Similar provisions were made in the Charters of the Courts of Bombay and Madras.[13] The High Courts in their appellate jurisdiction were to apply the principles of equity and the rule of good conscience, but these were never spelt out and were left to the discretion of the courts. Curiously enough, the Mofussil Courts were precluded from introducing any English or foreign law under the cover of the words, justice, equity and good conscience". On the original side, in the High Courts, English law and rules of equity continued and on the appellate side local laws were applied. This was a deliberate design to "divide and rule" under the posture of "justice, equity and good conscience".[14]

(e) **The Legal Practitioners Act, 1879**.—In the course of time other High Courts were established. The Legal Practitioners Act, 1879 was enacted to consolidate and amend the law relating to legal practitioners of High Court. It empowered the High Court, not established under a royal charter, to make rules, with the previous

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12. B.M. Malbari: *Gujarat & the Gujaratis*. (1882), 178, 181.
13. As to the benevolent effect of these provisions *see* IBR III (3 & 4) 1986, 323.
14. K.L. Sharma: *Sociology of Law & Legal Profession*, 106, 108.

sanction of the Provincial Government, as to the qualifications and admission of proper persons to be pleaders and Mukhtars of the High Court.

(*i*) *Classes of Lawyers*.—In the chartered High Courts rules had been framed under which there were, apart from Attorneys, two other classes of lawyers, Advocates and Vakils. Advocates were to be barristers of England or Ireland or members of the Faculty of the Advocates of Scotland. The High Courts, other than the Calcutta High Court, permitted non-Barristers as well to be enrolled as advocates under certain circumstances, *e.g.* in Bombay, law graduates of the Bombay University, could be enrolled as Advocates. The Vakils were the persons who had taken their law degree from an Indian University and fulfilled certain other conditions. In Madras, a law graduate qualified to be admitted as a vakil if he passed an examination in procedure and underwent practical training with a practising lawyer for a year. Similarly rules had been made by the other High Courts also. The High Courts were given the power, under Section 6 of the Legal Practitioners Act, 1879, to make rules as to the qualification, admission and certificates of proper persons to be Pleaders and Mukhtars of the subordinate courts. Under the rules framed by the High Courts under the Legal Practitioners Act, law graduates who did not possess the additional qualification to enable them to be enrolled as the High Court Vakils, and non-law graduates after passing the pleadership examination conducted by the High Court, were enrolled as Pleaders to practise before subordinate courts. Besides the Pleaders, there were Mukhtars who passed by Mukhtarship examination held by the High Court after passing the matriculation or equivalent examination.

Section 4 of the Legal Practitioners Act, 1879 empowered an advocate or vakil on the roll of any High Court to practise in all the Courts subordinate to the Court on the roll of which he was entered and in any court in British India other than a High Court on whose roll he was not entered and with the permission of the Court in any High Court on whose roll he was not entered. There was a proviso, however, to the effect that this power would not extend to the original jurisdiction of the High Court in a Presidency Town.

(*ii*) *Practitioners on the Original & Appellate side*.— On the original side of the Calcutta High Court only the Advocates, *e.g.*, the Barristers of England and Ireland and the Advocates of Scotland, were entitled to appear and plead, on the instructions of an Attorney. These Advocates were also entitled to appear and plead on the appellate side of the High Court and subordinate courts. The Vakils of the Calcutta High Court were not entitled to act or plead on the original side or in appeals from the original side. This state of affairs was severely criticised as monopolistic and discriminatory. As the criticism says the Calcutta Barrister "has no objection to plead before a mere B.L. (or L.L.B.) Judge, but he cannot have as his companion at the bar a mere B.L. of an Indian University however high his attainments may be".[15] The Madras High Court had, however, altered its rules, as early as 1886, and permitted the Vakils admitted under the Rules of 1833, and the Attorneys to appear, plead and act for suitors on the original side. The result, therefore, was that in the Madras High Court there remained no distinction between Barristers, Vakils and Attorneys as regards their rights to appear and plead on the original side. Under the new Rules, the Vakils and Attorneys could also act on the

15. Report of Indian Bar Committee. AIR 1924 Jour 63, 66.

original side while the advocates had to be instructed by an attorney. In the Bombay High Court the Vakils were not originally permitted to act or plead on the original side. This position, however, later changed and a non-Barrister, on passing an examination conducted by the High Court, became eligible for enrolment as Advocate entitled to appear and plead on the original side. The only limitation was that the Advocates of the original side, whether Barristers or non-Barristers, had to be instructed by an Attorney before they could appear and plead on the original side.

(f) The Indian Bar Committee (Chamier Committee), 1923

The Vakils expressed dissatisfaction about the distinction that existed between barristers and vakils, and the special privileges enjoyed by the British barristers and solicitors. There was also a demand for creating an all-India Bar in the country. Consequently, the Government of India in 1923, constituted the Indian Bar Committee under the Chairmanship of Sir Edward Chamier to go into these issues.

The Committee did not consider it practicable at the time to organise the Bar on an all-India basis or to constitute an All-India Bar Council. The significant recommendation of the Committee was as regards the establishment of Bar Councils for the High Court.

Recommendations:—

The Committee[16] recommended

(1) that in all High Courts, a single grade of practitioners entitled to plead should be established and called Advocates,

(2) that when special conditions are maintained for admission to plead on the original side of a High Court, the only distinction shall be within that grade which shall consist of advocates entitled to appear on the original side and advocates not so entitled,

(3) subject to certain conditions being fulfilled, Vakils would be allowed to plead on the original side of the three High Courts,

(4) that a Bar Council be constituted for each High Court having power to enquire into matters calling for disciplinary action against a lawyer,

(5) that the disciplinary powers would rest with the High Court but before taking any action, it should refer the case to the Bar Council for enquiry and report.

4. The Indian Bar Councils Act, 1926

To implement the recommendations of the Chamier Committee, the Central Legislature enacted the Indian Bar Councils Act, 1926. The object of the Act was to provide for the constitution and incorporation of Bar Councils for certain Courts to confer powers and impose duties on such Bar Councils, and to consolidate and amend the law relating to legal practitioners entitled to practise in such Courts.

A Bar Council was to be constituted for every High Court.[17] Every Bar Council was to consist of fifteen members of whom one was to be Advocate-General, four

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16. For enlightening Speech of The Hon'ble Chief Justice Sir Murry Coutts Trotter at the opening of the Madras Bar Council on 9-10-1928 see Indian Bar Review, Vol. XIII (3 & 4) 1986, 419 to 435 (An Article by N.R. Madhav Menon captioned "Bar Councils and Management of Legal Profession); See also Sasheej Hegde : "Lawyers and The Legal System in India—A Critique" Indian Bar Review, XII (4) 1985, 465-78 for further information.

17. S. 3.

persons to be nominated by the High Court and ten were to be elected by the Advocates of the High Court from amongst themselves.[18] Each High Court was to prepare and maintain a roll of advocates of High Court.[19] While the roll was maintained by the High Court, the Bar Council was authorised, with the previous sanction of the High Court, to make rules to regulate the admission of persons to be Advocates of the High Court without affecting in any way the power of the High Court to refuse admission to any person at its discretion.[20]

Under the Act, the power of enrolment of advocates virtually continued to remain in the High Court and the function of the Bar Council was merely advisory in nature. The Act did not affect the power of the High Courts of Calcutta and Bombay to prescribe qualifications to be possessed by persons applying to practise on the original sides of those High Courts and their power to grant or refuse any such application, or to prescribe the conditions under which such persons were to be entitled to practise or plead. The roll of Advocates was to be maintained by the High Court which also had the disciplinary power over the Advocates. The right of the Advocates of the High Court to practise in another High Court was not unfettered but was expressly made subject to rules made by the High Court or the Bar Council. Each of the High Courts as well as the Bar Councils of Calcutta and Bombay made rules to the effect that Advocates of other High Courts would be permitted to appear and plead in the respective High Court concerned only after obtaining the permission of the Chief Justice and on several occasions very eminent Advocates of one High Court were refused permission to appear and plead in another High Court.

In course of time the Calcutta and Bombay High Courts liberalised their rules so as to permit non-Barrister Advocates to practise on their original sides as well which so far had been reserved for Barristers only. Thus, the distinction between Barristers and Advocates was abolished. However, no advocate, whether Barrister or not, could act on the original side but had to appear and plead on the instruction of the Attorney on record.

5. All-India Bar Committee, 1951

The Bar was not satisfied with the passing of the Bar Councils Act, 1926. The Act did not bring the Pleaders, Mukhtars and Revenue agents practising in the Moffusil Courts and revenue offices under its scope and consequently did not set up a unified Indian Bar. Further the powers conferred on the Bar Councils constituted under the Act were limited and the Bar Councils were neither autonomous nor had any substantial authority. The demand for a unified all-India Bar which arose initially as a protest against the monopoly of the British barristers on the original sides of Calcutta and Bombay High Courts and the invidious distinctions between barristers and non-barristers received a new orientation with the advent of independence and became "a claim for the fulfilment of a cherished ideal", namely, an autonomous and unified all-India Bar. In response to this persistent and widespread demand by the legal fraternity the Government of India, in 1951, appointed the all-India Bar Committee under the Chairmanship of Justice S.R. Das of the Supreme Court.

18. S. 4.
19. S. 8(2).
20. S. 9.

The Committee, in its report, made detailed recommendations for the unification of the Bar providing for a common roll of advocates who would be entitled to practise in all courts in the country. Thus all grades were done away with and one integrated and autonomous all-India Bar was formed.

The Committee recognised that the task of preparation of a common roll of advocates, who would be members of the unified all-India Bar, would be difficult but not impossible.

The Principal recommendations in that behalf were:

(*i*) *Recommendations:*

(*i*) Each State Council should maintain a register of all existing advocates entitled to practise in their respective High Courts.

(*ii*) All vakils and pleaders, entitled to practice in the district and other subordinate courts, who are law graduates, should be entitled to be included in the roll of advocates maintained by the State Bar Council on payment of certain fees.

(*iii*) Vakils and Pleaders, who are not law graduates but who, under the existing rules, are entitled to be enrolled as advocates, should also be entitled to be placed on that register.

(*iv*) The State Bar Councils should then send copies of such registers to the all-India Bar Council who are to compile a common roll of advocates in the order of seniority according to the original enrolment of the advocates in their respective High Courts or the Supreme Court if they are not enrolled in any High Court.

(*v*) New entrants possessing the required minimum qualifications may also apply to a State Bar Council for enrolment and their names should be forwarded by the State Bar Council to the all-India Bar Council for being entered on the common roll.

The Committee also recommended that there should be no further recruitment of non-graduate pleaders or mukhtars.

The Committee also felt that the essence of an all-India Bar is the capacity or the right of its members to practise in all the courts in the country, from the highest to the lowest, and recommended that the requirement of leave for practising in any other High Court under Section 4 of the Legal Practitioners Act, 1879 should not exist.

A majority of the Committee were of the opinion that the insistence on a certain number of years' practice in a High Court as a condition of eligibility of the Supreme Court had not yielded satisfactory results and that it was best to let an advocate have the freedom to practise in any court including the Supreme Court irrespective of his standing at the Bar.

On the question of the continuance of the dual system in the High Courts of Calcutta and Bombay and their original sides the Committee concluded that there was no reason for the abolition of the system as "the dual system is nothing more than a division of labour which necessity enures for the better preparation of the case and enables the Advocate to effect a better and forceful presentation of the client's point of view before the Judge". The Committee was also of the view that

the system would not in any manner be inconsistent with the creation of an all-India Bar with a common roll of Advocates as the "right to practise in all Courts does not mean that the rules of the Courts where the Advocates go to practise may be ignored. What is meant is that there should be no rule of any court preventing any advocate ordinarily practising in any other court from exercising his profession in the first mentioned court in the manner in which an advocate ordinarily practising in that Court may do".

The Committee also recommended creation of an all-India Bar Council and State Bar Councils. Under the Indian Bar Councils Act, 1926, the Bar Council were merely advisory bodies and the power of admission, suspension and removal from the Roll of Advocates was entirely vested in the respective High Courts. Subject to some safeguards, the Committee suggested that in the interests of an autonomous national Bar, the power of enrolment, suspension and removal of Advocates be vested in the Bar Councils. The Committee did not feel the need for a separate Bar Council for the Supreme Court as every Advocate on the common roll shall be entitled as of right to practise in the Supreme Court and would be amenable to the jurisdiction of the appropriate State Bar Council and of the all-India Bar Council.

(*ii*) *Law Commission's 14th Report, 1958*.—The Law Commission, 1955, considered this question in the famous fourteenth report on 'Reform of Judicial Administration, (1958)'. The Commission endorsed all of the recommendations of the Bar Committee with respect to the unification of the Bar and lamented that "these proposals which were made as far back as March 1953... should not have been given legislative effect".[21] The Commission also endorsed the recommendation of the Committee that there should be no further recruitment of non-graduate pleaders or mukhtars.

The Commission agreed with the Bar Committee that the dual system should continue in Calcutta or Bombay. The Commission in addition recommended a system closely analogous to the dual system for the Supreme Court "so that the Court may have the assistance of the Bar in a full measure in the discharge of its onerous task.[22] In the Commission's view, a large number of matters in the Supreme Court are matters of prime importance and substantial value, and it is very necessary for the efficient working of the Court that it should be assisted by a Bar which has given thought and labour to the preparation of a case.[23]

The Commission also favoured the division of the Bar into Senior Advocates and Advocates, the seniors being, by reason of their status, precluded from accepting certain types of work[24] and from appearing in cases unless briefed with a junior. "This would result in achieving several objectives. To the seniors it will mean the recognition of a successful career at the Bar by the conferment of a privilege which will give them an honoured position among members of the profession and enable them to concentrate on important work yielding as large or perhaps a larger income.

21. The Law Commission. XIV Report, 558 (1958).

22. *Ibid.*, 566.

23. *Ibid.*

24. According to the Commission, the seniors would be subject to the following obligations:—

(*i*) they should not draft notices, pleadings, affidavits or other documents nor advise on evidence.

(*ii*) they should not settle notices, pleadings, affidavits or documents unless they have been drawn by an advocate who is not on the list of senior advocates.

It should result in putting work in the hands of the junior members of the Bar. This should hearten them and raise their morale, which in turn should attract an abler class of men to the profession... The distribution of work among a large number should also help to prevent delays caused by adjournments".[25]

The Commission emphasised the principle of autonomy of the Bar, in matters relating to the profession, sought to be given effect to by the Committee of 1951. Consequently, the Bar Councils were to be entirely autonomous bodies consisting wholly of the members of the profession. The Bar Councils were to elect their own chairmen.

6. The Advocates Act, 1961

In 1961, Parliament enacted the Advocates Act to amend and consolidate the law relating to legal practitioners and to provide for the constitution of State Bar Councils and an All India Bar Council. The Act establishes an all-India Bar and a common roll of Advocates. An advocate on the Common Rolls has the right to practise in all Courts in India from the highest to the lowest. The Bar has been integrated into a single class of legal practitioners known as Advocates.

The Act creates a State Bar Council in each State and a Bar Council of India at the Centre. The functions of a State Bar Council are *inter alia* —(*a*) to admit persons as Advocates on its roll; (*b*) to prepare and maintain such roll; (*c*) to entertain and determine cases of misconduct against advocates on its roll; (*d*) to safeguard the rights, privileges and interests of advocates on its roll; and (*e*) to promote and support law reform. The functions of the Bar Council of India are *inter alia*—(*a*) to prepare and maintain a common roll of advocates; (*b*) to lay down standards of professional conduct and etiquette for advocates; (*c*) to lay down the procedure to be followed by the disciplinary committee of each State Bar Council; (*d*) to safeguard the rights, privileges and interests of advocates; (*e*) to promote and support law reform; (*f*) to exercise general supervision and control over State Bar Councils; and (*g*) to promote legal education and to lay down standards of such education in consultation with the universities whose degree in law shall be a qualification for enrolment of an advocate.

Any advocate may, with his consent, be designated as a Senior Advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability, experience and standing at the Bar, he deserves such distinction.

The Advocates Act, 1961, has marked the beginning of a new era in the history of the legal profession by vesting largely in the Bar Councils the power and the jurisdiction which the Courts till then exercised, by fulfilling the aspirations of those who had been demanding an All-India Bar and effecting a unification of the Bar in India, by the creation of a single class of practitioners with power to practise in all the Courts and bound by rules made and a code of conduct laid down by their own bodies to which the members could resort to for the protection of their rights, interests and privileges. Thus the Legal Profession can play a vital role in upholding individual rights, promoting more efficient and widespread justice, and acting as an integrating force in national life. It has great traditions on which to build. It is now part of a modern legal system which provides both the personnel and techniques

25. Commission Report, 568.

for effective rational unity. The responsibility of this profession to the Indian society is indeed great, as has been its history.

7. The 'Pathology' of Legal Profession[26]

However, all is not gold that glitters. The responsibility that the Indian Bar bears to the society and the challenge that it faces today bear a testimony that the Indian Bar has not risen to the occasion to discharge its duties.

Learned professions are often distinguished from 'occupations' and 'business' by their more explicit pursuit of, and greater fidelity to, certain basic social values, writes Prof. Baxi: *Lawyers as a profession are thus oriented to the achievement of conditions of justice in society. We may not be able to say with any tolerable measure of consensus what "justice" signifies; but there may be a fair measure of consensus on the idea of "conditions" of justice, one of which is the construction of public discourse on the nature and limits, legitimacy and legality, of State power. The denial of such a discourse often signifies an end to the very quest for justice. Creation and sustainance of such conditions has been articulated by codes of ethics providing standards for identification and measurement of professional deviance.* Prof. Baxi examines this Code of Professional Ethics promulgated by the Bar Council of India under Section 49 of the Advocates Act and points out a number of drawbacks and lacunas in these rules which are regularly misused.[27] The language gives an impression that the rules are mandatory and productive of disciplinary-consequences[28] *but looking to the fees charged*[29]*, the use of the idea of retainership*[30]*, fomentation of litigation whenever chances occur*[31]*, the defiance of rules by lawyers and the behaviour pattern of the legal community*[32]*, lack of professional norms*[33]*, confusing the meaning of professional misconduct and all other associated practices*[34] *expose the community to a severe commentation of the society. The lawyers as a profession live and thrive on ambiguity*[35]*, inherent in, or imparted to words, and the professional deviance of the lawyers is multifaced.*[36] In spite of this the treatment accorded to such deviators is the overall pattern of "Peer Group Adjudication". This sort of experimentation has not served the purpose of enforcing a minimal level of integrity in Indian Legal Profession. This is sad and most unfortunate. *Lawyers as adjudicators, certainly at the Bar Council of India level, have shown themselves incapable of enforcing the Code vigorously as the final custodians of ethical standards.*

Besides this, the highest obligation under Rule 41 is to provide free legal aid to the "indigent and the oppressed". This obligation is subject to the limits of an advocate's economic condition. But we know that even the superstar lawyers, whose

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26. Upendra Baxi: *The Pathology of the Indian Legal Professions*. IBR Vol. XIII (3 & 4) 1986, 455-84.
27. *Ibid.*, 456.
28. *Ibid.*, 456-57.
29. *Ibid.*, 458.
30. *Ibid.*, 458.
31. *Ibid.*, 459.
32. *Ibid.*, 461 (practices).
33. J.S. Gandhi: *Sociology of Legal Profession, Law and Legal System*. (1987), 46-48.
34. *Ibid.*, 462; *supra* n. 32, 60-66.
35. *Ibid.*, 463.
36. *Ibid.*, 469-79: Client-centered deviance, (471-74), abuse of judicial process (474-77), disrespect to judicial authority (477-79), criminal conviction (479).

economic condition is unconscionably affluent even refuse summarily to see an indigent person with urgent need for legal assistance. Most senior lawyers stay away from the legal aid programmes of the State. In *Hussainara case*[37] the notice issued to the Supreme Court Bar Association by the Supreme Court to handle the case did not get a response. The Indian lawyers, as we know, did not rush to assist the Bhopal victims. This proves that the lawyers in India have understood Rule 41 of the Code as, in its nature, unenforceable. All this is quite unfortunate and marks the low level to which the profession has dwindled down so as to make it an occupation or business. Prof. Baxi therefore suggests that the Advocates Act needs to be fundamentally amended if this pattern is to continue.[38] It is said that this profession is an open profession where many can come, rub their shoulders and prove their worth (called an open-door policy) but as replied by Prof. Baxi the "*profession is really dynastic in character. Mention me, Prof. Baxi said, twenty-five leading scheduled castes or scheduled tribes lawyers who have occupied the centre of the stage of the national legal profession through what you call the 'open-door' policy.* And in what does the character of the profession lie? Learning? Integrity? Dedication to fundamental duties under the Constitution? Legal Services to the impoverished? Fight against social injustice? Measured by anyone of these, or all, the legal profession in India has still to acquire a character of a learned profession. I don't wholly despair but *unless the leaders of the Bar do some introspection and put the profession back on the rails all we will be left with is an occupation, not a profession*".[39]

8. The Future of Legal Profession

The talk about the "pristine glory "of the profession seems meaningless since the legal profession in India has yet to become a profession of men and women of learning and of justice, says Prof. Baxi. *When a "profession" values income or practice over social objectives such as service, sacrifice and justice it begins to be perceived by society as a necessary evil.*[40] The future of the legal profession lies in its ability to take its profession seriously. This means care and concern not just for independence of the bar and the bench—a vital issue, rather well served by the "profession" so far—but also a capacity to struggle regardless of fees, for the *Atisudras*, the vast majority of the deprived, disadvantaged and depressed classes of India. Courts have supplied superb initiation for social change and SAL is its contemporary example. Every decision requiring the executive to act in accordance with the law is a social change decision because it helps the growth of the idea that power must conform to certain ideals of the rule of law; that power does not justify itself because it is power. This is still a new and often painful education for those in power.[41]

B. LEGAL EDUCATION

(*a*) *The Aims of Legal Education.*—The aims of legal education are varied and have differed at various times and places. It may be aimed broadly at understanding

37. J.S. Gandhi : *Sociology of Legal Profession, Law and Legal System*, (1987), 469-79: Client-centered deviance, (471-74), abuse of judicial process (474-77), disrespect to judicial authority (477-79), criminal conviction (479).
38. *Ibid.*, 482, 483 (suggestions).
39. Prof. Baxi interviewed: 1987 (14) Reports (Mag.) 37.
40. 1987 (14) Reports (News & Views) 37.
41. *Ibid.*, 38.

the functioning of law in society, as a training for administrators and civil servants as much as for legal practitioners; or it may be more narrowly aimed at training persons for legal practice.[42]

The aims, methods and content of legal education have differed in different countries, affected particularly by whether there were or were not professional schools concentrating on practical branches of law, the relative importance of legal treatises and decisions of courts, the relative standing of professors and judges and other factors.

If we look to the West the legal studies there have been much concerned with the development of intellectual capacity in law rather than with inculcating professional expertise. For the attainment of this ideal, attention should always be given to jurisprudence, constitution, legal history and all other allied topics. Moreover our firm belief that law is a subject of study in Colleges and Universities and that it has nothing to do with at the school level which is the grassroot level is quite unfortunate. As we have started streams of education with arts-bias, science-bias, commerce-bias and technical-bias, streams with law-bias may be started as well, the students whereof would come to law colleges.

(*b*) *History*.—Compared with science, technology and medicine the legal education is less technical or less professional. In the beginning to become a vakil, knowledge of Persian language was necessary but after 1826 English replaced Persian. At that time no principles of law were taught; what was taught was only rules and regulations. It was only in 1885 that law classes were made a permanent feature in Bombay, Calcutta and Madras. In 1857 study of law was declared as a permanent part of each University. Many prominent persons of India began their career as Mukhtars.[43]

A number of commissions and committees were appointed between 1917 to 1958 to examine the question of legal education. Those committees[44] suggested a number of measures to improve legal education but so far nothing noteworthy has been done. Consequently, Law Colleges do not have a place of high esteem either at home or abroad and the study of law and legal research is discarded. Law Colleges are mostly crowded with students who have been refused admissions in other faculties. This "refuse" therefore and those who have nothing better to do, gather in law colleges. The Bombay Legal Education Committee stressing the need for reorientation of legal education and academic and vocational training reported that "There is no real antimony between the professional and the cultural aspects of law. A lawyer will be a better lawyer and a judge a better judge, if he has studied the science of law. A thorough grounding in the principles of law is absolutely necessary in the make up of a real lawyer.[45]

(*c*) *Reasons for Stagnation*.—The causes that retard the development of our legal education have been noted by Miss Master, the noted legal educationist of Canada as: (1) lack of financial resources, (2) lack of adequate books, (3) lack of teaching materials, (4) deterioration of teaching standards, (5) lack of teaching staff

42. Walker: *Oxford Companion to Law* (1980), 739, 740, 910.
43. K.L. Sharma: *Sociology of Law & Legal Profession* (1987), Ch. 5.
44. e.g., Dr. S. Radhakrishnan Committee of 1948-49.
45. A Report of the Uni. Education Committee, Vol. I, 1948-49, 257 quoted by Sharma, *supra* n. 43.

incentives, (6) discrepancies in the goals of legal training, and (7) the general desire for uniformity has led to a tendency to emphasise the importance of memorised learning of substantive laws. There is thus little attempt made to inculcate an awareness of the kinds of legal problems, encountered in the Indian social, cultural and political context through the comparative method.[46]

A lawyer, says Madhav Menon[47], *has to have a vision of the emerging challenges, a zeal to serve the cause of justice and the ability to forge new tools and techniques appropriate to the changing needs and times. Legal education as it obtains today is totally inadequate to the tasks ahead*.'' Legal practice which was a monopoly of a few and the closed preserve of a privileged few increased its scope after independence. Lawyers especially good lawyers were in great demand. However the legal education, on the other side started to touch its lowest level when in 1966 the compulsory apprenticeship and the Bar examination on procedural subjects for every new entrant were removed. Unfortunately enough the Bar Councils too were unable to ''stem the rising tide of inefficiency and mediocrity in the profession''.

(*d*) *The New Scheme*.—A new scheme for legal education is now prepared which is a milestone in professional legal education.[48] It took a considerable time but the scheme is ''to improve legal education through selective admission, better teaching methods, improved curriculum and updated syllabii, compulsory programmes of practical training and strict adherence to norms and standards laid down for law schools''.[49]

The course prescribed is for five years; the first two years cover seven compulsory subjects, that is (1) General English Pt. I and II (graduate standard), (2) Political Science Pt. I, II and III, (3) Economics, (4) History, (5) Sociology, (6) Legal language including legal writing, and (7) History of Courts, Legislature and Legal Profession in India. For the next three years there shall be twelve compulsory subjects and in addition to this six more subjects are to be chosen from the list comprising of 23 subjects. The compulsory subjects are: General Principles of Contract, Special Contracts, Torts, Family Law, Hindu Law, Mohammedan Law, Indian Succession Act and Indian Divorce Act, Law of Crimes and Procedure, Constitutional Law of India, Property Law and Easements, Evidence, Legal Theory, C.P.C., Limitation and Arbitration, Administrative Law and Practical Training of 6 months. The optional subjects are Equity, Company Law, Labour Law, Taxation, International Organisations, Bankruptcy, Law of Co-operation and Public Control of Business, Legislative Drafting, Military Law, Insurance, Trusts etc., Trade Marks, Copyrights and Patents, International Economic Law, Criminology and Criminal Administration, Interpretation of Statutes and Principles of Legislation, Legal Remedies, Private International Law, Comparative Law, Law and Social Change,

46. Meher K. Master: *Reflections, on Legal Education and Teaching*, 452 quoted in D.C. Mukharjee's *Practical side of Law Teaching*: Journal of the BCI, Vol. 2 (4) 1973, 533.
47. N.R. Madhav Menon: *Legal Edn. For Professional Responsibility—An Appraisal Indian Bar Review* XIII (3 & 4) 1986, 436, 437.
48. For details *see* Silver Jubilee Report on the Bar Council of India and Trust—Lecture on 3-11-1986 by Shri N.N. Mathur, Managing Trustee, BCIT.
49. *Supra* note 46.

Law and Poverty, Land Revenue Law, Land Reform and Rural Development, Law and Planning and Law relating to Local Self Government.

On account of hue and cry from the bar and the teachers of law and the vested interests the BCI went on giving concessions and the position as it stands today is that legal education would be of two types: liberal and professional. For the first time, notes Dr. Menon, the BCI is forced to recognise the plurality of objectives in legal education and limit its rule making power only to professional legal education.

(e) *Future of Legal Education.*—The functions of the Bar Council have been laid down in Section 7(*h*) and (*i*) and its rule making power is laid down in Section 49 (*af*) and (*d*) of the Advocates Act, 1961. Accordingly the law courses which were of two years' duration before were from 1962 made of three years' duration. The expert Legal Education Committee constituted under Section 10(*b*) of the Advocates Act, 1961 thereafter prepared a scheme of 5 year course. This was the result of seven years' constant consultations, suggestions and deliberation with authorised bodies. The scheme reflected the recommendations of the Education Commission 1964-1966. However the scheme got a scant response. This was on account of the fear by some law Colleges and Universities that they might have to close down their institutions. Indian legal education is entering a new phase and its object is to arrest the deteriorating standards and to promote higher level of excellence. The success or failure of the scheme depends upon the total response and the co-operation of the Bar and the Government.

According to Dr. Baxi "the five-year course is one major way of redeeming Indian Legal Education. Look at the vested interests in the Bar and Indian politics which are opposing and diluting it. It was the first step towards professionalising legal education"[50] but it is now diluted beyond recognition. The future of legal education is now uncertain but in words of Shri Weeramantry, formerly a judge of the Supreme Court of Sri Lanka and now a Professor of Law at Monash University in Australia, so much is certain that "whether one believes with some scholars that law is the queen of humanities, or takes a more prosaic view of its position in the spectrum of knowledge, there can be no doubt of the significant and continuing interaction between law and nearly every other field of knowledge. Unfortunately, the sheer weight of black letter law is pushing away from popular consciousness an appreciation of some of the broader perspectives which legal studies should inculcate. *It is a matter of regret that in recent years even law school curricula reflect this tendency and crowd out the perspectives through insistence on black letter teaching... students pass out, qualified as law graduates and practitioners who may never have heard of Bentham or Pound. The cultural and social value of legal studies cannot adequately be fostered if such narrowness should characterise legal studies*".[51]

(*f*) *Recent Developments*:

As observed by the Curriculum Development Centre (CDC) in its report published by University Grants Commission (UGC) in 1989[52] "trends" in Legal Education after independence may be divided into three phases— In the *first phase*

50. (1987) 14 Reports (Interview) 22.
51. C.G. Weeramantry : *An Invitation to the Law*, 1982, Butterworths, Australia.
52. 2.

(roughly 1950-1965), the principal theme was how best to transform legal education away from the colonial heritage, and in a way to Indianise it. In the *second phase* roughly (1965-1975) the emphasis was on a sound reorganisation of curricula and pedagogy towards professional legal education. In the *third phase* (1976-1988), the focus shifted to "modernisation" of law curricula so as to make this increasingly relevant to the problems of a society and State in deep throes of transition.

To the efforts to improve the quality and content of the legal education through seminars, symposia, papers and reports, may be added the efforts of UGC in 1975-76 and thereafter. This led to the report published in 1979[53]. Thus a programme of developing curriculum in different subject areas through CDCs was taken up. Reports of this CDCs were received by UGC and discussed by the Expert Groups. The CDC's final report was published in 1989. The Report goes deep into problems of Law Colleges and legal education and proposes that legal education should be wholly full-time, a law student should not be allowed to undergo double courses[54] at a time, overcrowding in Law Colleges should be restricted and multiple jurisdiction[55] over legal education has demoralised legal education and law teaching community. Moreover legal education remains a low-priority area of Higher Education and it is resource-starved.

If a qualitative transformation of Indian legal education is to be achieved three challanges have to be faced :

(*i*) modernisation of syllabi to make them socially relevant;

(*ii*) multidisciplinary enrichment of Law Curricula; and

(*iii*) corresponding pedagogic modifications.

"Modernisation" need not mean "de-westernisation". But it must mean first-hand indigenous thinking, research and teaching on the Indian problematic. This has to draw its content and direction from the ideology of Indian Renaissance and nationalist movement—subsequently embodied in the Constitution of India.[56] Legal education, as humanistic education has to ensure in India, a degree of emotional identification with "*social pain*" without "*shutting ourselves off from suffering*" or without "*dulling of sensitivity*". We have thus to "*resurrect the Constitutional dream*" for the down-trodden, the poor and the ignorant.[57]

In its 758 pages report the Centre has laid down an up-to-date curricula worth implementing in order to redeem legal education in India.

C.—LAW REPORTING

(*a*) *The Doctrine of Precedent : History and development.*—A precedent is the making of law by the recognition and application of new rules by courts themselves in the administration of justice. A judicial precedent in England speaks with authority, said Salmond. It is not merely evidence of the law but a source of it, and the courts are bound to follow the law that is so established. In England under the

53. by Prof. Upendra Baxi.
54. Percy Jal Pardiwala, AIR 1987 Bom 283.
55. Bar Council of India, UGC, University, Management. There is yet another report of 1993 or so but the details are not available.
56. Part IV and Part IV-A.
57. Ch. I, II of the C.D.C. in Law.

Common law a judge has a great responsibility because of the institution of precedent.

Precedents mean things which have gone before. The term 'Judicial precedents' means previous decisions of the superior courts deemed to embody a principle which in a subsequent case raising the same, or a closely related, point of law, may be referred to as stating or containing the principle which may be at least influential on the court's decision of it, or even under the principle of stare decisis, decisive of it. While reference to precedents in England has long been common it is only since 1800, and particularly since the late nineteenth century, that the full rigidity of stare decisis has been accepted in England.[58]

The doctrine of stare decisis is the doctrine of the binding force of precedent, to the effect that in deciding a case before him a judge not only has regards to precedents, but that in certain circumstances he is bound to stand by the decided case, and to accept and follow the principles of particular precedents, whether he personally approves them or not. This practice has been one of long growth and continuous development in English law.[59]

Since the beginning of the British system of justice in India the theory of precedent gained ground and this has been the main source of inspiration to the practice of law reporting in India. However it has to be noted that till the end of the eighteenth century there was nothing like precedent. Cases of Raja Nand Kumar and Cossijurah are its examples. It was Dovin, a Judge of the Sadar Diwani Adalat who first recognised in 1831 the importance of precedent and advocated giving statutory basis to the principle of precedent. According to him if a regulation was made to that effect it will have the effect of making the superior courts more cautious. It would thus result in introducing something like a system for other courts, the want of which was very much felt. This would also abridge the labour of civil courts.[60] In this connection Potter rightly points out that "the gradual development of the art of law reporting reflects the growth of the authority of precedents... the principle of law is to be stated and then applied to the particular facts of the case. It is the principle that is now binding. Such an idea is, of course, not primitive and in fact was the result of a long process".[61] As noted by Ramachandran[62] the doctrine of rule of law rests on the basic foundation and structure of a country's well-ordered government and its established courts of justice doing justice according to law in their interpretative jurisdiction. Courts sometimes supply the omissions in the enacted law and open new avenues for the legislature to take note of and regularise them by enacted law. The legal profession and the litigant public, therefore, look for enlightenment in the law of the country by studying the law reports which contain the decisions of the highest courts of the country. In the federal set-up of Bharat, such decisions emanate only from the High Courts in the States and the Supreme Court at the Centre.[63] Dovin's recommendations as noted before, however, did not fructify but his voice found an expression when the Privy Council in 1925 in *Mata*

58. Walker: *The Oxford Companion to Law*, (1980), 977.
59. *Ibid.*, 1174.
60. Selections from the Records of East India House, 11, 20.
61. Harold Potter: *An Historical Introduction to English Law & Its Institutions*, (1948), 262.
62. V.G. Ramachandran: *Law Reporting & Law Reports in India*, (1980) 22 JILI 218-239.
63. *Ibid.*

Prasad v. *Nageshwar Sahai*[64] expressed and declared that their decisions were binding to the Courts in India. In their own words,

> "It is not open to the Courts in India to question any principle enunciated by this board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor it is open to them, whether on account of 'judicial dignity' or otherwise to question its decision on any particular issue of fact."

This principle was fully endorsed by the High Courts[65] and the Law Commission of India not only reiterated the same but also observed that though the decisions of the High Courts have not been invested with authority of law by any enactment not to follow the decisions of the High Courts by the subordinate courts would tantamount to insubordination. The present system of treating judicial precedents as binding and citing them in courts, observed the Commission, serves a very valuable purpose and should be continued.[66]

The Government of India Act, 1935 by Section 212 provided that the judgment of the Federal Court and the Privy Council shall be binding on all the courts in India. Thus the decisions of the highest court of the land prior to the commencement of the Constitution of India in 1950 are also governed by the doctrine of precedent if not overruled by the Supreme Court.[67] In words of Dr. Jain[68] "Publication of decisions is a condition precedent for the theory to operate; there must exist reliable reports of cases; if the cases are to be binding there must be precise records of what they do lay down and it is only then that the doctrine of stare decisis can function meaningfully."

(*b*) *Advantages*.—As observed by the Fourteenth Law Commission besides uniformity and certainty of law in the administration of justice the doctrine of stare decisis tends to promote convenience and avoids delays. "If earlier decisions were not recognised as binding every court would have to decide the same question over and over again on principle which would cause delay and increase the burden of judges to a breaking point".[69] Besides this, there would follow a confusion and chaos because in one district a statute may be interpreted in one way while the same may be interpreted in a different way by the court of another district, though of the same State. Thus if the courts were allowed to interpret the law in their own way, unmindful of the binding force of precedents the result is disorder and conflict and the resultant chaos. It should, however, be noted that too rigid adherence to precedent leads to injustice and restricts the development of law. In peculiar circumstances therefore the Supreme Court may review and depart from its own judgment and can change the law.[70] Law reporting is thus an important function of the State to sustain the rule of law.

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64. 52 IA 398, 417: AIR 1925 PC 272, 279.
65. *P. Ramaswami* v. *Chandra Kottayya*, AIR 1925 Mad 261; *Dhondo* v. *Mishri*, AIR 1936 Bom 95; *Vinayak* v. *Moreshwar*, AIR 1944 Nag 44, 49; *Bankelal* v. *Batra*, AIR 1953 All 747; *Rex* v. *Ram Dayal*, AIR 1950 All 134.
66. Law Commission's 14th Report: *Reform of Judicial Administration*, (1958), 626, 646, para 44.
67. *Supra* n. 5; Articles 372(1) and 141 of the Constitution of India.
68. *Indian Legal History* (1972), 611.
69. Law Comm. XIV Report, 1, 626: Jain: *Indian Legal History* (1972), Ch. 26.
70. Art. 137, Constitution of India; *see* (1966) 1 All ER 77 (which states that too rigid adherence to precedent is not acceptable in England); Indian cases on this point: *Goluknath case*, AIR 1967 SC 1643

(c) *Law Reporters: Supreme Courts*.—It is interesting to note that after the Supreme Courts were established in Presidency towns law reporting system came into existence. It was a private enterprise and it remains so even up to date barring a few exceptions.

In 1824 Sir Francis Macnaghten published "Considerations upon Hindu Law" and in 1825 Sir William Macnaghten produced "Dissertations on Mohammedan Law". Both these were works on personal laws. In 1829 Longueville Clarke published "Rules and Orders of the Supreme Court" which contained notes on cases. Similarly in 1834, "Collections of Orders" from 1774 to 1813 was published by Smoult. These were useful publications. "Morton's Reports", compiled from notes of Sir R. Chambers C.J., and other judges of the court covering a long period from 1774 to 1841 was a publication leading to a definite development of law reporting in India. "Bignell's Reports" (1830-1831) published in 1831 contained full reports of the cases. Besides these other reporters Fulton's Reports (1842-1844), Montriou's Select Cases, Montriou's Reports (1846), Boulnois Reports (1853-1859), Gasper's Commercial Cases (1851-1860), George Taylor's Reports (1847-1848), Taylor and Bell's Reports (1847-1853) and Gasper's Reports on Small Cause Cases (1850-1859) of Calcutta Supreme Court were the useful reporters. In Bombay Sir Erskine Perry (C.J. of S.C. at Bombay) published two collections known as Perry's Oriental Cases. Morley's Digest (second volume) was his collection. At Madras Sir Thomas Strange in 1816 published three volumes (1798-1816) known as "Strange's Reports". As noted by Dr. Jain these decisions were frequently referred to by the Privy Council and the High Courts but now they have become rare. "The value of these old decisions was great both for professional lawyer and academic researcher because the cases not only contained good law, but they were also of great historical interest as they depicted how in the early days, the English lawyers and judges laid the foundation of a system of Anglo-Indian jurisprudence in India".[71] An attempt to consolidate all the above said reporters and to publish them under the name now known as Indian Decisions (old series) was made by T.A. Venkaswamy Rao, and five volumes were published.

On the side of the Sadar Diwani Adalats Sir William Hay Macnaghten was the pioneer of law reporting. Covering a period from 1791 to 1849 he published seven volumes. The first volume was prepared by Dovin who was appointed later as a judge of the SDA. The second, third and a part of the fourth volume were prepared by Sir William himself, the fifth volume was prepared by Sutherland and the last two volumes were prepared by the Registrar himself. From 1845 the SDA decisions were published monthly. These were known as the Bengal SDA Reports. These reports are the oldest official series of law reports in India. The Indian Decisions (old series) volume six and onward contain their reprints. As regards SDA of Madras only a single volume entitled "Decrees in Appeal Suits determined in the court of Sadar Adalat" was published in 1843 covering a period from 1805 to 1826. It contains interesting cases on Hindu law on the prevailing doctrines of the Southern School. At SDA in Bombay Borradaile, a judge of the Adalat in 1825 published

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which overruled *Shankari Prasad*, AIR 1951 SC 458; *Golaknath* was later overruled by *Kesavananda*, (1973) 4 SCC 225.

71. *Indian Legal History*, (1972) Ch. XXVI.

two volumes of the cases decided by SDA, Bombay. The second volume appeared in 1843. The volumes cover a period from 1820 to 1840. It should be noted that all these were private publications.

On the Sadar Nizamat Adalat (NA) side only two series containing criminal cases were published; first series (1949) comprised of five volumes and other series which covered a period from 1827 to 1846 was published by Bellasis the Deputy Registrar of the Bombay SDA, in 1950. From 1951 a monthly reporter of NA at Calcutta was started. At Bombay the reports covering a period from 1827 to 1846 were published in 1848. Moreover the monthly reports of Madras Fozdari Adalat were published. Morris, in 1855 published a collection of cases decided by SFA at Bombay in two volumes.

(*d*) *Law Reporters: High Courts.*—The period up to 1861 was an era of dual judicature but the establishment of High Courts in Presidency towns of Calcutta, Madras and Bombay in 1861 "*constitutes a conspicuous landmark in the process of the development of legal and judicial institutions in India*". This period after 1862 saw the acceleration and fineness in regular law reporting. Semi-official and private law reporting grew. The Madras High Court Reports in eight volumes were published which covered a period from 1862 to 1875. Similar reports came out from Bombay (12 volumes, 1862-1875) and Calcutta High Courts. Government published these reports. Side by side private reporters grew and continued competition. They were the Weekly Reporter, Indian Jurist at Calcutta, Madras Jurist at Madras, two volumes of Reports of Calcutta High Court (1878-1883) by Hyde E., fifteen volumes of Bengal Law Reports (1868-1876) and three volumes of Kinealy and Henderson Reports of the Calcutta High Court (1878-1883).

Due to severe criticism of Sir James Fitzjames Stephen, the Indian Law Reports Act was passed in 1875. This was in order to improve the quality of reporting and to make reporting an activity under the supervision and authority of the Government. Law reporting, according to him, should be regarded as a branch of legislation and that it was hardly a less important duty of the Government to publish that part of law which is enunciated by the tribunals in their judgments than to promulgate its legislation. The position after passing of the Act was that "No court shall be bound to hear cited, or shall receive or treat as an authority binding on it the report of any case decided by any of the said High Courts on or after the said day other than a report published under the authority of the Governor-General-in-Council".[72] The roots of the binding theory of precedents were thus laid down firmly by the Act. However the Act could not stop publication of private reports and as we see and read in the law reports the official publication of law reports are rarely cited. The citations are mostly from private law reports.

In pursuance of the provisions of the Act of 1875 each High Court started publication of law reports. The year of commencement of those series are as follows:

1876—Bombay, Calcutta, Madras and Allahabad

1920—Lahore

1922—Patna

1923—Rangoon

72. S. 3, Indian Law Reports Act, 1875.

1926—Lucknow
1936—Nagpur
1939—Karachi
1948—Punjab (East Punjab)
1949—Cuttack & Assam
1951—Rajasthan, Mysore, Hyderabad, Travancore-Cochin
1952—Madhya Bharat, Patiala
1954—Andhra Pradesh
1957—Kerala, Madhya Pradesh
1960—Gujarat

The series are known as I.L.R. series. Besides this Jammu & Kashmir Law Reports (1948) and Supreme Court Reports (1950) are the official reporters.

(e) *Law Reporters: Privy Council, Federal Court and Supreme Court.*—On the Privy Council side Jerom William Knapp was the first person who published cases of the Privy Council on Appeal from India in 3 volumes covering a period from 1829 to 1836. Another series beginning from 1836 to 1862 in regard to P.C. cases was brought out by E.F. Moore in 15 volumes. Moore also published another series (called New Series) of P.C. cases in 9 volumes from 1862 to 1873. The series is known as Moore's P.C. (N.S.) cases. Moore's most well known series — Moore's Indian Appeals (M.I.A.) contained exclusively Indian cases before P.C. in 14 volumes. We have thus P.C. Judgments available from 1829 to 1873 and they are all reprinted in volumes 12 to 20 of the English Reports (E.R.). From the point of view of language, extracts and arguments the series of cases serves the best purpose and is excellent. 300 copies of the M.I.A. were purchased by the East India Company. From 1872 onwards to 1950 the P.C. Decisions are reported in 77 volumes from England under supervision and control of the Incorporated Council of Law Reporting (ICLR).

From 1935 to 1950 the decisions of the Federal Court of India were published under the name Federal Court Reports. With the establishment of the Supreme Court from 1950 onwards the reports is known as Supreme Court Reports.

(f) *Private Reporters.*—A High Court's decision or Supreme Court's decision is itself authoritative. It does not become authoritative because of reporting. Moreover because a decision is reported by a private reporter it does not take away or affect its authority at all. A number of important cases remain unreported but that also does not reduce the authority of those decisions. If this was not so, then as the decision in *Mahomed Ali* v. *Mir Nazar Ali*[73] speaks, a mere whim of the reporter (in reporting or not reporting) could take away the authority of a decision. As declared in *State* v. *Ramji*[74] and *Vinayak* v. *Moreshwar*[75] what is binding is the decision of the High Court and not merely a report. It is rightly pointed out by Dr. Jain that the decision establishes a precedent and the report only serves merely as evidence of it. The courts therefore do not follow the rule of exclusive citation of the Indian Law Reports. One of the reasons for publication of private reports was

73. 5 CWN 326, 329 (1901).
74. AIR 1958 Bom 381.
75. AIR 1944 Nag 44.

this. Besides the ILR series is incomplete, costlier and the publication of its reports are delayed. This gave impetus to private reporting. The number of such reports is growing year by year. As reported[76], by the end of 1977 there were 127 private law reporters (old and new) starting from 1774. Adding other law reporters on special subjects the number today goes beyond 300. This uncontrolled growth in number requires a brake because to allow "a near fungus growth of a plethora of 'below-par law journals' is a dire danger to the administration of justice".[77] A scheme was therefore prepared by the Indian Law Institute to render and abridge the huge bulk of nearly 5000 or more volumes of law reports into 500 volumes by deletion of the dead wood from the archaic law reports.[78] But nothing has been done so far in this direction. The law reports as a rule, do not give a summary of arguments; they do not as a rule, report any interlocutary proceedings or orders".[79]

What is however not appreciated is the total disinterest of the courts themselves in helping this situation. The total present effort is directed towards disposal of the cases and little or no attention is paid either to make it convenient for the law reporters to get copies of all the judgments nor is there any attempt towards a comprehensive and complete list of judgments delivered. Though the Supreme Court and High Courts are court of record, the implications of being so is little recognised and never lamented. Criticism by academicians ignore such realities.

(g) *Principles for Law Reporting.*—[80] If indiscriminate reporting is allowed that would create chaos leading to a maze of decisions that dazzles the eyes of both lawyers and judges. The Law Commission therefore said in its 14th report that proper selection and reporting of judicial decisions which are the exposition of the law ex non scripto is public duty and the State has failed to discharge that duty properly. The legal profession can well take up this responsibility. So long as this is not done it is neither feasible nor desirable to restrict the publication of reports or to confer the monopoly of citation on one set of reports. However certain points are to be taken into consideration.

A.— The Reporter may well omit to report cases:

1. Where the decision relates only to a question of fact.
2. Where it does not introduce a new rule of law or materially modify a principle or rule or settle a doubtful question of law.
3. Where it is a mere case of construction of document unless there is good reason for including them.
4. Where the decision has been given per incuriam i.e. by reason of relevant statute not having been called to attention of the Court.
5. Where the decision is by a Single Judge and it only reiterates a principle of law laid down by a prior decision of another Single Judge. A differing single judgment may however be reported.
6. Where the decision is unimportant or is of no general interest.

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76. 22 JILI (1980) 218-237: V.G. Ramachandran: *Law Reporting and Law Reports in India.*
77. *Ibid.*, 229.
78. *Ibid.*, 231; *see* Appendix-C for List of Law Report.
79. Prof. Upendra Baxi Interviewed: (1987) 14 Reports (Interview) 22.
80. 22 JILI (1980) 220: V.G. Ramachandran, *Law Reporting and Law Reports in India*, 218-239.

7. Where the decision is on an interlocutory matter and the final decision of the case is yet pending.

B.—In recent years the arguments of the counsel are not incorporated in the report or sometimes the judges do not note those arguments. A good reporting must incorporate these arguments and points. Besides there is a practice of pronouncing three or even five concurring judgments by the judges. In such case the editor may incorporate in his report only those paras which throw new light on the issues arising in the case.

C.—The report should contain proper head-notes. The head-notes must be succinct, pinpointed and adequate to portray the salient points raised and decided in the case.

D.—The editorial notes must be crisp and short and aim at throwing more light when the judgment is silent or possibly erroneous or contradictory to the established precedents.

E.—Judgments[81] dealing with construction of documents may be omitted except when they state definite rules or principles of law which are aids to construction.

F.—Where the law under which a judgment was delivered is repealed if the decision yet contains valuable pronouncement involving legal principles which are not obsolete, such decision may be reported.

G.—Minority judgments cannot be omitted as the dissenting view is equally important.

H.—Quotations in a judgment may not be omitted since without them, the judgment may not make any sense. Classical passages from prior decisions and standard works often are the pivot on which the decision rests.

I.—Judgments of a Single Judge may not be omitted if they contain binding principles of law.

(*h*) *Computer aided search of case-law reported in law reports*.—In 1995, the Supreme Court in collaboration with the National Informatics Centre launched a judgment information system called JUDIS. The search is however limited to *reportable* judgments only as reported in SCR. A more comprehensive and versatile system was launched by the publishers of *Supreme Court Cases* entitled SCC ONLINE.

81. Points E to I suggested on the motion of M.C. Setalvad the then A.G. of India at the meeting of the Committee on Revised Law Reports (14-8-1962) held at Vigyan Bhavan: quoted by Ramachandran, op. cit., n. 68, 222.