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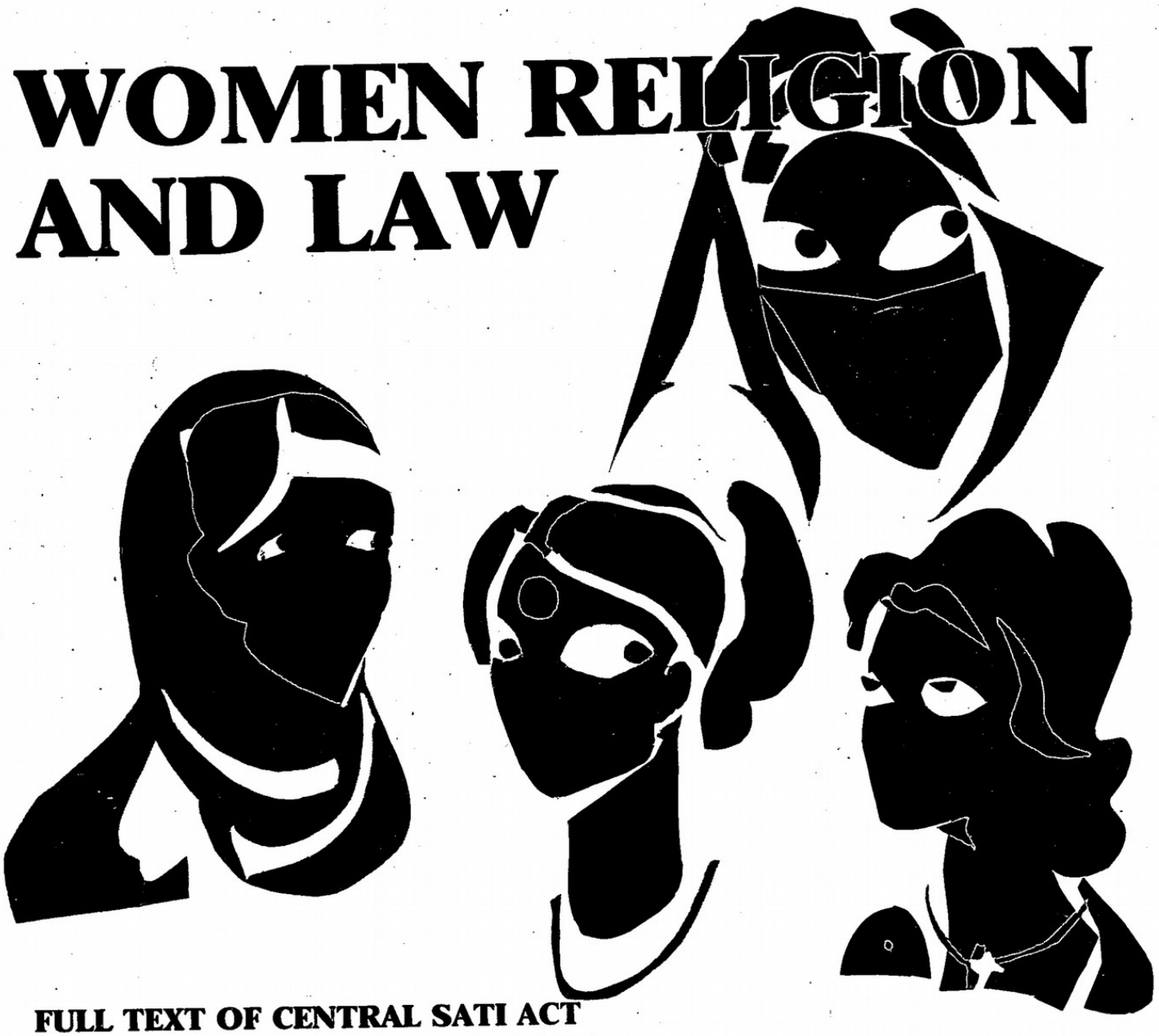
FROM THE LAWYERS COLLECTIVE

WOMEN RELIGION AND LAW



FULL TEXT OF CENTRAL SATI ACT

RESERVATIONS IN MAHARASHTRA

SELF-DEFENSE PLEA FOR BATTERED WOMEN

EDITORIAL

Where's the Justice?

When sitting judges of the Supreme Court sit on Commissions of Enquiry to enquire into obviously political matters, they seriously compromise the independence of the judiciary. For whichever way the findings go, they are bound to be faced with the charge of being anti-government or pro-grovernment. Why then, must they agree to put themselves in such an unenviable position? There are surely enough retired judges of the Supreme Court and High Courts who can be called upon to head such enquiries. Nothing illustrates this point better than the reactions to the Thakkar Natarajan Commission report.

When judges of the Supreme Court who sit on such enquiries, come back to their judicial function, they decide cases of far reaching importance to which the Government of India is the main Respondent. They are expected to be impartial and do even handed justice. But with what confidence can a litigant approach a judge who has been inextricably mixed up in a highly political controversy and given a report which clearly damns some politicians and gives a clean chit to others? Added to this is the allegation that those found guilty of deriliction of duty have not been given a proper opportunity to defend themselves.

It is an old old cliche that justice must not only be done but also seem tobe done. Litigants with cases against the Government which come before Justice Thakkar and Justice Natarajan are bound to feel that the dice is loaded against them. It is after all, not so easy to switch personalities, between being a sitting judge and a Member of a Commission of Equiry. We hope that this will be the last time that a sitting judge is appointed to enquire into an obviously political fight between warring factions of politicians.

Indira Jaising.

FROM THE LAWYERS COLLECTIVE

CONTENTS VOL. 2 NO. 11

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LETTERS

Attempt to Malign Builders?

The Builders' Association of India (BAI) has noticed, with regret, the letter of one Shri S.Bhatnagar, Coordinator, National Campaign Committee on Central Legislation for Construction Workers, published in "The Lawyers October 1987" and has to state that the contents thereof are nothing but a distortion of facts aimed at tarnishing the image and the good intentions of the builders towards the workers in the building and construction industry.

To put the record straight, the BAI has to point out in this behalf that in the meeting of the Tripartite Working Group (TWG) which was held at New Delhi, on 21.5.1987, for consideration of the draft report of the Drafting Committee, it was noticed that the said report while it contained the views of employers did not give the views of the trade unions in the matter. This was so presumably because the trade union representatives on the Committee, expressed a desire to meet together and settle their say in the matter, before conveying the same to the TWG.

Accordingly, the Trade Union Representatives of the TWG met in the Meeting Hall of the TWG itself at New Delhi and deliberated over the matter. Thereafter, it appears they wanted to meet and discuss the matter further with the BAI representatives, whose representatives were in New Delhi on 21.5.1987. Accordingly, the trade union representatives of the TWG called on the BAI representatives in their hotel at New Delhi, where it was decided that the representatives of the trade unions on the TWG and the BAI should meet in Bombay, on 27 May 1987, for thrashing out the issues involved and come to some agreed solutions in the matter, if possible. All the trade union representatives on the TWG were invited to attend the bipartite meeting in Bombay on 27.5.1987, by the Executive Secretary of the BAI. However, only the representatives of INTUC (Shri S.L.Sharma) and HMS (Shri K.A.Khan) attended the aforesaid bipartite meeting in Bombay. In this Meeting, which continued on 28th and 29th May, 1987 as well all the issues involved were discussed threadbare by the representatives present and a consensus eventually reached between them.

On the basis of the said consensus, an agreed draft report was prepared by the said representatives, signed by all of them, and the same was then forwarded by the Executive Secretary of the BAI, to the Member - Secretary, for consideration at the next meeting of the TWG. The BAI has to particularly clarify here that the above-said draft report of the bipartite committee has never been claimed by the BAI to be the "final report" of the TWG. The BAI has always held and still holds the said report to be a 'draft for consideration' and the same is still under consideration. The TWG, which met at New Delhi, on 8.10.1987, could not fully consider the above-said report, as the trade union representatives again wanted some more time to mutually come to some agreed terms in the matter, which was allowed by the Chairman. The report is, therefore, now expected to come up, for consideration, in the forthcoming Meeting of the TWG, which is scheduled for 29.12.1987 at New Delhi.

It would be noticed from the foregoing that the BAI has done nothing whatever to sabotage the work of the TWG. On the contrary, it would be seen that the BAI has gone out of the way in inviting the trade union representatives of the TWG at Bombay and discussing with them, at length, the issues involved and coming to some agreed solutions with them in respect of the terms of reference of the TWG, which have been set out in the draft report of the bipartite committee and forwarded to the Member- Secretary of the TWG, on 1.6.1987. It may also be worthwhile mentioning here that it was the BAI, which was mainly instrumental in the appointment of the TWG, for finding out ways and means of providing some social security measures to the workers employed in the building and construction industry.

In conclusion, therefore, it is plain that the letter of Shri Bhatnagar in "The Lawyers October 1987" is nothing but an unwarranted, nay mischievous, propaganda against the BAI.

N.A.Samant
Executive Secretary
Builders' Association of India
Bombay.

In Memory
Neelam Raheja

We mourn the death of our friend and comrade Neelam Raheja who passed away in November 1987. Neelam was founder member of Lawyers Collective and took a keen interest in all its activities.

Born in a conservative Sindhi family, Neelam grew up to be quite a rebel and was a radical student organiser in her college days. In law college Neelam formed a group of socially committed law students which published a newsletter called Law Spectrum. In the profession, she opted for and fared commendably in, Criminal Law, a sphere where most women lawyers do not tread.

After the Emergency, Neelam campaigned enthusiastically for civil liberties and became a leading activist of the Committee for the Protection of Democratic Rights (CPDR), Bombay. She was an active participant in the Prison Rights Project of the Lawyers Collective.

Nothing could suppress Neelam's zest for life and her spirited struggle against injustice. Not even lupus, the incurable disease that finally felled her at the untimely age of 37. All who knew her will never forget the determined manner in which Neelam kept up her activities even in the face of impending death. Her warmth, openness and generosity will remain with us always. We shall sorely miss her.

COVER STORY

Women Religion and Law

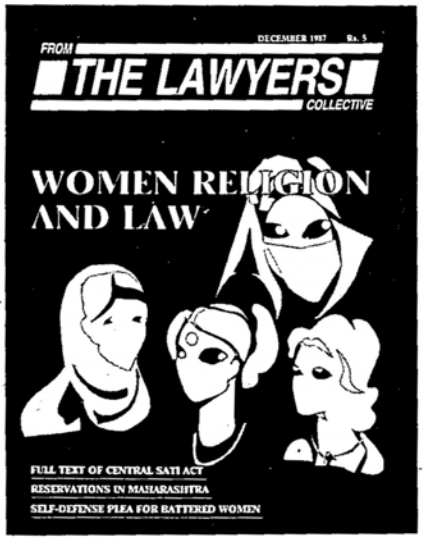
With every passing year, the involvement of the State with religion makes a mockery of its secular pretensions. For women this has meant State supported oppression of religious obscurantists of all hues and colours. In this critique of the existing judicial interpretation of secularism, ***Indira Jaising*** *explains that the Constitution does not provide for State support to religion in any form.*

Since women have rarely been a part of organised religious leadership anywhere, they have no experience in challenging religious oppression. Instead, feminists have channelled their energies towards other secular evils. But just as the personal is political, the religious is secular where women are concerned. Religion has played a crucial role in the maintenance of superstition and oppressive cultural institutions and until religion itself is challenged, the fate of womens' equality will be left not to the Gods, but to the fundamentalist religious authorities. A few examples from recent memory will serve to illustrate the point.

In 1986, Shahida Parveen's husband divorced her; she was childless and he wanted to find a new wife. As a divorced woman in Pakistan, Shahida was subject to ridicule and attack, and hence three months later, she married her cousin. On November 7 1987, a judge ruled that her divorce papers were invalid and found Shahida guilty of adultery. She was punished under the law of Islam to death by stoning. Shahida now awaits her sentence in a jail in Pakistan, a victim not of misdeed or misfortune, but of religious fundamentalism.

Impact of Fundamentalism

In countries throughout the world, the revival of religious fundamentalism has been accompanied by the increasing oppression of women. In the West, Christian fundamentalists preach against abortion and argue that women should return to their 'rightful' place in the home. In Iran, women helped to overthrow the Shah, but with Ayatollah Khomeini's accession to power all womens' rights were abolished through legislation. He reintroduced the compulsory chador, which had been banned since 1936. In Kuwait religious authorities recently decreed



that Muslim women should be denied the right to vote or run for Parliament stating, "The nature of the electoral processes befits men, who are endowed with ability and expertise. It is not possible that women recommend or nominate other women or men for public posts. Islam does not permit women to forfeit their basic commitments, bearing and rearing children".

In India, Hindu widows are subject to extreme forms of ridicule and cruelty. This cruelty culminated on September 4 in the Sati of Roop Kanwar. Muslim women become non-persons upon divorce under the Muslim Womens' (Protection of Rights on Divorce) Act. Why do women continue to endure such extreme forms of oppression? Women are trapped because they are often literally wedded to their oppressors and because their subordinator is clothed in religious rhetoric.

Historically, religious fundamentalists have always used their dogma to subordinate women. Much of this religious sexism has little to do with the fundamental tenets of the religion.

There are several reasons why fundamentalists historically have advocated the oppression of women. The most obvious is because they want to and religion is a convenient disguise for their biases. A more radical theory might posit that fundamentalist revivals are a reaction to the increasing equality of women. Knowing that women are becoming aware of their power, fundamentalists appeal to irrationality to convince women to accept an unequal place.

The oppression of women helps fundamentalist leaders to sell their theories, appealing to mens' biases, to convince them to become followers, by offering the man who adheres to fundamentalism, greater authority over his wife. The fundamentalists may also seek to oppress women because it provides them with a convenient formula for controlling the morality of both sexes: Women are given a specific role in the family and men are responsible for seeing that this role is carried out.

Fundamentalism is a danger to womens' emancipation everywhere. It's fires can turn back time, depriving women of the gains they have so desperately worked for. The passage of the Muslim Womens' (Protection of Rights on Divorce) Act of 1986 following the Shah Bano judgement is but one example of the strength of the fundamentalist backlash. The burning to death of Roop Kanwar is another. In the context of the marked increase in communal and fundamentalist forces, it becomes necessary to understand the place of religion under the Indian Constitution.

Place of Religion Under the Constitution

India today presents a picture of ex-

cessive Government entanglement with religion. Whether it is the screening of the Ramayana on Doordarshan, or the publication of religious texts at reduced prices, the active support for religion by Government is all pervasive. The recent controversy in Maharashtra over the dropping of "Riddles of Hinduism" by Dr. Ambedkar also demonstrates excessive entanglement with religion by Government. In fact not only has the Government in this case published a book on religion-related writing at its own cost, but has also assumed the role of censor, the right to decide what part or portion of critical writing on religion to publish and what not to publish.

Forty years after independence, women continue to be governed by religious laws in matters of marriage, divorce, maintenance and inheritance. In disputed cases of marriage, divorce, custody, inheritance and child support our judges continue to decide what is religious law and what is not for the purpose of resolving a dispute in a given case. In the process they get deeply enmeshed in deciphering religious texts and interpreting them as happened in the *Shah Bano* case. Thus not only the State but even our judges are excessively entangled with religion. Is such excessive entanglement with religion by the State and it's judiciary constitutionally permissible? Is it any answer to say that the State has an excessive entanglement with all religions alike and hence no religious community is being discriminated against? Is it any answer to say that all religious communities are guaranteed their 'personal' laws hence no religious group is being discriminated against? Could the Government for example argue, that while the Ramayana is being serialised on Doordarshan, religious texts of other communities are also being serialised and hence the freedom of religion of all communities is assured? Can the State justify its failure to reform family law on the ground that to do so would be to violate the guarantee of freedom of religion?

This assumption of the role of censor and arbiter, interpreter and final keeper of religion is a logical consequence of the entry of the State into the realm of religion. To accept such an argument would be to horribly misunderstand the meaning of the right to freedom of religion guaranteed by Article 25.

In fact acceptance of such an argument can lead to fanning the flames of fundamentalism. The freedom of religion then ends up being the guarantee of the right to be communal. The continued enforcement of religious laws in matters considered the realm of family law is nothing short of support of communal as against secular values by the State. Relegating matters of family law to the realm of private law as opposed to public law and linking it up with religion, ensures a hands off policy by the State to womens' issues and consigns them to the mercy of mullas and pandits. Is there anything in the Indian Constitution which permits such state sponsored support of religion and religious laws, even when they so blatantly violate other fundamental rights guaranteed to women?

...just as the personal is political, the religious is secular where women are concerned. Religion has played a crucial role in the maintenance of superstition and oppressive cultural institutions and until religion itself is challenged, the fate of womens' equality will be left not to the Gods, but to the fundamentalist religious authorities.

Article 25 Perverted

Article 25 says that subject to public order morality and health and subject to the other fundamental guarantees (right to equality, the right not be discriminated against on grounds of sex, race or religion) all persons are equally entitled to freedom of conscience and the right to freely profess, propagate and practice religion. Article 25 makes it clear that the State can make laws regulating and restricting any economic, financial, political, or other secular practice, which may be associated with religion. The State can also enact laws for social reform and welfare. Article 26, which is an aspect of Article 25 guarantees to every religious denomination, the right to establish, maintain and administer institutions of religious or charitable nature. Article 27, a much ignored provision is in essence a "non-establishment of religion" clause. No discussion of Article 25 can be complete without an understanding of Article 27. Whereas, Article 25 guarantees freedom of religion to the individual, Article 27 prevents the State from entanglement with any religion. Without Article 27, the right under Article 25 can end up being the guaranteed right to State supported communalism.

Thus far the guarantee to freedom of religion in India has ended up meaning the right to active state support for religious laws of all communities. We argue that this is patently unconstitutional. Firstly, the enforcement of religious laws results in direct violations of the fundamental right to equality for women and discriminates against them on grounds of religion alone. Secondly by enforcing religious laws, the State is in fact "establishing religion." What is not clearly understood is that the guarantee of freedom of religion makes no sense without a corresponding injunction against the state preventing it from establishing religion. State entanglement with religion in any form is antithetical to the negative injunction preventing the establishment of religion, an injunction implicit in the Indian Constitution, running right through the Preamble, the Fundamental Rights and the Directive Principles of State Policy. In fact the injunction against establishing or getting entangled with any religion is the constitutional meaning of the secular state. Thus while the citizen is guaranteed the right to freedom of conscience, belief and religion, the State is correspondingly debarred from getting entangled in any religious matters and debarred from establishing religion. The one guarantee without the other limitation on the State's powers makes no sense.

Essential Core Test-Incorrect

The current judicial analysis of the scope of the guaranteed right to free-

dom of religion, its meaning, content and limitations, is entirely wrong. While deciding whether a particular law violates freedom of religion, judges have got hopelessly entangled in finding out whether the law interferes with the "essential core" or practice of the religion. If it does, the law is held to be bad, if it does not the law passes the test and is held valid. In the process, judges have assumed the role of mullas and pandits and assumed to themselves the right to interpret and enforce religious sanctions. This test for determining the constitutional validity of a law alleged to violate freedom of religion is hopelessly incorrect and leads to dangerous conclusions, namely that if a law interferes with the essential core of religion, it is unconstitutional regardless of the fact that it seeks to achieve the reform of secular activity. Suppose for example a law is enacted abolishing polygamy, or unilateral talaq among Muslims, or conferring equal rights of inheritance for men and women, and it is found that these practices form part of the essential core of religion, can it be argued that a law abolishing them is unconstitutional and violative of Article 25? What then is to be made of the right to equality for women? Article 14 & 15 would have to be rewritten to mean that subject to the freedom to practice religion, women shall have the right to equality and the right not to be discriminated against. These are the logical absurdities of accepting the "essential core" test.

The courts' answers to the question of what is or what is not a core practice of religion have been lacking in rationale which could be understood and applied in future cases and thus have yielded inconsistent determinations.

Compelling State Interest

Constitutionally, the courts' focus in testing laws alleged to violate fundamental rights has been wrong. The courts' focus should be on the necessity of the State law or regulation rather than on whether or not it alters the "essential core" of a religion.

The true test in judging whether a particular State law violates Article 25 of the Constitution would be to pose the question--is there a compelling State interest in making the law? This

would mean that the courts should focus attention on the law, it's purpose and effect. This test is explicit in Article 25, which in unambiguous terms permits the State to make laws for social reform, public order etc. Such a test would promote certainty of results and would be easy to apply, since compelling State interests have been defined in the Directive Principles of State Policy. Hence in a given case, when a particular law or regulation is challenged, the test would be as follows:

First to enquire whether the party or group asserting the religious freedom qualify as a religion in order to be able to assert the freedom. This is a threshold enquiry-not an enquiry into "core practices", but simply into whether religion exists, judged by sincerity of beliefs, surrounding symbols and practices. If no religion at all exists, there is no protection under Article 25. If on the other hand, a religion does exist, the courts will then examine the law to see if the State has a compelling interest in making the regulation. To answer this question, the court will see whether the law is passed to give effect to the provisions of Part III, or made in the interest of public order, morality, health, regulating or restricting any economic, financial, political or other secular activity associated with religion or is a measure of social reform. If the State's interest is compelling, the regulation stands. If the State's interest is not compelling, the regulation fails.

National Anthem Case

To date, there appears to be only one case which has adopted this approach i.e. *Bijoe Emmanuel v/s. State of Kerala* [AIR 1987 SC 748]. Children belonging to the Jehovah's Witnesses were being compelled to sing the national anthem on pain of expulsion from their school. They challenged this regulation as being violative of Article 25. Justice Chinnappa Reddy after scanning the available literature, held that the Jehovah's witness truly and conscientiously believe what they say, do not hold their beliefs idly and their conduct was not the outcome of perversity. It was their belief that their religion does not permit them to join in any rituals except in their prayer to Jehovah, their God. Hence religion existed and was entitled to protection. The Judge then proceeded to examine whether the ban imposed by the Kera-

la Education authorities against silence when the National Anthem is sung, on pain of expulsion from School was consistent with Article 25 i.e. whether it was required in the interest of public order, morality, health or the other provisions of Part III. This is the truly secular State interest test. This is how he formulated the test:

"We see that the right to freedom of conscience and freely to profess, practise and propagate religion guaranteed by Article 25 is subject to (1) public order, morality and health; (2) other provisions of Part III of the Constitution; (3) any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; or (4) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Thus while on the one hand, Article 25 (1) itself expressly subjects the right guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other

Right to Freedom of Religion Under Fundamental Rights Chapter of Constitution

Article 25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.- The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.- In sub clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

Article 27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by Article 25(1). Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practice and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practice or to provide for social welfare and reform. It is the duty and function of the Court so to do."

Having so formulated the test, the Court held that the expulsion of the children from the school because they conscientiously adhered to their religious faith and did not join the singing of the national anthem is a violation of their fundamental right to freedom of conscience and the right to freely profess, practice and propagate religion. This was because the ban was not intended to protect public order, morality and health or to give effect to Part III or made to regulate or restrict economic, financial or secular activity associated with religious practice or a measure of social reform.

Personal Laws Unconstitutional

So-called personal laws, which discriminate against women in a hundred different ways, are all liable to be declared unconstitutional if they violate the right to equality guaranteed by Article 14 or if they discriminate against women on grounds of religion or sex. They will not be protected by Article 25 if it's true limits are understood. Similarly a law abolishing an abhorrent religious practice, or a law intended to further the right to equality or the right not to be discriminated against on the basis of religion or sex, cannot be held unconstitutional as interfering with the "core concept" of religion.

Suppose for example a law is enacted abolishing polygamy, or unilateral talaq among Muslims, or conferring equal rights of inheritance for men and women, and it is found that these practices form part of the essential core of religion, can it be argued that a law abolishing them is unconstitutional and violative of Article 25? What then is to be made of the right to equality for women? Article 14 & 15 would have to be rewritten to mean that subject to the freedom to practice religion, women shall have the right to equality and the right not to be discriminated against.

Plight of Tribal Women

The non-interventionist attitude to family law on the ground that it is "private" law and not "public" has also lead to indifference towards the plight of tribal women. Such tribal women are presumably governed by custom. In most cases, they end up being governed by unreformed Hindu law. There is a general presumption that anybody who is not a Christian or Muslim is a Hindu. Thanks to the exclusion of tribals from the Hindu Succession Act, 1955 and the Hindu Marriages Act which specifically exclude Scheduled Tribes from their application, tribal women are governed by custom in matters relating to divorce, maintenance, and inheritance. This has inevitably meant Hindu customs as most courts tend to think that all tribals are Hindu and follow Hindu customs unless there is specific evidence of conversion. Thus the institution of polygamy continues to exist and tribal women do not inherit property which passes exclusively through the male line. The reasons for this non-interventionist attitude are not clear. While in the pre-independence days

this would be part of general British policy not to interfere with the religion and custom of the community in matters considered "personal", in the post constitution period it was supposedly part of the policy of preserving the identity of tribal communities and ensuring that their culture is not destroyed by non-tribal invasions of their land. But where restrictions on alienation of tribal land to non-tribals can be understood, the application of unreformed Hindu Law patently discriminates against tribal women and serves no purpose.

Common Element in All Religions

In all religions, the father is the natural guardian of the child to the exclusion of the mother. Hindu law still gives to sons a birthright in ancestral property, to the exclusion of daughters. Muslim men may marry four wives, but their women may not marry more than one husband, whereas marriages of Hindus and Christians are expected to be monogamous. A Muslim woman cannot unilaterally divorce her husband whereas she can be so divorced by her husband. All divorced women are entitled to maintenance after divorce from their former husbands under Section 125 of the Criminal Procedure Code, but Muslim Women, thanks to the infamous Muslim Womens' Protection of Rights on Divorce Act, 1986 are not. The right to get a divorce for Christian women, as compared to men is so severely restricted that they virtually have to live in bondage.

The true test in judging whether a particular State law violates Article 25 of the Constitution would be to pose the question--is there a compelling State interest in making the law? This would mean that the courts should focus attention on the law, it's purpose and effect. This test is explicit in Article 25, which in unambiguous terms permits the State to make laws for social reform, public order etc. Such a test would promote certainty of results and would be easy to apply, since compelling State interests have been defined in the Directive Principles of State Policy.

The judgement of the Bombay High Court in *Narasinh Aappa's* case that personal law is not "law" within the meaning of Article 13 is clearly wrong. As A. M. Bhattacharjee points out in Muslim law and the Constitution (1985) P. 13-14:

"When the various statutory enactments commonly referred to as the Civil Court Acts and then the Muslim Personal Law (Shariat) Application Act, 1937 have commanded the application of the Muslim Personal Law and these statutory enactments are indisputably the laws of India and the laws of the land, then, it would be difficult to understand how and why the Muslim Personal Law itself, whose application has been enjoined by those statutes, must still be regarded not to be among the law of the land".

Conclusion

In conclusion, one can state that the continued existence of anti-women so-called personal laws, based on religion yet enforced by the State, is patently unconstitutional. They not only discriminate against women on grounds of religion, they also discriminate against women on grounds of sex. Enforcing such laws, in fact amounts to enforcing religious laws and sanctions and directly puts the state and it's judiciary in the position of final arbiter and defender of religion. For this reason, such enforcement will amount to establishment of religion and therefore opposed to Article 27. The attitudes of the Indian State to personal laws reflects its inability to separate the religious from the secular, thus making religion a convenient tool for the oppression of women.

NOTICE BOARD

Bill No. 133-C of 1987

THE COMMISSION OF SATI (PREVENTION) BILL, 1987

A BILL to provide for the more effective prevention of the commission of sati and its glorification and for matters connected therewith or incidental thereto.

WHEREAS sati or the burning or burying alive of widows or women is revolting to the feelings of human nature and is nowhere enjoined by any of the religions of India as an imperative duty;

AND WHEREAS it is necessary to take more effective measures to prevent the commission of sati and its glorification;

BE it enacted by Parliament in the Thirty-eighth Year of the Republic of India as follows:-

PART I

PRELIMINARY

1. Short title, extent and Commencement.

(1) This Act may be called the Commission of Sati (Prevention) Act, 1987.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force in a State on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States.

2. Definitions.

(1) In this Act, unless the context otherwise requires,--

(a) "Code" means the Code of Criminal Procedure, 1973;

(b) "Glorification", in relation to sati, whether such sati was committed before or after the commencement of this Act, includes, among other things,--

(i) the observance of any ceremony or the taking out of a procession in connection with the commission of sati; or

(ii) the supporting, justifying or propagating the practice of sati in any manner; or

(iii) the arranging of any function to eulogise the person who has committed sati, or

(iv) the creation of a trust, or the collection of funds, or the construction of a temple or other structure or the carrying on of any form of worship or the performance of any ceremony thereat, with a view to perpetuate the honour of, or to preserve the memory of a person who has committed sati;

(c) "sati" means the act of burning or burying alive of--

(i) any widow along with the body of her deceased husband or any other relative or with any article, object or thing associated with the husband or such relative; or

(ii) any woman along with the body of any of her relatives, irrespective of whether such burning or burying is claimed to be voluntary on the part of the widow or the woman or otherwise;

(d) "Special Court" means a Special Court constituted under section 9;

(e) "temple" includes any building or other structure, whether roofed or not, constructed or made to preserve the memory of a person in respect of whom sati has been committed, or used or intended to be used for the carrying on of any form of worship or for the observance of any ceremony in connection with such commission.

(2) Words and expressions used but not defined in this Act and defined in the Indian Penal Code or in the Code shall have the same meanings as are respectively assigned to them in the Indian Penal Code or the Code.

PART II

PUNISHMENTS FOR OFFENCES RELATING TO SATI

3. Attempt to commit sati.

Notwithstanding anything contained in the Indian Penal Code, whoever attempts to commit sati and does any act towards such commission shall be punishable with imprisonment for a term which may extend to six months or with fine or with both:

Provided that the Special Court trying an offence under this section shall, before convicting any person, take into consideration the circumstances leading to the commission of the offence, the act committed, the state of mind of the person charged of the offence at the time of the commission of the act and all other relevant factors.

4. Abetment of sati.

(1) Notwithstanding anything contained in the Indian Penal Code, if any person commits sati, whoever abets the commission of such sati, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also be liable to fine.

(2) If any person attempts to commit sati, whoever abets such attempt, either directly or indirectly, shall be punishable with imprisonment for life and shall also be liable to fine.

Explanation. - For the purposes of this section, any of the following acts or the like shall also be deemed to be an abetment, namely:-

(a) any inducement to a widow or woman to get her burnt or buried alive along with the body of her deceased husband or with any other relative or with any article, object or thing associated with the husband or such relative, irrespective of whether she is in a fit state of mind or is labouring under a state of intoxication or stupefaction or other cause impeding the exercise of her free will;

(b) making a widow or woman believe that the commission of sati would result in some spiritual benefit to her or her deceased husband or relative or the general well being of the family.

(c) encouraging a widow or woman to remain fixed in her resolve to commit sati and thus instigating her to commit sati;
(d) participating in any procession in connection with the commission of sati or aiding the widow or woman in her decision to commit sati by taking her along with the body of her deceased husband or relative to the cremation or burial ground;
(e) being present at the place where sati is committed as an active participant to such commission or to any ceremony connected with it;
(f) preventing or obstructing the widow or woman from saving herself from being burnt or buried alive;
(g) obstructing, or interfering with, the police in the discharge of its duties of taking any steps to prevent the commission of sati.

5. Punishment for glorification of sati.

Whoever does any act for the glorification of sati shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.

PART III

POWER OF COLLECTOR OR DISTRICT

6. Power to prohibit certain acts.

(1) Where the Collector or the District Magistrate is of the opinion that sati or any abetment thereof is being, or is about to be committed, he may, by order, prohibit the doing of any act towards the commission of sati by any person in any area or areas specified in the order.
(2) The Collector or the District Magistrate may also, by order, prohibit the glorification in any manner of sati by any person in any area or areas specified in the order.
(3) Whoever contravenes any order made under sub-section (1) or sub-section (2) shall, if such contravention is not punishable under any other provision of this Act, be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine which shall not be less than five thousand rupees but which may extend to thirty thousand rupees.

7. Power to remove certain temples or other structures.

(1) The State Government may, if it is satisfied that in any temple or other structure which has been in existence for not less than twenty years, any form of worship or the performance of any ceremony is carried on with a view to perpetuate the honour of or to preserve the memory of any person in respect of whom sati has been committed, by order, direct the removal of such temple or other structure.
(2) The Collector or the District Magistrate may, if he is satisfied that in any temple or other structure, other than that referred to in sub-section (1) any form of worship or the performance of any ceremony is carried on with a view to perpetuate the honour of or to preserve the memory of any person in respect of whom sati has been committed, by order, direct the removal of such temple or other structure.
(3) Where any order under sub-section (1) or sub-section (2) is not complied with, the State Government or the Collector or the structure to be removed through a police officer not below the rank of a Sub-Inspector at the cost of the defaulter.

8. Power to seize certain properties.

(1) Where the Collector or the District Magistrate has reason to believe that any funds or property have been collected or acquired for the purpose of glorification of the commission of any sati or which may be found under circumstances which create suspicion of the commission of any offence under this Act, he may seize such funds or property.
(2) Every Collector or District Magistrate acting under sub-section (1) shall report the seizure to the Special Court, if any, constituted to try any offence in relation to which such funds or property were collected or acquired and shall await the orders of such Special Court as to the disposal of the same.

PART IV

SPECIAL COURTS

9. Trial of offences under this Act.

(1) Notwithstanding anything contained in the Code, all offences under this Act shall be triable only by a Special Court constituted under this section.
(2) The State Government shall by notification in the Official Gazette, constitute one or more Special Courts for the trial of offences under this Act and every Special Court shall exercise jurisdiction in respect of the whole or such part of the State as may be specified in the notification.
(3) A Special Court shall be presided over by a Judge to be appointed by the State Government with the concurrence of the Chief Justice of the High Court.
(4) A person shall not be qualified for appointment as a Judge of a Special Court unless he is immediately before such appointment, a Sessions Judge or an Additional Sessions Judge in any State.

10. Special Public Prosecutors.

(1) For every Special Court, the State Government shall appoint a person to be a Special Public Prosecutor.
(2) A person shall be eligible to be appointed as a Special Public Prosecutor under this section only if he had been in practice as an advocate for not less than seven years or has held any post for a period of not less than seven years under the State requiring special knowledge of law.
(3) Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code and the provisions of the Code shall have effect accordingly.

11. Procedure and powers of Special Courts.

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.
(2) Subject to the other provisions of this Act, a Special Court shall, for the purpose of the trial of any offence, have all the powers of a Court of Session and shall try such offence as if it it were a Court of Session, so far as may be, in accordance with the procedure prescribed in the Code for trial before a Court of Session.

12. Power of Special Court with respect to other offences.

(1) When trying any offence under this Act, a Special Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.
(2) If, in the course of any trial of any offence under this Act it is found that the accused person has committed any other offence under this Act or

under any other law, a Special Court may convict such person also of such other offence and pass any sentence authorised by this Act or such other law for the punishment thereof.

(3) In every inquiry or trial, the proceedings shall be held as expeditiously as possible and, in particular, where the examination of witnesses has begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, and if any Special Court finds the adjournment of the same beyond the following date to be necessary, it shall record its reasons for doing so.

13. Forfeiture of funds or property.

Where a person has been convicted of an offence under this Act, the Special Court trying such offence may, if it is considered necessary so to do, declare that any funds or property seized under Section 8 shall stand forfeited to the State.

PART V

MISCELLANEOUS

14. Appeal.

(1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgement, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgement, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days.

15. Protection of action taken under this Act.

No suit, prosecution or other legal proceeding shall lie against the State Government or any officer or authority of the State Government for anything which is in good faith done or intended to be done in pursuance of this Act or any rules or orders made under this Act.

16. Burden of Proof.

Where any person is prosecuted of an offence under Section 4, the burden of proving that he had not committed the offence under the said section shall be on him.

17. Obligation of certain persons to report about the commission of offence under this Act.

(1) All officers of Government are hereby required and empowered to assist the police in the execution of the provisions of this Act or any rule or order thereunder.

(2) All village officers and such other officers as may be specified by the Collector or the District Magistrate in relation to any area and the inhabitants of such area shall, if they have reason to believe or have the knowledge that sati is about to be, or has been, committed in the area shall forthwith report such fact to the nearest police station.

(3) Whoever contravenes the provisions of sub-section (1) or sub section (2) shall be punishable with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

18. Person convicted of an offence under section 4 to be disqualified from inheriting certain properties.

A person convicted of an offence under sub-section (1) of section 4 in relation to the commission of sati shall be disqualified from inheriting the property of the person in respect of whom such sati has been committed or the property of any other person which he would have been entitled to inherit on the death of the person in respect of whom such sati has been committed.

19. Amendment of Act 43 of 1951.

In the Representation of the People Act, 1951,-

(a) in section 8, in sub-section (2), after the proviso, the following proviso shall be inserted, namely :-

"Provided further that a person convicted by a Special Court for the contravention of any of the provisions of the Commission of Sati (Prevention) Act, 1987 shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of five years since his release";

(b) in section 123, after clause (3A), the following clause shall be inserted, namely:-

(3B) The propagation of the practice or the commission of sati or its glorification by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Explanation - For the purpose of this clause, "sati" and "glorification" in relation to sati shall have the meanings respectively assigned to them in the Commission of Sati (Prevention) Act, 1987.'

20. Act to have overriding effect

The provisions of this Act or any rule or order made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

21. Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

22. Repeal of existing Laws.

(1) All laws in force in any State immediately before the commencement of this Act in that State which provide for the prevention or the glorification of sati, shall on such commencement, stand repealed.

(2) Notwithstanding such repeal, anything done or any action taken under any law repealed under sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of this Act, and in particular, any case taken cognizance of by a Special Court under the provisions of any law so repealed and pending before it immediately before the commencement of this Act in that State shall continue to be dealt with by that Special Court after such commencement as if such Special Court had been constituted under section 9 of this Act.

Reservations in Maharashtra

M. B. Mehere discusses the law pertaining to the highly volatile issue of reservations.

Reservation in services and educational institutions is provided for under Articles 340 and 341 of the Constitution of India. Article 46 also provides certain guarantees to the weaker sections of society, especially the Scheduled Castes and Scheduled Tribes. These three Articles of the Constitution protect the rights of these communities which have been deprived opportunities in educational institutions and in the services of the State and Central Government for years.

Reservations Under Constitution

Dr. Babasaheb Ambedkar was the Chairman of the Drafting Committee of the Constitution of India. He was the champion of the revolution started for the Scheduled Castes and Scheduled Tribes during the British period. He has, therefore, given protection to the Scheduled Castes and Scheduled Tribes under the Constitution of India. However, certain limitations were put up under Article 335 of the Constitution of India which will not affect the efficiency of educational institutions or State services. Article 341 provides protection to the Scheduled Castes and Article 342 provides protection to the Scheduled Tribes in educational institutions and State services. Articles 14, 15 and 16 are the crucial articles which prohibit discrimination on the basis of race, religion and caste. However, Articles 15(4) and 16(4) give the protection that reservations made in educational institutions and State services will not affect the fundamental rights of citizens and cannot be challenged in a court of law on the ground that the reservations violated the fundamental rights guaranteed under the Constitution. However, Article 16 contemplates also the restrictions and four important factors have to be considered while making reservations in State services or educational institutions:

(a) Social backwardness of the caste or tribe.
(b) Educational backwardness of the caste or tribe.
(c) Whether inadequately represented in services under the State.
(d) Whether weaker section both under the castes and tribes.

Reservations in Maharashtra

The President of India promulgated the Presidential order 1950, for various States, providing reservation to the Scheduled Castes and Scheduled Tribes on the basis of the population of each State. The said presidential order was subsequently amended and Parliament has passed the Act giving protection to the Scheduled Castes and Scheduled Tribes in 1976. As far as Maharashtra is concerned, the following is the percentage of reservations prescribed in both educational institutions and State services on the basis of the population of the Scheduled Castes and Scheduled Tribes in Maharashtra.

Category	*Percentage*
(a) Scheduled Castes	*13*
(b) Scheduled Tribes	*7*
Total	*20*

Deshmukh Committee

The Government of Maharashtra appointed a Committee to report and make recommendations for reservations in the State educational institutions and services on the ground of reservation for other backward classes as contemplated under Article 340 of the Constitution of India. The Committee submitted its report in 1964 to the Government and on the basis of the said recommendations, the Government of Maharashtra accepted the report and reserved certain percentages in educational institutions and in the State services as follows:-

Category	*Percentage*
(a) Nomadic Tribes, Denotified Tribes	*4*
(b) Other Backward Classes	*10*
Total	*14*

Reservation for Economically Weaker Sections

Maharashtra is the most advanced state in India, socially, economically and politically. The Government, therefore, took the revolutionary decision to give protection to the economically weaker sections without discrimination on the basis of religion, caste or tribe which is the spirit of Articles 15(1) and 16(1) of the Constitution of India and Article 46 of the Directive Principles of State Policy. In 1972, the Government, therefore, reserved 46% seats in the services only for economically weaker sections irrespective of whether the student or the candidate belongs to any religion, caste, tribe or community. This reservation was in addition to the existing reservations in the services of Maharashtra State already stated herein above. The reservation table for recruitment in services was then as follows:-

Category	*Percentage*
(1) Scheduled Castes	*13*
(2) Scheduled Tribes	*7*
(3) N.T., D. T.	*4*
(4) O.B.C.	*10*
(5) Economically Weaker Sections	*46*
Total	*80*

Excessive Reservations

The above table shows that the total reservation in Maharashtra amounted to 80%. The Supreme Court laid down the law in a classic judgement written by Chief Justice Gajendragadkar, in his judgment in the case known as *Balaji v/s. The State of Mysore* [AIR 1963 SC 649]. In the said judgment, reservation to the extent of 68% in the educational institutions was struck down by the Supreme Court as it exceeded 50%, which was held to be the maximum reasonable percentage. Further, the Supreme Court in *Jankiprasad v/s. State of Jammu and Kashmir* [AIR 1973 SC 930] and in *State of U.P. v/s. Pradip Tandon* [AIR 1975 SC 563] laid down the law that reasonable reserva-

tion in State services or in educational institutions should not exceed 50%. It is unfortunate that all the State Governments have appointed different State Commissions and added State reservations in addition to the reservation made by the Act of Parliament. Various State Governments have made reservations ranging from 34% to 80% according to State conditions. These reservations have been challenged in various High Courts and the Supreme Court which have laid down the law that the maximum reasonable percentage of reservations in State educational institutions and State services should be on the basis of the above four criteria and should not be unreasonable or excessive. Reservation on the basis of one criterion alone is not permissible.Inspite of this, various State Governments have violated the principles laid down by the Supreme Court which has resulted in a large number of writ petitions in the High Courts as well as the Supreme Court. The theory of checks and balances under constitutional law has to be applied here and executive Government has to be controlled by the judiciary within the framework of the Constitution.

Reservations Struck Down

We have seen that Article 46 of the Constitution of India which is in the Directive Principles gives guidelines to the State to make reservations for the economically weaker sections. The Supreme Court has observed in a number of judgements that the Scheduled Castes and Scheduled Tribes themselves form a part of the weaker sections of society. Further, on the basis of the annual income surveyed by the Government of India, the whole country could be classified as being economically weaker. Therefore, economic backwardness cannot be the sole criterion for reservation. Hence the constitutional validity of 46% reservations for economically weaker sections in Maharashtra was challenged in writ petition No. 2180 of 1983 in the case of *Shivaji Garje v/s. The Maharashtra Public Service Commission* [AIR 1984 Bom. 434]. The above writ petition was heard by the Constitutional Division Bench of the Bombay High Court and by its judgement and order dated 3.4.1984 the High Court struck down the above reservation as being excessive and violative of the principles laid down by the Supreme Court in the above judgment. The High Court however, retained the reservation up to 34% for the Scheduled Castes, Scheduled Tribes and other classes for which the reservation is made by the Maharashtra Government as stated herein above and only the 46% was struck down as exceeding the maximum permissible reservation of 50% as per the law laid down by the Supreme Court.

The State of Maharashtra filed a Civil Appeal in the Supreme Court and by its Judgment and order dated 19.10.1984 the Supreme Court modified the above order of the High Court and allowed the Maharashtra Government to reserve 21% posts in the State services in view of the 4 principles laid down. The Supreme Court held yet again that economic backwardness is only one test to determine social and educational backwardness, but while making the reservations the 4 principles stated earlier will have to be complied with by the State for securing protection under Article 16(iv) of the Constitution of India. Reservations made on basis of only one principle may not secure the protection of Article 16(iv) of the Constitution of India. Therefore, the original reservation of 34% has been protected by both the High Courts and also the Supreme Court.

Conversions And Reservation

In 1956 Dr. Ambedkar gave a call to all his fellowmen to convert to Buddhism which does not preach the caste system. He said that the caste system is a black spot on Indian life and a shame to humanity. Therefore, there was a mass conversion, especially in Maharashtra from Hinduism to Buddhism. The estimated Census figure shows that about 6% to 7% people have converted themselves to Buddhism. A new problem arose because of this conversion as the Scheduled Castes lost the protection of reservation in the state educational institutions and services.

There has been conversion from Hinduism to Sikhism, Buddhism and Jainism. However, in the case of Sikhism and Buddhism, the mass conversion is from Scheduled Castes and therefore, the problem of giving protection to this class for the purpose of reservation in educational institutions and State services arose. The conversion from Hinduism to Sikhism was protected by the Presidential order and this dispute has been decided by the Supreme Court in Writ Petition (original side) No. 9596/83 on 30 September 1984, in *Soosai v/s. Union of India*. The Government of Maharashtra also thought it fit to give protection in educational institutions and in the State services to persons who have converted from Hinduism to Buddhism because of the call given by Dr. Babasaheb Ambedkar in 1956. The Government of Maharashtra therefore, amended the Government Resolution by including Neo-Buddhists among the Scheduled Castes for the purpose of reservation in educational institutions and in State Services including the principles of roster for reservation adopted by the Government of Maharashtra in 1974 in the State services. This policy of the Government was challenged in the Bombay High Court from time to time and different Division Benches of the High Court at Bombay and Nagpur have taken different views but have all, given protection to the Neo Buddhist. The dispute being of prime importance the Hon'ble Chief Justice referred the matter to the Full Bench consisting of Mr. Justice Lentin, Mr. Justice Kurdukar and Mr. Justice Jamdar. The Writ Petition No. 2133 of 1984 and others in the case of *G. R. Chavan v/s The State of Maharashtra* [AIR 1987 Bom. 123] were referred to the Full Bench for laying down the law pertaining to conversion and reservation. The Full Bench by it's Judgment and Order dated 14.1.1986 upheld the principles that converts to Buddhism from the Scheduled Castes can be given protection for reservation in educational institutions and State services. The High Court laid down the law that the Buddhist converts from Scheduled Castes must continue to be treated as members of the Scheduled Castes or citizens within Article 16(iv) of the Constitution of India and will have protection under Article 341, 342, 386(24) and (25) of the Constitution of India. The above judgment of the Full Bench of the Bombay High Court is under appeal to the Supreme Court and millions in Maharashtra will keenly follow the case as it will govern the fate of about 15% of the total population of the State.

Conclusions

It may be pertinent to note here that Chapter XVI provides special provisions relating to certain classes. This includes reservations for Scheduled Castes and Scheduled Tribes in the House of People and in the Legislative Assembly of the State, the representation for the Anglo-Indian community in the House of People and in the Legislative Assembly of the State. By Article 334 these special provisions will continue to apply up to 40 years from the adoption of the Constitution of India. It is now pronounced that this protection should continue up to 2000 A.D., only so that within half a century the Scheduled Castes and the Scheduled Tribes would have been given sufficient opportunity to come up in society as a whole.

In conclusion I may state here that the problem requires a

debate in the country and there were a lot of agitations in various States in the country on this point because the various State Governments also made certain reservations in their own State which has added to the gravity of the problem of reservation. It is therefore, for the Government of India and Parliament to lay down a uniform law for reservations in the whole country, both for educational institutions and in the State and the Central Services.

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Desertion by Wife

Since matrimonial disputes have their roots in social situations, the development of this branch of law is confronted by changing social demands. ***P. M. Bakshi*** *elaborates on recent developments in a crucial concept in matrimonial law viz. desertion of the husband's home by the wife.*

Our matrimonial law is gradually being enriched with newer interpretations of certain basic concepts. In the law of divorce, the two grounds most frequently invoked are, cruelty and desertion. Cruelty, as interpreted in recent times, focuses attention on the effect which certain conduct of a spouse is likely to have on the other spouse. Desertion emphasises the intention of the deserting wife to leave the matrimonial home or in some other manner to reject the matrimonial alliance. Both the concepts are easy to formulate, but not always so easy to apply concretely. Sometimes, one finds that in administering these concepts the court has to balance conflicting social desires and to strike a new path that will solve, or try to solve, problems created by social tensions.

Desertion Justified

A discussion of the difficulty of performing this task may well begin with an illustrative Andhra Pradesh case. [*D. Rajeswaramma v/s. D. Ramamohan Choudhary,* judgement dated 21 January, 1987; (1987) 6 Ind. Jud. Reports (A. P.) 166]. In that case, the wife was placed in a situation which now seems to be recurrent. She was made to live with her parents-in-law, while the husband was posted at a different place. There was some misunderstanding between the wife on the one hand and her mother-in-law and sisters-in-law on the other hand, in regard to jewellery. In the circumstances, the wife started living with her own parents and the husband filed a petition seeking divorce on the ground of desertion. The wife denied the allegation and pointed out that there was a just cause for her living separately. A Division Bench of the High Court (Mrs. Justice Amareshwari and Mr. Justice Bhaskar Rao) held that the wife was justified in living separately in the circumstances. The crucial reasoning, as given in the judgment, is as under:-

"The husband was admittedly working at Uravakonda. There were misunderstandings between the mother-in-law and sisters-in-law on one hand and his wife. In the circumstances, her demand that he should live separately cannot be said to be unreasonable. If the husband was living in Anantapur along with his parents, it would be a different matter. But he was working at Uravakonda and the wife cannot be expected to live in a house with the parents-in-law in the absence of the husband. In the circumstances, it cannot be said that the desertion by the wife is without any reasonable cause."

Social Situation Crucial

The above judgement of the Andhra Pradesh High Court shows how the real cause of litigation lies in certain social situations. Sometimes, the courts take account of the reality and go more by the necessities of the case, than by the supposed faulty conduct of either party. In a Punjab case [*Nirmal Jeet v/s. Harbans Singh,* (1987) 6 Ind. Jud. Reports (P&H) 157, judgment dated 27 January, 1987], the husband petitioned against the wife on the ground of desertion. The petition was granted, because the parties were living apart for more than five years. The wife made allegations of beating against her husband and father-in-law, but could not prove the same and the Court found them baseless. Within three months after marriage, the wife had withdrawn from the society of her husband and thereafter did not return to her husband. Efforts by the husband to bring her back, the court felt, would not succeed in the circumstances. Thus, there was no reasonable cause or excuse for the wife's withdrawal and the husband was granted divorce.

At times, there is more clear proof of the intention to desert on the part of a spouse and the justice of the case demands that the marriage should be dissolved. A rather novel situation was presented in this context in a Delhi case [*Ashok Kumar Arora v/s. Prem Arora,* judgment dated 24 September 1986; (1987) 6 Ind. Jud. Reports (Delhi) 170]. The husband suspected that the wife was leading an immoral life before marriage. The marriage took place in 1970 and in February, 1972, the wife left the husband, leaving her son also with the husband. In a letter, the wife herself confessed that before marriage she had been operating as a call girl and felt that it would not be possible for her to live with the husband any more. The High Court construed this letter as evidence of her intention to bring the cohabitation permanently to an end. Incidentally, the Court pointed out that "desertion" means the intentional permanent forsaking and abandonment of one spouse by the other without the consent of the other spouse and without reasonable cause. [*Lachman v/s. Meena,* AIR 1984 SC 45]. Some controversy arose in the Delhi case as to whether the letter or so called deed of divorce was in fact signed by the wife. The wife made an allegation that the husband had created false evidence and also that her signatures had been obtained through coercion. The document was written in Hindi as well as in English. An interesting feature of this case was that a lady handwriting expert was called to prove that the document was a genuine one. The expert gave her considered opinion that the disputed signature and writing were written by the wife. This opinion was given on the basis of

comparison with admitted and specimen signatures and writing of the wife. The wife did not produce any expert evidence in rebuttal. While in her pleadings she had said that the signatures were obtained through coercion "at dagger's point", in her cross-examination in the court she completely denied her signature. On the basis of the evidence, the court held that the wife had signed the document in question.

Constructive Desertion

Sometimes one comes across the legal concept of "constructive desertion". In such a situation, the spouse apparently deserting has a justification for doing so because of the conduct of the other spouse. A Punjab case formulates the concept of constructive desertion in these words:-

"Where a spouse is forced by the conduct of the other spouse to live separately or to stay away, the desertion is not to be attributed to the spouse who lives away separately or stays away because the situation of separation has been brought about by the act of the other spouse, who has misconducted. As a consequence of the misconduct and misbehaviour of one spouse when the other spouse is forced to stay away, the offending spouse is presumed to have intended that such an eventuality will take place. Where parting of the spouses has arisen in such circumstances, it is called constructive desertion and the spouse responsible for creating the situation in which the other spouse is forced to stay away is guilty of constructive desertion."

In the above Punjab case [*Prempati v/s. Ranbir Singh,* judgment dated 15 January, 1987; (1987) 6 Ind. Jud. Reports (P&H) 117], the wife's allegation, that she had been given a beating by the husband and turned out of the house was corroborated by the evidence. She went to her parents' house and stayed there for more than two years preceding the date of presentation of the matrimonial petition. It appears that the wife was a teenaged girl of 15 years at the time of marriage and was married to a widower who was 56 years of age. Her petition was based on the ground of cruelty as well as desertion by the husband. Some efforts at reconciliation had failed and in the circumstances, the court held that the wife's staying apart was justified and that it was the husband who had willfully neglected his wife in terms of section 13(1), second explanation in the Hindu Marriage Act. The Court described the situation as an instance of "incongruous matrimonial alliance."

Second Marriage

During the last few years, one also comes across cases involving a second marriage by the husband and its legal impact on the wife's right to maintenance. As regards Hindus, Section 18(2) of the Hindu Adoptions and Maintenance Act, 1956 provides that a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance in certain enumerated situations, including the following:-

"(e) If he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere.

(g) If there is any other case justifying her living separately."

Where the husband marries again, the situation is covered by clause (g) quoted above and the wife is justified in living separately, even though the woman is not a "concubine". It has been so held by the High Court of Karnataka. [*P. Bhadra Reddy v/s. A. M. Shanthamma,* judgment dated 25 November, 1986; (1987) 6 Ind. Jud. Reports (Karnataka) 121]. The Karnataka High Court described clause (g) as a general provision which includes, within its ambit, situations which may have been excluded in other specific clauses but which would justify the wife's right to live separately and claim maintenance. It should be mentioned that failure to give separate maintenance, in circumstances where an obligation to maintain arises in law, would be a ground for divorce.

Conflicting Evidence

Occasionally, courts are faced with conflicting evidence and it is difficult to decide which of the conflicting factual versions given by the two spouses is correct. Decision in such cases often depends on the inferences about mental intent, to be drawn from facts showing conduct. Thus, in a Delhi case [*Hem Chandra Misra v/s. Satya Misra,* judgment dated 9 October, 1986; (1987) 6 Ind. Jud. Reports (Delhi) 120], there was a long standing dispute between the spouses and moves for reconciliation did not succeed. The wife was charged with desertion by the husband who petitioned for divorce, while the wife made counter allegations of physical and mental torture. It appears that the wife had sued for return of her dowry after she left the husband's house and at a meeting for reconciliation, it was agreed that she would withdraw the suit for return of dowry and the husband, in his turn, would withdraw the petition for judicial separation which he had filed. The husband withdrew the petition and the wife came back; but she refused to withdraw the suit on the ground that she was not treated well by her husband after she re-joined him. She again left the home. The High Court drew the inference that her conduct in pursuing her suit for the return of her dowry signified that she had no intention of resuming cohabitation with her husband. In the circumstances the wife was held guilty of desertion.

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LAW AND PRACTICE

ADMINISTRATIVE

Sale of Public Property

Haji Hassan, owner of a tea estate, had given it as security for a loan to the Kerala Financial Corporation (KFC). As he could not repay it fully, KFC filed a suit and obtained a decree for the amount. The KFC itself bought the property in the auction in execution of the decree as there were no buyers. As the KFC was only interested in recovering its amount, it invited tenders for sale through a notification. There was only one tender, from the daughter of Haji Hassan. However, she could not pay. Therefore, the KFC again invited tenders. There were three tenders, Haji Hassan's being the highest. But he could also not pay, though he was given ample opportunity to do so. As the KFC was anxious to recover its money, it negotiated with the next highest bidder in the second tender. It agreed to sell the property at an amount slightly higher than his bid. Haji Hassan then filed a petition in the High Court, which was rejected on grounds of equity. He then moved the Supreme Court.

The Supreme Court admitted the petition on the question viz. whether the property should be sold by auction but on the condition that Haji Hassan would not be entitled to bid. The Supreme Court held that public property, as a rule, must be sold by auction or by inviting tenders, so as to fetch the best price as well as to ensure fair play in State action. This rule could be departed from only in compelling circumstances. However, in the present case, the Supreme Court held that the KFC invited tenders twice, gave Haji Hassan opportunity to pay several times and ultimately got a higher price than the second bidders original bid. It could not be said that the State acted unfairly. Hence the petition was dismissed.
Haji T. M. Hassan v/s. Kerala Financial Corpn. [JT 1987 (4) 368]

CRIMINAL

Evidence of Accomplice In Offence Committed by a Child

Balwant Kaur, a minor was married to Pritam Singh, a police constable. Their relations were strained, apparently on account of his addiction to liquor. Nand Singh was another police constable at the same police station. His brother Bhaig Singh was a neighbour of Pritam Singh. The prosecution alleged that during his visits to Bhaig Singh, Nand Singh's relations with Balwant Kaur became intimate. During these visits he also met Ram Sarup who became his friend. Occasionally Nand Singh confided in him about his relationship with Balwant Kaur, at which he, Ram Sarup, also indicated his desire to have relations with Balwant Kaur. Ultimately, Nand Singh introduced Ram Sarup to Balwant Kaur. Their relations also became intimate. Balwant Kaur confided in the two about the miserable life she led with her husband and persuaded them to do away with him, promising to marry Nand Singh afterwards. They hatched a conspiracy to murder Pritam Singh. Pritam Singh was persuaded to meet the two men at a bus stand, have liquor and walk back to the city on 13 November 1973. The two met Pritam Singh at the bus stand. During the walk, the two got hold of Pritam Singh near a lonely spot and killed him by inflicting blows. They concealed the body and clothes in a nearby bush. Balwant Kaur was a minor at the time. On Pritam Singh missing, his mother lodged a police complaint against some others alleging that they had killed him. Nothing happened for quite some time, until on 3 April 1975, Nand Singh was arrested. At his instance, a skull, pieces of bone, shoes etc. were recovered. On investigation, Balwant Kaur was also arrested. Ram Sarup turned approver. On his testimony in the trial Court, Nand Singh and Balwant Kaur were convicted and imprisoned for life. The High Court dismissed their appeal and confirmed their sentences. Balwant Kaur filed a Special Leave Petition to the Supreme Court.

The Supreme Court held that all facts that require to be sequentially established were not corroborated by independent testimony. There was no independent testimony to show that (i) the relations between Balwant Kaur and Pritam Singh were strained or (ii) Balwant Kaur and Nand Singh were having an extra-marital relationship (iii) Balwant Kaur also had an extra-marital relationship with Ram Sarup or (iv) Balwant Kaur implored both Nand Singh and Ram Sarup to do away with Pritam Singh, or (v) that she promised to live with Nand Singh after Pritam Singh's death or (vi) Balwant Kaur misled Pritam Singh's mother into making a false complaint. Therefore, the Supreme Court held that on material particulars there was no corroboration. Hence the approver's testimony could not be accepted. Balwant Kaur was given the benefit of doubt and directed to be set free.
Balwant Kaur v/s. Union Territory, Chandigarh. [JT 1987 (4) SC 239]

Assistance of Friend In Detention Proceedings

Johnny D'Couto was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA). At the hearing of his representation, D'Couto requested the Advisory Board that he be allowed to be assisted by a 'friend', a retired Assistant Collector of Central Excise. He argued that some person experienced in customs procedure was required to represent him as intricate questions of fact and law relating to customs were involved. The detaining authority was represented by a retired Deputy Collector and Superintendent of Central Excise. The Advisory Board rejected the request of D'Couto.He then filed a Special Leave Petition in the Supreme Court.

The Supreme Court held, following *Nand Lal v/s. State of Punjab* [(1982) 1 SCR 718], and *Smt. Kavita v/s. State of Maharashtra* [(1982) 1 SCR 138] that as the Detaining Authority was represented by a person who played the role of legal advisor, refusing such assistance to D'Couto by the Board was wrong. It vitiated the detention which was set aside.
Johney D'Couto v/s. State of Tamil Nadu. [JT (1987) (4) SC 248]

Respondents in Revision Petition

The State Government of Karnataka filed a complaint u/s 500 IPC against A. K. Subbaiah & Ors. with sanction under Section 199(2) CrPC as the Director General of Police (DGP) was also allegedly defamed by the accused. The trial Court issued process against the accused who filed a revision petition u/s 397 CrPC in the High Court. The DGP and the Chief Minister were made Respondents 2 and 3 respectively. The High Court examined the complaint papers to check whether an offence was made out. Prima facie, no offence was made out so the High Court admitted the petition, issued notice to the State Government and deleted names of Respondents 2 and 3 so they were not necessary parties before the trial court. Subbaiah & Ors. filed a Special Leave Petition in the Supreme Court against this order.

The latter confirmed the High Court's order clarifying that its revisional jurisdiction allowed to it the legality and correction of the order which was the issue of process from the complaint and accompanying papers.
A. K. Subbaiah & Ors. v/s. State of Karnataka & Ors. [(1987) 4 SCC 557]

See also *Municipal Corpn.of Delhi v/s. R. K. Rohtagi* [(1983) 1 SCC 1: 1983 SCC 115] and
Thakur Ram v/s. State of Bihar. [(1966) 25 CR 740: AIR 1966 SC 911]

FAMILY

Maintenance with Possession Amounts to full Ownership

Under a family partition, Maharaja Pillai was given certain properties with the condition that after his death his wife, Lakshmi Amal would get maintenance from it. On his death Lakshmi Amal was in possession of the property and receiving maintenance from it. During that period, the Hindu Succession Act, 1955 came into force. Section 14 of the Act provides that any property possessed by a female Hindu shall be held by her as a full owner and not a limited owner. The Explanation to that section states that 'property' includes property possessed in lieu of maintenance. However, one of the sons Maharaja Pillai filed a suit claiming 1/3 share in the property, contending that Lakshmi Pillai had no rights in it. The trial Court held that Lakshmi Pillai had an absolute right over the property. The Appellate Court differed holding that she only had a restricted right. The High Court, in second appeal, agreed with the first Appellate Court. Lakshmi Amal then approached the Supreme Court.

The Supreme Court held that the right to maintenance of a Hindu woman is a personal obligation of the husband. If the wife is put in exclusive possession of the property with the right to take income from it, it must be presumed that property is given in lieu of maintenance, which is sufficient to enable the ripening of possession under Section 19 of Hindu Succession Act. The Supreme Court set aside the order of the two appeal courts and restored the order of trial Court.
Maharaja Lakshmi Amal v/s. Maharaja P. Thillanayakom Pillai.[JT 1987 (4) SC 281]

SERVICE

Principles of Natural Justice in Disciplinary Proceedings

Chandrama Tewari a fireman employed in Northern Railway, was alleged to have removed coal which is railway property. A preliminary enquiry showed that he was the culprit. A chargesheet was issued to him. It expressly mentioned that it proposed to rely upon a document No. 5. In the enquiry conducted into the chargesheet, he demanded inspection of the original and a copy of the document No. 5 which was refused. Otherwise he was given full opportunity to defend himself. The Enquiry Officer held him guilty and the Railways dismissed him from service. Tewari filed a suit in the District Court which held that the dismissal was illegal on the ground that non-production of document No. 5 violated the principles of natural justice and vitiated the enquiry. The trial court thus decreed the suit. The first appellate court confirmed it. However the High Court, in second appeal, set aside the order of the lower courts. Tewari then approached the Supreme Court.

The Supreme Court noted that principles of natural justice required that a copy of the document relied upon should be given to the employee. Failure to do that would render the enquiry and consequent punishment illegal. Documents would include statement of witnesses recorded on a preliminary enquiry. However the document must be material to the enquiry i.e. it should have a bearing on the charge. In the present case the Enquiry Officer did not rely upon the document No. 5 for his finding. The Supreme Court thus upheld the decision of the High Court.
Chandrama Tewari v/s. Union ofIndia. [JT 1987(4) SC 398]

Hearing Essential

O. P. Gupta an employee in the Central Public Works Dept. (CPWD) was placed under suspension on September 3 1959, under Central Civil Service Rules, 1957. He was dismissed in March 1964 but after an appeal his suspension was revoked in May 1970. Adverse remarks were made in his confidential report during the suspension. Gupta asked for full back wages from 1959 to 1970 under FR 54 (Fundamental Rule) which was rejected on the ground that a departmental enquiry was still pending against him. In October 1972, an order of compulsory retirement under 56(j) was passed against Gupta. He would normally have retired in March 1978. He filed a writ petition asking for all back wages and quashing of departmental proceedings against him. The Delhi High Court Judge quashed the order of compulsory retirement, departmental proceedings and ordered payment of all back wages. Since the CPWD did not comply with the Court order, Gupta initiated contempt proceedings upon which arrears were paid to him. Subsequently the CPWD stopped the increment which would have allowed Gupta to cross the efficiency bar at Rs. 590/- w.e.f. October 1966. The reasons advanced were that Gupta should have passed the Departmental examination in Accounts and had good reports for the past 5 years. Gupta filed a writ before a Division Bench regarding denial of increments beyond EB and for interest on delayed payment of pension. The writ petition was dismissed, so Gupta moved the Supreme Court.

The Supreme Court stated that Gupta should have been given a hearing before any adverse order was passed against him, especially if monetary loss occurred. The Government's actions in keeping Gupta suspended for a long period affecting his livelihood was arbitrary, unfair, malafide and violative of the principles of natural justice. In accordance with the Courts practice, Gupta was awarded 12% interest on all delayed payments.
O. P. Gupta v/s. Union of India. [(1987) 4 SCC 328]

Discharge of Confirmed Officer

A. C. Bhargav was appointed to the India Police Service (IPS) on July 4 1969, posted to Gujarat and discharged by an order dated 9 April 1974. The impugned order was quashed by a single judge and also a Division Bench of the High Court. The State of Gujarat appealed to the Supreme Court.

The Court reiterated that discharge of a probationer for unsatisfactory work and conduct would not be stigmatic *[State of Orissa v/s. Ram Narayan Das,* AIR 1961 SC 177; (1961) 1 SCR 606]. However Bhargav was discharged after 5 years. The IPS Probation Rules stipulated probation period of two years after which the Central Government could extend the probation. In 1973 Government had issued instructions that no probationer should be kept on probation for more than double the normal period of two years. The Rules had to be read with instructions. Bhargav who had completed 5 years was to be treated as a confirmed officer on the date of discharge. Due process of law had to be followed in discharging a confirmed employee. The State's appeal was dismissed.
State of Gujarat v/s. Akhilesh C. Bhargav & Ors. [(1987) 4 SCC 482]
See also *State of Punjab v/s. Dharam Singh.* [(1968) 3 SCR 1: AIR 1968 SC 1210]
Moti Ram Deka v/s. General Manager, N.E.F. Railways, Maligaon, Pandu. [(1964) 5 SCR 683: AIR 1964 SC 600]

Index For Grey Pages-1987

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CLARION/B/R/44/203

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COMMENT

Directors' Liabilities Under the Factories Act

*To what extent is a director of a company liable for the breach of any provision of the Factories Act? **Firoze D. Damania** argues that recent amendments to the Factories Act, which though enacted have not yet been brought into force, instead of clarifying the position are likely to create confusion.*

Quite obviously in keeping with the temper of the time the legislature wanted to rope in the big guns (the directors) and not just the paid executives for breaches of the Factories Act committed by a factory. Unfortunately what has been enacted may not meet the object. What the legislature intended to enact is indeed, just a guess, for the statement of objects and reasons shed no light on the reasons for the proposed amendment.

Earlier Position

Prior to the amendment,Section 2(n) defined 'occupier' as:

"occupier of a factory means the person who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent such agent shall be deemed to be the occupier of the factory."

This was to be read along with Section 100 of the Act, (deleted after the amendment) the material portion of which is reproduced below:

100. (2) Where the occupier of a factory is a company, any one of the directors thereof may be prosecuted and punished under the Chapter for any offence for which the occupier of the factory is punishable.

The proviso to this section states that the company may give notice to the Inspector that it has nominated a director who is a resident within India to be the occupier of the factory for the purpose of this Chapter, and such director shall, so long as he is so resident, be deemed to be occupier of the factory for the purposes of this Chapter until further notice cancelling his nomination is received by the Inspector or until he ceases to be a director.

Section 7 of the Act requires the occupier to give 5 days notice before occupation or use of any premises as a factory with details of the location, name and address of the occupier. This section remains unaltered.

Rule 14, clause 10 of the Form, requires the full name and residential address of all the Directors of a public limited liability company, to be given.

Though a plain reading of the proviso to Section 100 would suggest that only a director can be nominated as an occupier, after considering these provisions, various High Courts have held that where a particular person was nominated by the Board of Directors of a company as an occupier of the factory, he was to be regarded and treated as the occupier even though such a person may not be one of the Directors of the company. [Allahabad High Court judgement reported in 1982 Labour Industrial Cases, page 1499, a judgement of the Gujarat High Court reported in (1977) 34 F.L.R. 354 and a judgement of the Orissa High Court reported in 1979 L.I.C. 746].

Altered Position

Section 2(n) as amended now reads as:

"(n) 'occupier' of a factory means the person who has ultimate control over the affairs of the factory (xxxx).

Provided that:

(i) in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier.

(ii) in the case of a company, any one of the directors shall be deemed to be the occupier."

The law before the amendment was that in the case of a company the Board of Directors could nominate any person, not necessarily a director, to be the person who would have the ultimate control over the affairs of the company and as per the proviso to subsection (2) of Section 100 such a person was deemed to be an occupier. Where the proviso applies and such a nomination was made by the company and notice thereof was given to the Inspector, the other directors of the Company were saved from prosecution. In the absence of such nomination and intimation to the Inspector any one of the directors of the company could be prosecuted and punished for any offence for which the occupier of the factory was punishable. Since Section 100 has been deleted there is no question of a company nominating one of the directors or as held by the various High Courts any other person to be the occupier of the factory. Now the occupier of the factory means the person who has ultimate control over the affairs of the factory, but in the case of a company any one of the directors shall be deemed to be the occupier. The normal effect of a deeming provision is that what is not so, is, by a legal fiction, treated or regarded to be so. Applying this to the present amendment even though a director of a company may not be in the ultimate control over the affairs of the factory and the Board of Directors may have nominated or designated a particular person as the one having the ultimate control over the affairs of the factory, even so any one of the Directors of a company shall, by reason of the legal fiction created, still be regarded or treated or deemed to be an occupier. The protection offered to him by the proviso to sub-section (2) of Section 100 has been thus taken away.

Directors still have the protection afforded to them under Section 101 of the Act. An actual occupier and an

actual manager can escape liability of any prosecution if he proves to the satisfaction of the Court that some other person committed an offence without his knowledge, consent or connivance and a director who is now deemed to be an occupier by virtue of the deeming provision in proviso (ii) to Section 2(n) will also be entitled to the same protection and shelter of Section 101. Moreover, such directors can also seek the shelter and protection of Section 633 of the Companies Act and either apply to the Magistrate before whom the proceedings are already initiated and where proceedings are apprehended, to the High Court, to be absolved from facing the prosecution if they can bring their cases within the protection afforded by this Section. Instances are not wanting where High Courts have stepped in and granted protection to directors in fit cases [See Delhi High Court Judgement in 1978 (48) Company Cases page 85 and Bombay High Court Judgement in 1983 (54) Company Cases 197 at pages 222-223].

Apart from the changes introduced above, there is no further change in the Factories Act itself. Will the amendments then achieve what one guesses is the objective of the legislature? Time alone will tell. But if the intention was to make the directors absolutely liable and to provide that none but a director would be acceptable as an occupier, then the amendments certainly do not achieve that objective.

Feroze Damania is an advocate practising in the Bombay High Court

"Paradise Lost" For Minority Managements.

A landmark judgement of the Supreme Court requires minority management to comply with the provisions of various labour laws. ***K. Chandru*** *reports on the case and its far reaching implications for lakhs of employees.*

Smt. Yesudial a cook employed by the Community Health Department of the Christian Medical College Hospital, Vellore, after serving for over eight years was sacked by the management in the year 1978. The charge- "she was guilty of stealing Dal worth 68 paise". She produced a bill from the shop in which the article was purchased. But the almighty management would not accept anything of that sort.

Crusade Of Yesudial

She started a battle to vindicate herself of the charge. C.M.C. Employees' Union took up her cause. The dispute was sent for adjudication by the Labour Court at Madras. The hospital management thought, that it was an affront to them to prove their case before the Labour Court. Hence a writ petition was filed before the Madras High Court challenging the provisions of the Industrial Disputes Act. Basis - that it is a "minority" entitled to protection under Article 30(1) and hence the law which can question the "right to administer" their "own institution" is unconstitutional.

Hire and Fire

It is the same management which successfully argued that even the Factories Act was not applicable to them in view of their minority status. Limitless ambition to practice the naked policy of hire and fire dragged the litigation from Madras to New Delhi and the case finally landed in the Supreme Court. After four years of hibernation the case which was decided on 20 October 1987, resulted in convulsions for the self styled champions of 'minority rights' who are now searching for oxygen masks. Yesudial's travails of nine long years have brought fresh air to the working class which has scaled new heights in industrial jurisprudence.

Talk In Dying Language

It was Julian Huxley who said: "Many of our old ideas must be retranslated, so to speak into a new language. The democratic idea of freedom, for instance, must lose its nineteenth century meaning of individual liberty in the economic sphere, and become adjusted to new conceptions of social duties and responsibilities. When a big employer talks about his democratic rights to individual freedom, meaning thereby a claim to socially irresponsible control over a huge industrial concern and over the lives of tens of thousands of human beings whom it happens to employ, he is talking in a dying language" (Economic Man and Social Man) Perhaps it was the dying language which many of the minority managements were talking about when they demanded rights without limits.

End Of Laissez Faire

To understand the organisation of workmen we may quote Justice Dwivedi of the Supreme Court: "In the sunny days of the market economy theory people sincerely believed that the economic law of demand and supply in the labour market would settle mutually beneficial bargain between the employer and the workman..... but the exercise of the working of this law over a long period has belied their faith.... when the workman made this discovery, they organised themselves, in trade unions and insisted on collec-

tive bargaining."
It is to regulate this process of collective bargaining that the central legislature enacted the Industrial Disputes Act, 1947 lest it might have created a lawless hiatus. Justice Krishna Iyer while speaking about the purpose of this law said: "if industrial peace is the signature tune of industrial law, industrial violence would be the vicious shower of consequences if parties were relegated either to an ancient and obsolete contract or to a state of lawless hiatus."

Thrust Of Industrial Law

Such a law enacted by the central legislature must have the thrust of Part IV of the Constitution containing the Directive Principles of State Policy which though not enforceable in a court of law are nevertheless fundamental in the governance of the country. It cannot be a teasing illusion to the millions of the downtrodden. The purpose behind the law was declared by the Supreme Court through the words of Justice Krishna Iyer: "Articles 39, 41, 42, 43 and 44 speak of the right to an adequate means of livelihood, the right to work, humane conditions of work, living wage ensuring a decent standard of life and enjoyment of leisure and participation of workers in management of industries. De hors these mandates law will fail functionally. Such is the value vision of Indian industrial jurisprudence."

Managerial Rights Claimed

If these were the objectives of the law, then what were the difficulties in applying those laws to the minority run institutions. Can they remain as an island beyond the pale of any judicial review over the administrative actions taken by them which affect rights of so many individuals ? The argument put forth by the management was that the application of the Act will abridge their 'right of management' and adjudication by the court will result in attenuation of the power of the management. It is clear that what was put forth by them was not any interference to the religion or faith on any religion but a limitless control over the proprietorial right of running their institutions.

Very rightly, the learned judges of the Supreme Court posed a general question to those managements in their judgment:- "if a minority School is ordered to be closed when an epidemic breaks out in the neighbourhood or if a minority School is ordered to be pulled down when it is constructed contrary to town planning law are the minority rights under Article 30(1) violated ?"

By answering these questions negatively the Court observed:- "If a dispute is raised by an employee against the management of a minority educational institution such dispute will have necessarily to be resolved by providing appropriate machinery for that purpose. Laws are now passed by all the civilised countries providing for such a machinery."

Very rightly, the learned judges of the Supreme Court posed a general question to those managements in their judgment;- "if a minority School is ordered to be closed when an epidemic breaks out in the neighbourhood or if a minority School is ordered to be pulled down when it is constructed contrary to town planning law are the minority rights under Article 30(1) violated?"

Magna Carta for Employees

The judgement in the Christian Medical College Hospital case is a milestone in the endless journey ventured by the employees of the minority run institutions. In the pursuit for a judicial review over the arbitrary actions taken by the managements of minority institutions, they achieved a real 'pilgrims progress' when the Supreme Court thundered: "rights which are enforced through the several pieces of labour legislation in India have got to be applied to every workman irrespective of the character of the management. Even the management of minority institution has got to respect these rights and implement them. Implementation of these rights involves the obedience to several labour laws including the Act (Industrial Disputes Act).....Due obedience to those laws would assist in the smooth working of the educational institutions and would facilitate proper administration of such educational institutions. If such laws are made inapplicable to minority educational institutions, there is every likelihood of such institutions being subjected to maladministration".

The C.M.C. Hospital case is the outcome of the efforts of not only Yesudial and her Union but the endless travails endured by thousands of employees engaged in minority run institutions and the hundreds of unsuccessful legal battles launched by them with their limited resources. The nine judge bench judgment in the *St. Xavier's College case* was interpreted by clever managements to strike down even innocuous provisions found in welfare laws. In the name of so-called minority rights hidden in Article 30(1) although even the Constitution makers would never have dreamed of such an interpretation. At last the C.M.C. Hospital case has finally put a seal to the distortions and excesses committed by the votaries of limitless exercises of power of administration. The judges have at last read the signs and translated the symbols on the national sky. Justice Krishna Iyer when talking about great judgements said:- "Every great judgment is not merely an adjudication of an existing lis but an appeal addressed by the present to the emerging future. And here the future responded, harmonising with the human scape hopefully projected by Part-IV of the Constitution. But the drama of a nation's life, especially when it confronts diehard forces, develops situations of imbroglio and tendencies to back-track. And law quibbles where life webbles. Judges only read signs and translate symbols in the national sky."

K. Chandru is an advocate practicing in the Madras High Court.

FEATURE

To Robe Or Not to Robe

Despite the obvious absurdity of wearing stuffy bands and gown in a tropical country, Advocates in India continue to be weighed down by their robes. ***Yatindra Singh*** *argues that it is high time we do away with this essentially British legacy.*

What would you say, if you see a person in suit and tie in the scorching heat of May or the humid climate of July? Is there anyone? Think again. There are many. Their reputation is neither envied in this world nor their fate thereafter. Yes, we the lawyers. Instead of suit it is combination. And in the place of tie it is band and to top it of, there is a gown.

Historically speaking, wigs were first used as a personal adornment and not for any other purpose. Barristers, started wearing them in the beginning of the eighteenth century. According to Lord Denning, "It conceals the personality and the bald heads... It is a mark of authority and source of respect". Good reasons, many need them. Bands, weepers, bibs, neck cuff or collar cuffs came to be worn by Barristers around the same time. "Counsel..seem to take great pride in the wearing of collar cuffs whose purpose I have been told is to wipe tears after an emotional plea. Perhaps (due to this) collar cuffs (were)..later known as weepers."[Wigs and Weepers by George Joseph]

British Legacy

When the British came to India, they along with their legal system, also brought the lawyer's attire. And when they left, they bequeathed black coats, bands and gowns. Dress among the legal fraternity was often governed by tradition. High Courts have also made rules in this regard. Normally male lawyers must wear black-buttoned up or open collar coat or achkan or sherwani with bands and gown. Under some rules female members were relieved of wearing coats at least. What about the head dress? Is a wig a head dress? Wigs have become obsolete in India. They are worn neither by Judges nor by Advocates, except, sometimes by Judges on ceremonial occasions. Thank goodness, what a relief! They are still worn in England by Judges and Barristers. Traditionally English head dress (hat, cap etc.) is not worn inside a building. They have never been worn inside the court. But what about Indian head dress? According to Hindu tradition, covering one's head is a show of respect. Indian head dress can always be worn inside the courts. The members of the legal fraternity (including the presiding officers) have traditionally been wearing turbans or safas. This sight once familiar during British Raj, is no longer so common.

High Courts have also made rules in this regard. Normally male lawyers must wear black-buttoned up or open collar coat or achkan or sherwani with bands and gown. Under some rules female members were relieved of wearing coats at least.

The Advocates Act

It is not that efforts were not made to legislate on the legal profession earlier. But the comprehensive Act- The Advocates Act was enacted in 1961. Section 34 of the Act gives power to the High Court to lay down conditions subject to which an Advocate shall be permitted to practice. Different High Courts already had rules or have since made rules prescribing dress for Advocates. Section 49(1)(b) permits the Bar Council of India to make rules for the conduct and etiquette to be observed by Advocates. The Bar Council of India has framed rule 5 under Section 49(1) (c) of the Act, to the effect that an Advocate shall appear in court at all times only in the prescribed dress and his appearance shall always be presentable. It does not prescribe any dress. Different rules made by the High Courts and the traditions followed by them may be irrelevant now. The Advocate's Act has been amended (Act No. 60 of 1974) and Section 49(1)(ga) has been added. It permits the Bar Council to frame rules about dress to be worn by Advocates with regard to climatic conditions. The Bar Council has made a rule. It also permits dhoti to be worn. It further provides for black coat, achkan or sherwani with bands for all and gown being optional for Advocates appearing before courts apart from the Supreme Court and the High Courts.

Why this Anachronism?

Let us come back to the original question Why should one continue to wear coat, bands and gown in a climate totally unsuited for the attire, just because it is suited to the British climate and we have been wearing them? The British themselves are having doubts about it. Some have been giving reasons for the continuance of robes. "The uniform is also a permanent reminder of professional discipline, not a guarantee of good behaviour but a great aid to it. The robes of Judges speak of continuity of development of responsibility. They remind him that he is not an isolated individual acting for himself along, here today and gone tomorrow".[Topolsk's Legal Land in the Indian context]

Some answers were provided by

Hon'ble Mr. Justice Shukla in *Prayag Das v/s. Civil Judge* (Reported in AIR 1973, All. 133). Prayag Das, an Advocate, was debarred by the Civil Judge for appearing in dhoti. He filed a writ petition to justify his stand. Allahabad High Court rules for subordinate courts, by necessary implication, excluded wearing of dhoti. In para 18 of the report, the court, about the necessity of dress says "In the first place they distinguish an Advocate from litigant. In the second place it induces a seriousness of purpose and sense of decorum...conducive to the dispensation of justice. If the rule is relaxed the Advocates may start dressing more scantily and even indiscreetly".

This may be sufficient reason to uphold a rule. But is it sufficient from not relieving us of this burden on the administrative side at least? Should we continue to have insults of black coats, bands and gown? At least advocates appearing in their personal capacities have always disrobed.

Good-bye to Robes

Well should we or shouldn't we? There is no doubt that "From a purely face of the opulent confidence of a Saville Row suit on a fashionable opponent" Topolsk's "Legal Land". But is it necessary to prescribe black coat, bands and gown during summers? Some other dress in accord with the summer climate may be provided. Rule framed by Bar Council of India may not be held ultra vires of Section 49(1) (ga) but it, undoubtedly, is not in line with it. What kind of robes should be provided for? Wouldn't it be lovely to have a fashion show to select one? Alas, we the lawyers, are too conservative. Let me make a few suggestions without a fashion parade. A safari (short sleeve), or sober coloured suit is an excellent idea. May be a short sleeved shirt, tucked in trousers (Army style of course in different colours) is an equally good one. We may also retain a gown to be worn on top of it to indicate that the person concerned is an Advocate or Advocates may also wear name plates to indicate the same. The time has come when we must bid good-bye to black coat, bands and gown, the last signs of our British legacy. If we must inherit, we had better inherit their independence of Bar and Judiciary rather than stifling bands, gowns and black coats.

"From a purely practical point of view, they (robes) are great levellers, so far as the Bar is concerned. In robes the most poverty stricken junior will not be put out of countenance by any man in court and will not be at any disadvantage in the face of the opulent confidence of a Saville Row suit on a fashionable opponent."

Yatindra Singh is an Advocate practicing in the Allahabad High Court.

Resolution Of

The Madras High Court Advocates Association

At it's Extraordinary General Body Meeting held at Madras on 15 April, 1987 at 1.15 P.M., having considered the views expressed by its members that wearing of the black coat in addition to the Robes as prescribed by Rules under Section 49(1) (gg) of the Advocates Act, is uncomfortable and injurious to health during summer resolves that.

1. To get Rules framed under section 49(1) (gg) of the Advocates Act be amended so as to dispense with the wearing of black coat.

This meeting authorises the Executive committee of the Association to take appropriate action for implementing the above resolution.

2. The Association has noted that despite the decision taken by the Supreme Court of India and the High Court of Tamil Nadu and the Bar Council of India and Tamil Nadu in 1973 the members of the Bar still continue to address the judges as "Your Honour" etc. Several members expressed the view that it is not proper to continue the same old tradition inspite of the decisions already taken. Therefore this meeting resolves that the members of the Association henceforth address the judges of the High Court as "Mr. Chief Justice", "Justice" or "Sir" as the case may be and the court as "The Honourable Court". The Judges of the subordinate courts may be addressed as "Mr. Judge" or "Sir" and the courts may be addressed as "The Honourable Court".

Self-Defense For Battered Women

Women abuse is reaching tragic proportions worldwide. Various studies estimate that one-third to one-half of all women experience brutality such as threats, beatings, sexual desecration, rape and torture. Domestic violence occurs in all cultures and all classes. ***Kathleen Behan*** *discusses.*

The alternatives for battered women are few. They are often unable to leave their homes for financial reasons. If they do escape, they are blamed for failing their husbands and disrupting the family.

Many battered women eventually die at the hands of their husbands. Others survive a life of constant suffering and fear, hiding their bruises from neighbours and hoping to survive the next attack. A very small number of women fight back.

Reports of women's deaths rarely catch the public eye- many are termed "accidental" and are never investigated. But when a woman kills a man, the public reacts with moral outrage. Female aggression is considered "unnatural" and the woman's life is often considered less valuable than the man's. Thus women who kill in self-defense are often prosecuted for murder.

Battered women who killed traditionally pleaded insanity. They were incarcerated in mental institutions rather than jails. The women who went to jail were undoubtedly better off, since they had the chance of parole and release and avoided the stigma of mental illness.

Recently, a growing number of women who kill their batterers are acquitted on the basis of self-defense. As a result, traditional self-defense theory is undergoing a radical transformation as advocates seek to eradicate sex-bias in criminal law by showing that the reasonable battered women may defend herself differently from the reasonable man.

Traditional Self-Defense Theory

Under traditional self-defense theory, a person may take reasonable steps to defend himself or herself from physical harm. If a defendant can prove that the actions taken were reasonable, then the law will find the defendants conduct justified rather than excused.

Certain acts are generally considered reasonable. Many of the acts are seen to be justified based upon what a "gentleman" would do to defend himself from threats to his person or property. A person may use force to counteract force, but may use deadly force only to repel deadly force. In other words, a person may kill in self-defense only when the alternative is to be killed or suffer great bodily harm.

Different Behaviour

Battered women do not typically defend themselves in the same way as men. Though these women are not necessarily less aggressive than their husbands, they will rarely fight back immediately when their spouse initiates an attack. The reasons for their hesitance are obvious. First, women often lack the physical strength of their male attackers. Women who fight back immediately would often be killed and so they passively accept the blows of their abusers, hoping to avoid death. Second, battered women are socialised to accept the domination of their husbands, and many are socialised to accept their husband's beatings. Sometimes, women do not fight back because they sense the beating will be less severe than usual or they hope their husband will apologise after the attack if they do not provoke him. Some women do not fight back because they blame themselves for causing the attack. These women are not masochistic; they do not enjoy the battering, but suffer from severely low self esteem.

Problems with the Theory

There are some problems with the battered womens' self-defense theory. First, it generally requires proof that a woman fits the model "battered" syndrome. But the experience of every violent couple is not identical. Some women will react to beating sooner than others, some may respond to danger to their children but not to themselves. In the U.S., prosecutors have occasionally introduced counter-experts to "prove" that a woman did not fit the pattern of the traditional battered woman. For example, she did not show low self-esteem or alienation from the outside world. But the question is not whether the woman is a traditional battered woman experiencing a particular mental syndrome, but whether this particular woman felt that the combination of circumstances, whether past and present beatings, the cycles of violence, the inaction of outside authorities, and her economic dependance rendered her desperate, leading her to believe (perhaps justifiedly) that she had no alternatives of retreat, and that her only option was to kill her husband or be killed.

Finally, battered womens' self-defense theory must be rigorously applied to avoid creating a separate self-defense standard for men and women. While men and women may often react differently to an attack, women must not be portrayed as weak and incapable, so subject to different rules of self- defense. Instead, the law should be revised for both men and women, taking into account those circumstances where a person, whether male or female, will respond with self-defense in a non-traditional manner because that person has no alternatives but to be killed.

Second, a battered woman may seek civil damages from her husband by suing him for the international tort of battering. At common law, husbands were usually protected from tort suits by the interspousal tort immunity doctrine. That doctrine prevented spousal law suits in order to preserve the har-

mony of the marriage. In cases where women are battered by husbands harmony no longer exists and there is little reason to try to preserve the marriage. Thus a majority of States in the U.S. have struck down the doctrine and allow women the right to sue. In India, the doctrine still holds [See B. M. Ghandi, Law of Tort (1987)] but should be struck down. Women can sue their husbands and vice versa for damage to property under the Married Woman's Property Act of 1874. Such a lawsuit would be just as detrimental to the marital relationship as a lawsuit for personal injury and there is no justifiable way to distinguish between the two.

Legal Alternatives

Ideally, a battered women will seek redress in the courts against her husband before resorting to killing him in self-defense. Once a woman has called the police and they have failed to arrest her batterer, she should go to the courts to obtain an injunction against the husband to restrain him from entering the home or beating her.

If a woman sues for damages, she should allege damages for medical bills, pain and suffering, physical injury, lost wages, loss of earning capacity, humiliation and shame. The complaint should allege that the husband's conduct was willful, malicious and intentional, thus requiring punitive damages. The Plaintiff should also allege that the beating was without provocation or justification.

Until such civil law suits against batterers for assault and police officers for non-arrest begin to succeed, women will be left without a legal remedy to escape their husbands violence. Thus they will have to resort to self-help by fighting back. Obviously, a society in which husbands kill wives and wives kill husbands is not ideal, so the courts should make every effort to bring an end to wife abuse.

Kathleen Behan is a student of law at the Colombia Law School, New York.

Acquitted For Killing In Self-Defense

Shanmugham and Kannamal lived in a village called Venkatapuram in Tamil Nadu. They had three daughters of whom the eldest was married and had left home. The other two, Vasanta and Longamal resided with their parents. The father, Shanmugham was involved with another woman with whom he also lived.

One day on returning home in a drunken stupor, he made sexual overtures to Vasanta. Fearing for her child's safety, the mother Kannamal sent Vasanta away to her brother's house. About four days later Shanmugham came into the house, once again completely under the influence of alcohol. He stripped his 14 year old daughter Longamal of her clothes and dragged her to a cot in the room. Enraged, Kannamal using a rope strangulated him. Her younger brother Perumal who was also witness to the scene was outraged and aided his sister to immobilise Shanmugham by crushing his testicles while the child Longamal held his feet.

Once Shanmugham was dead, the three of them suspended him from the roof of a cattle shed and called in the neighbours and told them that Shanmugham had committed suicide. Kannamal then burnt the rope saying that such a rope should not be kept in the house, lest such an incident recur!

However when Shanmugham's brothers arrived the next morning, seeing the body they suspected foul play and reported to the police their suspicion that Shanmugham had been murdered. After the complaint was filed under Section 302 and 201 IPC, investigation began. Kannamal, Perumal and Longamal were arrested. The post mortem report recorded that the death had occurred on account of asphyxia due to throttling when under the influence of alcohol. A confessional statement was extracted from the three accused which was later denied in Court. They claimed it was given under duress of torture and threat.

The Court however found them guilty and convicted them for murder. The accused appealed against this order in the High Court of Madras. The order was challenged on various technical grounds and finally on the ground that even if the entire evidence of the prosecution was accepted, the accused was entitled to an acquittal by the invocation of Section 100 of the IPC since the material placed on record would clearly and demonstrably show that the deceased committed an assault on the juvenile accused Longamal with the intention of committing rape on her. The Court now went on to examine whether all the accused had in fact committed the murder in exercise of the right of private defense of the body of Longamal.

The Court observed that it was in fact the evidence of the prosecution itself that Shanmugham was of a vicious nature, and had made sexual advances on both his daughters. The confessional statements of all the three accused showed the sexual perversity and depravity of Shanmugham in violation of all principles of morality and civilisation. The prosecution itself had put forward the notice of the murder as being the attempt of the drunken Shanmugham to rape his daughter in the presence of the mother. The Court held that it was in this extreme condition of provocation and helplessness that the mother found no other way to save her child from the abhorrent sexual attack. It is very difficult to visualise the extent of the mother's distressed condition. The court observed that it would be uncharitable to say that the accused should have waited till the act was committed and then have sprung to the defense of her child. What happened was the natural outcome of any mother's reaction in the given circumstances. All the three accused were acquitted. For once, justice was done!

HAAZIR HAI

Flavia

Flavia Agnes, a prominent activist of the womens movement has gone through a shattering personal experience facing battering from her husband Tony D'Mello. Her determined struggle to resist wife beating lead her to campaign against wife beating and for new laws against domestic violence. She filed a petition for Judicial Separation under the Indian Divorce Act, 1869 (she had no grounds for divorce under the Act). The proceedings dragged on from court to court. Flavia finally decided the courts had nothing to offer her and withdrew her petition in sheer exasperation. Separated from her husband, she now devotes all her time to the womens movement. Flavia was a founder member of the Women's Centre, Bombay. She has also published an autobiographical book about her experience of wife beating and the struggle against it, titled "My Story... Our Story of Re-Building Broken Lives". In this interview she explains the difficulties women face with the Indian Divorce Act.

Q. *Given that divorce is virtually impossible for a Christian woman, what are the options for a battered wife whose marriage has broken down?*

A. It is true that divorce under the Indian Divorce Act is virtually impossible for a Christian woman. The only ground on which a woman can get a divorce is to prove adultery coupled with another grave offence. Cruelty itself is not a ground for divorce. No matter how badly a husband may beat his wife, she has no ground for divorce. A battered woman has no remedy under Christian matrimonial law. In India, only Christian women cannot get a divorce on grounds of cruelty, all other women can.

Q. *Does this mean that there is no way out of such a marriage?*

A. The only way is to approach the Church for an annulment, but even here there are a lot of problems. The Church has it's own tribunal and it takes several years before an annulment is granted. Cruelty and alcoholism are grounds for annulment. But the procedure for proving them is very elaborate. The final dispensation has to come from Rome. This is the procedure for Roman Catholics. The Protestant Church is not as rigid about divorce as the Roman Catholic Church. Protestants therefore approach the Court more liberally than Roman Catholics.

Q. *What are the problems with a Church annulment?*

A. A Church annulment is not recognised by civil law. The grounds for a civil divorce or annulment are quite

different from those for a Church annulment. A woman therefore cannot get a divorce on the basis of a Church annulment. So far as the civil courts and law are concerned she is still married. Her status therefore is uncertain. This is very strange, because a Church marriage is recognised as a valid marriage, but an annulment by the Church is not recognised.

Q. *What about custody of children and maintenance? Does the Church decide on these issues at the time of the annulment?*

A. No. This is the real problem in which battered women are trapped. Their main problem is custody of their children, visitation rights and maintenance. The Church does not concern itself with all these problems. They are only concerned with the sacramental aspect of marriage. These aspects can only be settled by civil courts.

Q. *Does this mean that there is no solution to the problem of a woman seeking divorce?*

A. As the law stands today, the situation is very difficult. A woman is driven through both, a civil and a Church divorce, because the Church will not recognise a civil divorce. Most of the time women are not aware of this problem. Only when they get an annulment after prolonged efforts, they realise that they still have to go to court.

Q. *How do women get a divorce then?*

A. Often the only solution is that the husband files a petition on the ground of adultery in a Civil Court against the wife, who being left with no option is compelled to submit to a collusive divorce on the ground of adultery. She is stuck with the allegation of adultery, which is then used as a ground to deny her custody of her children.

Q. *Is there a change in the attitude of the Church towards divorce?*

A. No, not at all. The Pope is very reactionary so far as women are concerned, though considered progressive in other respects. He has opposed family planning, abortion and divorce. However, despite their opposition to divorce, the Church is liberalising the concept of annulment. This is their way of coping with the reality of breakdowns of marriages. Instead of dealing with the problem by accepting divorce, they are going about it in a round about way. The Church in India is now demanding that Church annulments be recognised by courts.

Q. *Will this solve the problem of women?*

A. I don't think so. It will only strengthen the authority of the Church.

Q. *What about the attitude of Christian women themselves? Is there a move to de-*

and changes in the law?

. Yes. The YWCA has passed several resolutions demanding the amendment of the Indian Divorce Act. The Joint Women's Programme has also demanded changes in the law. In fact, Christian women are in the forefront of the demand for the uniform civil code.

Q. *Do you think that the problems of Christian women are any different from those of other women seeking divorce or who have been treated with physical and mental cruelty?*

A. There are common problems like lengthy procedures, delays and non-payment of maintenance. But the situation is much better for Hindu women who can get a divorce by mutual consent. So far as remarriage is concerned, Christian women are at a disadvantage.

Q. *How did you solve the problem of dealing with a violent domestic situation?*

A. I tried to solve the problem by filing a petition for judicial separation. My main concern was to protect myself against violence from my husband. The other major problem was to get alimony and custody of my children. I got neither of these through court though I did get custody in an appeal. However the judge, knowing fully well that my husband was in the habit of beating me brutally, imposed a condition that I should visit the "matrimonial home" every Sunday and the family should attend Church Service together. Is it the function of a secular Civil Court, to tell me to go to Church? And it was Justice S. K. Desai now of the Bombay High Court who did this. The attitude of judges to women of the minority community is very communal. Can you believe that the High Court gave an order for maintenance of Rs.150/- per month per daughter, a grand sum,which to this day I have not been able to recover. My husband gave up his job to deny me maintenance. He is of course living comfortably off his investments.

Q. *Could you not have enforced the order?*

A. I tried. The only remedy was to get an order for auction of household articles. This was a very painful option, considering that my own son, was still living in the household and using the articles such as television and fridge. Although I got an order to auction I did not have the heart to go ahead as my son would be the worst affected by this. Before I could attach the bank account, my husband withdrew the money. The only way I have been able to cope is to leave the matrimonial home, and take full responsibility for my two daughters. Even today, if I decide to go back I may still be beaten by him. I withdrew my petition since the Court had nothing to offer me except a summon that I should to Church with the family.

If you are submissive, you will be subjected to more and more humiliation by your husband. If you assert yourself and stand on your rights as a woman, you are branded a "womens libber" as if that were a dirty word. If you have custody without any source of income, you will find it difficult to maintain your children as the husband will never pay up his dues. Take my case, I was given Rs.150/- for maintenance of the children. How can they survive?

Q. *Why did you lose custody of your daughters in the City Civil Court?*

A. My involvement with the womens movement was well known. The attitude of judges to women who are vocal and assertive about their rights is very negative. They expect women to be submissive and put up with all kinds of humiliation. Even her appearance in Court is expected to be passive and traditional. The Judge, V. D. Deshmukh, who denied me custody said in his judgment that I was a "womens libber" and "social worker" who would have no time to look after children. It did not occur to him that my husband himself was working and there was no one else in his house to look after the kids. This was his bias against assertive and non-traditional women showing up. My children told the judge that they were beaten by their father. In spite of this, he granted custody to the father.

If you are submissive, you will be subjected to more and more humiliation by your husband. If you assert yourself and stand on your rights as a woman, you are branded a "womens libber" as if that were a dirty word. If you have custody without any source of income, you will find it difficult to maintain your children as the husband will never pay up his dues. Take my case, I was given Rs.150/- for maintenance of the children. How can they survive? If you are working and earning to support yourself and the children, you will not get custody on the pretext that you have no time to look after them. It is a classic case of "Heads I win, tails you lose."

ADAALAT ANTICS

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Current Market Rate For Lawyers

We have more news about fees and senior lawyers. The story goes that the resolution of the Supreme Court Bar Association to the effect that fees for admission should be Rs.3300/- has been given a decent burial and fees have now gone back to Rs.5,500/- for each appearance, adjourned or otherwise. Some seniors, even when told that they need not come to court as the matter is due to be adjourned, turn up and send the bill. Another senior is known to have accepted a brief in a case in which he had appeared for the opposite party. Fortunately, he realised his error before the due date of hearing and returned the brief. But the story does not end there. With the return of the brief, he also sent his bill for payment.

Dressing Down in Court

A smart employer, thought he had found an opportunity for getting rid of his driver. He gave him a charge sheet alleging that the driver had committed misconduct. He alleged that whenever the car was parked and the employer went into his office, the driver, would remove all his clothes and go to sleep in the car in his underwear. He was therefore liable to be removed from service. Not to be outdone, the smart driver send in his reply to the show-cause notice. He said, "I deny that I wear underwear and put the employer to strict proof thereof. An enquiry was held and the driver was sacked. When the case went to court, the driver stepped into the witness box and told the judge "How can I convince you that I don't wear underwear?" and got ready to prove his case. "Wait", said the Judge, "I don't want to see anymore." What happened after that is not very material, but the poor driver is still out of a job.

Convertable Seniors

We assume that the normal career progression of a lawyer would be from Junior to Senior. But there are some who conveniently convert back from Senior to Junior and Junior to Senior. One day, in the Supreme Court, to my horror and suprise, I saw a senior lawyer mentioning a case. This apparently was against the practice that Senior Lawyers are not permitted to "mention" a matter for listing, only Juniors may. Well, this lawyer had found a way to beat the rule. He simply wore a Junior Lawyer's gown while mentioning and came out of the court room and converted back to his Senior Counsel's gown. Well, perhaps there is truth in the story that lawyers now charge "mentioning fees" which could explain this easy convertability.

Concerning Bank Work

Although the dual system has been ostensibly abolished in Bombay, a glance at the daily board shows that it continues to exist. This is nowhere more evident than in the legal work of the nationalised banks. It continues to be handled by their former solicitors. Routine summary suits of which there are hundreds, on promissory notes or dishonoured cheques are filed everyday by the banks against defaulters. There is nothing special about these suits that requires the attention of experts. They are routine plaints which can be cyclostyled and kept to fill in the blanks and yet solicitors, Senior Counsel and Junior Counsel are all mobilised into action to chase the defaulter. Often money paid to hot-shot lawyers will exceed money due to be recovered. All this is the monopoly of a couple of firms of solicitors. One observant lawyer mentioned that as far as chartered accountants are concerned, the Bank had an obligation to charge them, once every three years. Wouldn't it be a good idea he said, to introduce a similar provision for charging solicitors?

The Law is a Cow

The tribals of Khargone District in M. P. who own cattle were naturally using their cow dung for their daily needs such as fuel and manure. The forest department decided that their droppings were "minor forest produce" and prevented the tribals from collecting the cow dung. The tribals naturally retorted by saying that the cattle belonged to them and therefore the cow dung also belonged to them. Not having met with any relief, the tribals filed a petition in the M. P. High Court and demanded the right to collect cow dung from their own cows. Mercifully, the High Court decided that cow dung was not "minor forest produce." We know the well-known dig, the law is an ass but now shall we say the law is a cow. Of course we would imagine that whether the produce was "major" or "minor" would have depended on the motions of the cow and not the state of the law or the Forest Act.

Library With(out) Books

An interesting complaint was received by the Bar Council of Tamil Nadu from the Registrar of the High Court against an Advocate who owns a Book Agency by name, Bharat Law House. His wife is also an employee in the High Court. While the High Court ordered purchase of books worth sum of Rs. 6,62,755/- books worth of Rs. 3,29,045/- alone were received by them. Thus, the husband and wife team cheated the High Court to the tune of Rs.3,33,710/-. No one knows what happened to the criminal complaint. It is reliably learnt that nothing can be expected out of the criminal case as the orders for purchase and delivery had passed through hands of several higher-ups. Hence the complaint to take action against the Advocate for having committed "professional misconduct" in running a book agency while still continuing practice. What a way to redeem Rs.3.33 lakhs

125th Birthday Turns Sour

A chartered High Court is a pride creation. Hence when the Madras High Court celebrates it's post-centenary Silver Jubilee it should be done in a fitting manner so that people will remember the occasion. A committee of five senior judges has been constituted to chalk out the programmes. As one senior judge refused to associate himself it functioned with a new member. The committee demanded a neat sum of Rs.20 lakhs for the celebration from the State Government. The State Government was not in a mood to budge and only one lakh was offered. Now the 'planned' fitting celebration has run aground.

Devil's Advocate

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