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FROM

# THE LAWYERS COLLECTIVE

## Mental health

# EDITORIAL

# The Super Supreme Court

Judgements of the Supreme Courtare binding not because they are right, just and reasonable, but because it is the court of last resort. The Supreme Court has the right to be wrong; but its judgements, right or wrong, are considered binding on everyone.

In November 1986, the Supreme Court decided in the Frank Anthony case that the state could regulate the conditions of employment of teachers in unaided educational institutions run by minority communities. Barely three months later, several educational institutions run by minority communities, represented by Fali Nariman, are seeking to deny the benefits of the judgement to teachers by asking for a reopening of the case.

Only a few days earlier Sriram Mills had sought a reopening of the December judgement which decided that the company was liable to compensate victims of the oleum leak. Sriram Mills had sought an unprecedented declaration, that the judgement of the Supreme Court be declared unconstitutional. This petition also will be heard at length on its maintainability.

Earlier a petition filed by the Attorney General seeking to reopen the *National Anthem* judgement was also admitted.

If judgements of the Supreme Court are no longer to be considered final and binding, one must at least know the criteria on which they will be reopened. Is it the importance of the issue, or the need to appease the sentiments of minorities, or the interests of big business houses, or the wounded national pride of the Attorney General, or the status of the lawyers who appear and ask for a reopening? For such an unprecedented move, there must be some overwhelming considerations to push Article 141 aside. If the law declared by the Supreme Court is no longer the law of the land then we must have a Super Supreme Court functioning somewhere.

Now that the leaders of the Bar have shown the way to the Super Supreme Court, others will surely follow. For example, the pavement dwellers can with equal conviction argue that the judgement of the court is unintelligible and self contradictory.

If and when is filed, it will be interesting to see whether the Super Supreme Court will give them as patient a hearing as was given to the champions of management and industry.

Indira Jaising

FROM THE LAWYERS COLLECTIVE

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## LAW AND PRACTICE



**Editor**
*Indira Jaising*

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# LETTERS

## Ignorance Of Law An Excuse

In our legal society ignorance of the law is no excuse. However our people suffer not because they are guilty but because they do not know the law and its archaic proceedings.

Those who preside over the courts or have a lucrative practice at the Bar are never tired of vomiting their stock-phrases - "in the interest of justice... "to meet the ends of justice". etc. But justice for all remains an empty slogan when innocent persons harassed by the cumbersome procedures and tortured by the police, confess their " guilt" to salvage their peace of mind.

This tragic state of affairs is chiefly sponsored by the police and the lower judiciary. I personally know a C.J.M. who welcomes every accused brought before him, saying "if you are wise and admit your guilt, I shall take a lenient view and set you free with a fine only."

Many poor people dreading the prospect of imprisonment, long delays and exorbitant fees of vakils, tread on the magistrate's path of wisdom.

This wisdom-inspiring speech not only speedily disposes of arrears but helps the government to collect more revenue.

Talk of wise men killing three birds with one stone!

**Eknath P.Salve,**
*Advocate,*
*Vithal Mandir Ward,*
*Chandrapur District,*
*Maharashtra.*

## Law Commission's Recommendation On Rape

Your article "Rape - Legislative Changes" (November-December issue) was very interesting. The amendments of the Evidence Act regarding the "burden of proof" were based on the recommendations of the Law Commission which studied the substantive and procedural law to punish rape.

The Government accepted the Law Commission's recommendations that the onus of proof, regarding the question of consent, be shifted from the prosecution to the accused. This was a major departure from that canon of criminal jurisprudence that a person is innocent until proved guilty.

The Law Commission also found that sections 155 (4) and 146 of the Indian Evidence Act were unfair to the rape victims as they allowed a general cross- examination on the victims social and sexual relations, which are irrelevant to the question of consent. The Law Commission, therefore, recommended that evidence led under these sections should be confined to sexual relations the victim had with the accused only and not with others.

These recommendations were unfortunately not accepted by the Government As a consequence, women are subjected to unfair cross-examination in a trial for rape, which puts them off from making complaints.

**Nirmala Samant**
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*Bombay*

## Booking Dowry Murderers

As an activist of SANATHA, a womens' organisation, committed to exposing crimes against women, I would like to share with your readers the problems in booking the accused in dowry death cases.

Recently, on 28th January, 1987, Susheela, a 21 year old housewife was killed at Ashokpuram, Mysore, in her in-laws house. Susheela had been married for 9 months and was 5 months pregnant when she was killed. Her husband, Govindraj, father-in-law, Krishnappa and mother-in-law, Eramma, were arrested but granted bail.

SANATHA organised a public meeting to arouse public awareness in the Susheela case. The response was very good. About 2000 persons attended the meeting and many residents of the area came forward to give evidence. Due to the public outcry against the in-laws, nobody came forward to stand surety for them. So they are still in judicial custody.

Moreover, following the post-mortem report, which revealed that death occured not because of burns but due to a head injury, the police have filed a case under section 302-A and 207 read with Section 34 of the IPC and Section 4 of the Dowry Prohibition Act.

In another dowry death case, where the public protested at the deliberate mishandling of the case by the police and the doctor, SANATHA demanded that the case be turned over to the C.O.D. (Corps of Detectives). SANATHA also wrote to the Karnataka Medical Council regarding the foul play committed by the doctor. Despite our protests the police remain very slip shod in their enquiries. The Public Prosecutor is absolutely hopeless.

We at SANATHA request readers of "The Lawyers" to help us by suggesting new methods to combat the terrible menace of dowry deaths.

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## Health and Safety

The No More Bhopal Committee, in pursuance of its programme of environmental campaign and struggle, decided some three months ago to take up the cause of a humane and healthy work-place environment. Accordingly a trade union convention was organised in Calcutta on January 4, 1987 on the issue of occupational safety and health in India, in association with the West Bengal Voluntary Health Association.

The convention was attended by 185 trade union delegates and workers. Some among them were doctors, scientists and activists of the science movement.

Beside highlighting the general perspective of workers' health under a capitalist production system as a whole and particularly in India, the convention witnessed a focussed discussion on miners' health and safety, the occupational hazards in the printing industry, the health and life risks of corporation and municipal manual labourers like sweepers, and the health hazards emanating from new technology. The partisan nature of the relevant laws like the Factory Act, ESI Act, Workmen's Compensation Act etc., was also discussed. Particularly the bureaucratic and class nature of the ESI system came under heavy attack from several delegates. The delegates from several unions noted the inadequacy of the trade union movement as a whole in seriously tackling the issue and welcomed the efforts of NMBC towards the campaign against occupational hazards, accidents, illness and death.

**Dr Sujit Kumar Das**
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## COVER STORY

# Treating the Mentally Ill

*For a long time in our country mental illness has been considered synonymous with lunatics. While in other countries conceptions and treatments for the mentally ill have changed, as the laws relating to it, in India outmoded conceptions still hold sway. These are incorporated in the Mental Health Bill, proposed to be enacted into an Act.* ***Prashant Azad*** *argues in this article that unless conceptions and treatment modalities change, the mentally ill will continue to suffer.*

Nearly 10% of persons in our society experience a loss of control over their own life and seem to feel, think or become unhappy, angry or confused. Some may even lose, for some time, a sense of what is going on and behave in a fashion considered abnormal by society. A very small percentage of these may even respond with violence and thus fit into the popular, but incorrect, image of the violent, unpredictable, uninhibited madmen.

All of these problems come within the gambit of the mentally ill and such a person would have occasion to see a psychiatrist, psychotherapist, psychologist, social worker or a counsellor. The next few interactions, the treatment he or she receives and in fact even the way treatment strategies develop are practically and strongly influenced by the laws governing the mentally ill and the attitudes that such a law portrays.

### Indian Lunacy Act, 1912

Mental illness comprises a varied form of problems including adjustment problems, personality disorders, psychoses, neurores and so on. Unfortunately, the Indian law addresses itself only to lunacy. The law which presently applies in India is the Indian Lunacy Act, 1912, which is a hangover of the legislation from the pre-independence British era. Under the Act a person can be declared to be lunatic by a Magistrate. Lunatic, under the Act, means a person who is an idiot or of unsound mind. The Magistrate may do this with or without medical assistance. Moreover, the term lunacy in the Act is really only a legal definition. It has no psychiatric basis. A person may be mentally ill but not a lunatic. But a lunatic is necessarily mentally ill. Lunacy is in fact a very narrow area of the mentally ill. It comprises the mentally retarded as well as


severely mentally ill (nowadays referred to as 'incompetent').

Basically the Act invests powers in the Magistrate to incarcerate a lunatic and to establish caretakers for his property. It addresses itself to both, the lunatic as well as to the mentally retarded and does not make a distinction between the two. It deals only with the severe mental illness such as psychotics, and the mentally-ill criminal. It does not lay down licencing or regulations for treating other patients in different settings. It also lays down provisions for psychiatrists to incarcerate patients involuntarily in psychiatric hospitals. There is no mention of patients' rights and none of informed consent for treatment, the presumption being that the patient once declared lunatic has no fundamental rights, nay, no rights, and cannot be responsible for himself. There is also no mention of other mental health professionals such as clinical psychologists and social workers who are now considered competent in evaluating and carrying out the necessary treatments as well as legally competent to give expert opinions.

The other laws governing the mentally ill prisoners are the Indian Navy Discipline Act, 1934, the Indian Airforce Act, 1932 and Section 30 of the Prisoner's Act 1900 directing the reception of criminal lunatics into any asylum. They are also based on similar conception as the Lunacy Act.

The rules regarding culpability of criminal lunatics in India are still the McNaughten rules under which if a person can understand the nature of his offence he can be considered to be guilty irrespective of his mental illness.

The law in India reflects the thinking of the 19th century, when a mentally ill patient was not held to be responsible for himself and there were fewer techniques and options in dealing with the mentally ill.

The settings within which the treatments are carried out have changed considerably in most of the countries. Today, care and community mental health centres have replaced asylums. Moreover, elaborate safeguards and provisions for amenities and facilities are laid down in statute. None of these find mention in the Indian Lunacy Act or the proposed Mental Health Bill.

### The Situation In Practice

In practice a person who experiences any of the problems of mental illness finds himself initially going to a psychiatrist in a private or public hospital out-patient setting. Since there is only 1 psychiatrist for over a million persons in India, as compared to 1 for 20,000 in the U.K., for instance, the patient is usually seen for only an average period of 10 to 20 minutes. He is then prescribed drugs. Usually, the main modality of treatment, which is today psychotherapy, is unavailable to him. If he is to be hospitalised in a voluntary setting, he can often find himself admitted into a hospital and given treatment without his written consent. Although he is a voluntary patient, his relatives or friends or the

RMO usually sign the consent forms, both for admission as well as treatment procedures, like electro-convulsive therapy (ECT) with very little understanding of the need or possible long-term side-effects. At times this leads to a situation where even if the patient objects to the treatment, he is overruled. A good example is the J.J. Hospital in Bombay where the treatment is carried out behind bars in confined psychiatric wards even though it is a voluntary setting, which is illegal.

There are also reports of this happening in some private psychiatric nursing homes in and around the country. The psychiatrists are usually trained well as diagnosticians and are well-versed with biological theories of mental illness. They, however, receive very little training in the inter-personal form of treatment such as individual psychotherapy and family therapy although they are taught to mention it as important modalities in examinations. Even the treatments amongst voluntary settings differ considerably. For example, the psychiatrists at G.T. Hospital, Bombay, being progressive, do not prescribe ECT for the same problems as their colleagues in similar settings elsewhere. If the patient, however, does not improve with the available psyschiatric treatment, he may find himself being put into an asylum, usually as a result of being considered "dangerous"to himself and society. This may be done either by 2 psychiatrists or through a Magistrate's reception order. In India, in practice, just the history given by relatives and the presence of some mental illness is sufficient for him being incarcerated.

The conditions of revaluation of patients to effect discharge are usually very tardy and there are many instances of patients having improved with treatment, but very few long term patients being discharged. One of the reasons for this is that, in practice, discharge in some asylums needs the signature of the relative and the relative is either not found or has decided to forget about the patient. This, at times, leads to patients being in asylums for years on end in conditions which are sub-human and treatment facilities almost non-existent. The other predominant reason being that in cases where the patient has been incarcerated because of a judicial order, he has no lawyer or any other person to give legal aid and to get a judicial order to get him released.

## Trends In Other Countries

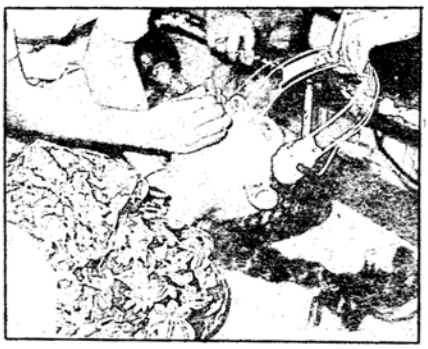
There has been little change in the nature of the mental health services in India over the last 30 years with the possible exception of a few prestigious institutions. Most psychiatrists are trained in professional teaching units which deal with the acutely ill, short-term patient problems. They then move into a well developed complementary private practice setting and continue to use drugs and shock treatments as the main modes of treatment which they have learnt earlier.

Most other countries have changed the nature of the psychiatric services with many asylums closing down and giving way to smaller, better managed community mental health centres, ending the warehousing of the mentally ill. These are staffed by equally competent psychiatrists, psychologists and social workers, all of whom undergo rigorous training in psychotherapy and practice it as the main form of treatment. Their main goal is to restore autonomy to patients and this is done by encouraging the patient to take re-

### Electro Convulsive Therapy (ECT)

ECT (Electro Convulsive Therapy) involves a passage of 'low-voltage' electric current (x110 voltage) to the head resulting convulsions resembling epilepsy. A dose of ECT would last for a minute resulting in the patient being dazed and incapacitated for about two hours. Ordinarily, the patient is confused immediately after treatment. Long term memory loss is also common. ECT is used widely and indiscriminately in India.

ECT was developed on the mistaken belief that mental illness and epilepsy do not co-exist. It was developed after the originator noticed the procedure being used to make pigs unconscious before slitting their throats. It was later used empirically on human patients for many years, more as a punitive procedure, often in full view of other patients. Presently, in J.J.Hospital, Bombay, patients were prescribed ECT if they were violent, bizzare or un co-operative.



**Patient undergoing ECT**

For approximately 150 public hospital beds in Bombay available for psychiatric patients, about 50,000 ECT are administered every year, the ratio being 1:333 (333 electro-shock treatments for one hospital bed per year) as compared to a ratio of 1:0.22 in the U.S. Thus, it is used about 1500 times more in India.The difference in treatment procedure and the development of new techniques of treatment in the U.S. has been made possible by increased pressure on the psychiatric profession by legal activists and patient rights movements.

ECT was later realised to be ineffective in the long run with long term patients and is found to be useful only mainly in some depressions where it is the last line of treatment after an adequate trial of psychotherapy or drugs. Mental health practice today prescribes ECT for some depressions which do not respond to drugs and psychotherapy, the use in other conditions being controversial and subsequently avoided. Though this is mentioned in examinations in psychiatry in India, it is not followed up in practice. Overcrowding of patients, lack of training in other techniques and economic gain in private practice leave the easy way of ECT out.

sponsibility for his own treatment. The laws ensure this by making it difficult to keep patients hospitalised involuntarily or to administer treatments such as ECT or even medication.

Presumed danger to the community can no longer be a reason for detention as research shows that it is difficult even for trained professionals to predict whether a given individual, especially in the area of previous sexual offenders or mentally ill criminals is considered as reason for detention. All mental health professionals are considered competent to do a legal assessment and carry out treatment. Much promising research has been done by psychiatrists on the biological basis of mental illness and to understand the functioning of the brain. It has resulted in new potent drugs such as lithium which have proved useful in managing mania and manic depressive patients. As psychotherapists, they have, along with other professionals, developed new forms of sophisticated therapy for use even with acutely ill psychotic patients.

The concept of Mental illness too has changed from being an intra-personal conflict within the person to

an inter-personal problem. In the last few years, family therapy has been increasingly adopted and has shown the patient to be drawing attention by his illness to problems within his family. In this approach, the patient is called the identified patient and the family is seen as the patient.

### The Mental Health Bill

The Mental Health Bill, now proposed to be enacted into law, was originally introduced by the Government in the Rajya Sabha on 14th December, 1981. It was referred to a Joint Committee. On the reconstitution of the Lok Sabha in the 1985, after the 1984 general elections, the Committee was reconstituted. The Committee submitted its recommendations on the original Bill to the Government on 24th April, 1986, the entire text of which is published in the Central Gazette of 2nd May, 1986.

Unfortunately, none of the new trends find a place in the Mental Health Bill. The Bill shows many welcome changes. It defines a mentally ill person as a person who is in need of treatment for mental disorder other than 'mental retardation'. Thus it differentiates mental illness from men-

## Mental Health Law In The U.K.

Under the mental health legislation in U.K. the decision to compulsorily admit a patient into hospital is without legal review or monitoring of any kind. A police officer acting alone, or a relative or social worker together with a General Practitioner may authorise a patient's detention for upto 72 hours in the first instance. The nearest relative or a social worker together with two medical practitioners, may then authorise more prolonged confinement for 28 days or even indefinitely. The exercise of professional or familial discretion in this respect is not examined by any court or tribunal at any point. What is subject to review is only the subsequent detention of certain involuntary patients. This is where the Mental Health Review Tribunal (MHRT) comes into the picture.

The MHRT is a body which exists in each Regional Health Authority in the U.K. The Tribunal has a legal member as its President with additional lay members and medical members. The MHRT was established by the Mental Health Act, 1959, and its proceedings are governed by the MHRT Rules, 1960.

The MHRT's function is to make decision regarding the subsequent detention of the following persons:-

1) patients who are compulsorily detained in mental illness or mental medical hospital, or

2) patients who are subject to guardianship orders.

In effect, only patients detained under long term sections without restriction orders are eligible (i.e. under sections 26,33,60,72,73) to apply to MHRTs. A patient detained under a short term order (i.e. under sections 25,29,30,135,136) has no legal review of the substantive merits of his detention. So also, a person under a restriction order (i.e. under sections 65, 74) is not eligible to apply to a Tribunal. However, the Tribunal may request the Secretary of State to refer his case for advice.

In the statistical vein, less than 10% of these patients compulsorily admitted to hospital have any statutory right to appeal to the MHRT and of those only approximately 12% actually exercise this right. It is thus only a small minority of involuntary patients who have a formal review of the propriety and the lawfulness of their confinement and even in their case the waiting time prior to such review is inordinate (months rather than weeks)

When the MHRT does hear on application, the only powers of review available to it are:-

a) power to discharge an unrestricted patient on any grounds [2 s:123(1)], and

b) power to reclassify a patient who is not discharged and who is found to be suffering from a mental disorder other than that specified in the relevant application.

The MHRT has no other powers. So it cannot, for example, make decision in respect of treatment, transfer from one health care facility to another or discharge the patient subject to conditions or delay.

tal retardation which is not done under the Indian Lunacy Act. It appoints visitors who will visit the psychiatric hospital and nursing homes at least once a month and see every minor patient and every other major patient. Also overdue is the creation of a mental health authority to oversee the functioning of these institutions.

However, these changes are swamped by the out-dated attitudes and presumptions in the Bill. It is surprising to note that while enormous changes in law and mental health have taken place elsewhere, we in India, still carry on with the same perceptions of the mental ill. There is a presumption under the law that mental health is only provided by psychiatrists. The licencing provisions under clause 5 to 14 only allow psychiatrists to open facilities for mentally ill persons. The admission and discharge procedures empower only psychiatrists to assess the patients as experts. This is unfortunate as many types of expert-trained professionals treat and deal with the mentally ill such as psychoanalysts, psychologists, psychiatric social workers and counsellors. All of these provide essential services and should be allowed to open facilities for the mentally ill. In countries like the U.S. all of these professionals have rights to do so and are also empowered to give expert opinions. In view of the lack of facilities for the mentally ill this becomes even more important.

### Admissions

The mentally ill person can be admitted under the Bill either as (a) a voluntary patient; (b) under a reception order as an involuntary patient; (c) as a involuntary patient under Section 27 for mentally ill prisoners; (d) under Section 28 for a period of ten days at a time, upto a maximum of 30 days, to find out if he is mentally ill.

There is a presumption that if the patient does not admit himself voluntarily he must be admitted involuntarily on the ground of apprehended violence to the community and intending care to the person. These are blanket permissions under admission procedures which ignore the crucial safeguards of deciding whether a person is

## The Defence Of Insanity

The common law defence of insanity was a Roman feature of law brought to pre-Norman England by the Christian Church. Around 1500 AD, juries in England began to acquit criminals on grounds of insanity on the basis that madmen "lacked the will to harm" and were "unable to distinguish between good and evil." The "will" and "right wrong test" were strictly applied and the insanity defence was usualy unsuccessful until James Hadfield's trial in 1800 and Daniel McNaughten's trial in 1843.

James Hadfield made an unsuccessful attempt to assassinate King George III on 15th May 1800. Hadfield was charged with high treason. He pleaded insanity and was acquitted but confined to a hospital. Since criminal law had no power over Hadfield whose offence had been treated as a political crime, the concerned judges were responsible for the passage of the automatic confinement statutes that now almost accompany a successful plea of insanity.

Daniel McNaughten attempted to assassinate the British Prime Minister on 20th January, 1843. McNaughten's also pleaded insanity as his defence. The question that arose was whether an insane person could be excused from criminal responsibility. The prosecution stated that McNaughten could not be absolved of criminal responsibility unless he was totally incapable of knowing right from wrong. McNaughten was held to be not guilty by reason of insanity. Public outrage against madmen being let off without impunity that followed led to the establishment of the famous right from wrong test of criminal responsibility, known as the McNaughten Rule. It was held that the defendant must prove that he meets the standard of not knowing "the nature and quality of the act he was doing, or, if he does know it, that he did not know what he was doing was wrong."

The modern insanity defence arose from a desire to punish and deter the mentally ill. Both Hadfield and McNaughten who were acquitted on grounds of insanity were punished by long terms of confinement as mentally ill patients, although they had been acquitted of their crimes.

In the modern Anglo-American world there is serious debate about retention versus abolition of the insanity defence as it evolved from the McNaughten case. However, there is general agreement about modifying this defence as it is based on a doctrine what is fundamentally just.

In India, the Indian Penal Code 1860 (IPC) allows a person accused of a crime to rely on the insanity defence. The IPC was enacted in 1860 and section 84 clearly reflects the McNaughten Rule. In *Sukru Sa v State of Orissa*, [1973, Cri.LJ 1323]. A distinction was made between legal insanity and medical insanity. To establish legal insanity the "right-wrong test" laid down in McNaughten's case is applied.

Insanity is recognised under civil law too. Section 11 of the Indian Contract Act states that "soundness of mind" is one of the requisites for competency to contract. Section 12 defines a sound mind for the purposes of contracting.

Under several matrimonial laws, insanity is a ground of divorce. The Special Marriage Act and Hindu Marriage Act provide that for a marriage to be valid the parties should be of sound mind.

'competent' or not and how one can decide that he will become violent. Competency implies the ability of a person to lead his own life, however, minimally.

The reason for such outdated views is that the Bill assumes that mental illness implies incompetence and that violence and mental illness are concurrent. This is not entirely correct. In fact, there are many ambulatory psychotics (people who are out of touch with reality to some who actively hallucinate voices and respond to them) who are competent to run their own lives, though in a limited manner. Violence amongst the mentally ill is also very low and research shows that even highly trained professionals (much less a Magistrate) cannot accurately predict it. The only areas where this has been done with any accuracy is where mental illness is associated with past evidence of violent crimes and sexual assaults. These categories are any way dealt with as mental criminals.

However, Sections 18 to 31 of the Bill allows very dangerous steps which can be taken to detain mentally ill persons and deprive them of their fundamental rights. Under Section 18(3), a voluntary patient can become an involuntary one by being denied discharge if the Board, set up under the Bill, decides it is not in his best interest. However, the Board is not obliged to give any reasons. In this manner, an involuntary patient can be detained for 90 days at a time.

Under Section 19(3) two psychiatrists, one of whom is a government psychiatrist, can admit any patient involuntarily for 90 days at a time, if they feel it is in the best interest of the patient.

Under Section 22, a magistrate can pass reception order on grounds of health and personal safety of the person or protection of others.

The medical certificates of experts are only those of psychiatrists. No other expert, such as psychologist, or psychiatric social workers is allowed. The psychiatrists can apply for reception on the same grounds.

Under Section 22 (3), the magistrate can forego examination of the person and rely on the certificates to pass a reception order.

Under Section 28, a magistrate can detain any person in a psychiatric hospital or nursing home for a period of 10 days at a time upto a maximum of 30 days for assessment of his mental illness.

## Mental Illness Unlawful

All of this implies that it is unlawful to be mentally ill and a person can be detained and denied of his fundamental rights if he is suspected of being or is mentally ill, whether or not he has committed any offence. It results in psychiatrists being given legal powers to detain persons and assuming that Magistrates have the mythical ability to predict violence, when even trained professionals cannot do so accurately.

Much of this confusion can be resolved if only incompetent patients are allowed to be detained, if incompetent patients are allowed to establish their regained competency and competent patients are allowed to determine their own treatment. This is already being practiced in other countries. For example, in California, for both "voluntary and involuntary patients thought to be incompetent.", the law requires a court hearing to determine competency. Moreover, the patient is required to be represented by an attorney. In addition a patient who has been adjudged incompetent may make a claim of regained competency at any time and has repeated access through his or her attorney for a competency hearing. It follows logically that people who are incompetent cannot be involuntarily restrained unless they commit specific offences.

Competency is a legal concept and even if it is to be determined in a medical context, the law ought to make it clear what standards are to be used. This should be done bearing in mind that it goes beyond single tests, semantics, and straight forward application of legal rules and will be influenced by social considerations and attitudes rather than only law or medicine.

In view of the fact that in practice mentally ill persons in India are generally unaware and have no knowledge of their rights, and have no access to lawyers, it is very important that such a procedure be clearly delineated and followed.

## Procedural Safeguards Necessary

Although the Bill is termed as Mental Health Bill, most of the provisions deal with locking people up and properly managing their property. It seems to assume that all treatment which mentally ill persons are required to undergo as voluntary or involuntary patients is harmless. This is totally incorrect. Many countries have specific safeguards regarding the types of treatment that may be administered to the mentally ill. No safeguards are provided in the Bill. Out of 98 sections in the Bill, only one (Section 81) deals with the rights of the mentally ill. Even that does not specify safeguards or detail consent procedures and it seems that the drafters of the Bill have not (using a popular phrase) "applied their minds" in this direction. Admittedly, proper safeguards have to be provided against the frequent use of drugs, ECT and even surgical interference of the brain.

In a U.S. case *(Wyatt v Stickney)* the District Court of Alabama, while dealing with various forms of unusual or hazardous treatment, including lobotomy (permanently removing portion of the brain) ECT and adversive reinforce (a euphemistic scientific expression for painful electric shocks for punishing unwanted behaviour) asserted that it was not for the court to practice medicine but that the question of procedural safeguards was a "fundamental legal question."

These procedural safeguards can be dealt with once the question of competency is settled. The most important of these is that all treatments require comprehensive informed consent from the competent mentally ill patient who can refuse them. For the incompetent patient, the consent may be given by a competent person or body acting for him. Recommendations of the American Psychiatric Association (APA) details the type of consent required from the patient. With some modifications (since this is for ECT), it can be made mandatory for all treatments which the mentally ill person is likely to face and which have side-effects. The recommendations of the APA include the following:

1) Information as to the nature and seriousness of the disorder.
2) The probable course of illness with or without ECT.
3) A description of the ECT procedure.
4) The risks and side effects involved with ECT (with particular reference to

# COVER STORY

*Dr. Raju Jerajani is one of the few forensic psychiatrists practicing in the country today. We talked to him about the state of the Mental Health Law. Here are the excerpts.*

**Q.** *Why is the concept of mental illness in medicine and in law not the same?*
**A.** The psychiatric definition of mental illness current and dominant today is based on the medical model of what is considered to be normal behaviour. Those who manifest behaviour which does not conform to this norm are considered to be deviants and mentally ill. Basically, this is an empirical definition based as it is on purely empirical behavioral research.

In law, there is a positivist static definition. In India it is based on the unchanging McNaughten Rules. Basically, these rules imply that a person is held responsible for his actions unless he is a lunatic. A lunatic is defined as a person who is an idiot or of unsound mind. This implies a person who is unaware of the nature, quality of consequences of his actions.

**Q.** *Surely, as society changes, norms do change. What was considered abnormal yesterday, may be normal today. How have these changing norms affected diognostic criteria for the mentally ill?*
**A.** For example, homosexuality was previously considered to be deviant behaviour and also considered to be a manifestation of mental illness. Today, homosexuality is more or less accepted by society, at least in the West. Today, psychiatry considers homosexuality as a manifestation of mental illness if the person cannot accept his sexuality.

**Q.** *The concept of informed consent of the patient has been developed in other countries. Why has it not gathered ground in India?*
**A.** The patient in India who is considered to be mentally ill is presumed to be a lunatic and incapable of giving consent. Therefore, the question of informed consent cannot arise. Things are seen in such black and white terms. As you know, the concept of mentally ill is wider and includes lunatics. All mentally ill persons are not lunatics. But this aspect is not taken into consideration here.

**Raju Jerajani**

**Q.** *In practice how does a person get into an asylum?*
**A.** A wandering or a dangerous lunatic can be arrested by the police, presented before the Magistrate, who can order his incarceration, without a medical examination.

There are then the cases of persons reported to be mentally ill by their relatives. The relatives file a petition accompanied by a medical certificate of a psychiatrist. This certificate only contains the diagnosis such as schizophrenia. There are cases of beggars from Chembur who are regularly diagnosed as schizophrenics.

**Q.** *What is the status of a poerson who is certified as a lunatic?*
**A.** The person loses all his rights, right to contract, right to vote, right to marry, right to hold property and all other civil rights. He becomes a persona non-grata.

**Q.** *How long is a person confined in an asylum in practice?*
**A.** A person who is incarcerated on a judicial order can only be released by a subsequent judicial order. This process is usually initiated by the Superintendent of the asylum. The Superintendent recommends to the Board of Visitors, who may examine the patient, after which he is put on parole. If he 'behaves' during the parole period, judicial orders are obtained by the Superintendent for his or her release. The time period may take from 6 months to 6 years.

**Q.** *What is the reason for the overemphasis on ECT and drugs in India?*
**A.** Because there is a mistaken belief that drugs bring about a rapid or symptomatic cure of the patient. However, basically what happens is that the patient is too dazed or confused to respond, which is regarded as an improvement. The long-term cure and rehabilitation is totally lost sight of. Moreover, the side effects of ECT and drugs, which are detrimental to the patient, are not taken into consideration.

long term memory loss and post-treatment confusion).
5) The possibility of alternative treatment.
6) The reasons why ECT has been recommended.
7) A statement of the patients right to refuse or revoke consent once it is given.
8) The fact that new consent must be given for additional treatment series.
9) The cost of the treatment.
10) A specific entry that all this information was given and the patient was competent to understand it.

None of this is followed in India. As a result there is widespread misuse of some treatment modalities such as ECT, drugs, which offer an easy way out.

Unless these or similar safeguards are incorporated in the proposed mental health law, all the Bill will do is to give professionals a licence to continue the misuse of the treatment which they are doing today. Instead of improving the lot of the mentally ill, which, undoubtedly, has to be the objective of any mental health law, it will provide a boon for professional psychiatrists who will be invested with enormous powers without any justification. It is about time that the mentally ill started being the subjects of their treatment, rather than just being objects. The purpose of any mental health Bill must be to facilitate that. They should at least have the same rights that criminals have.

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# NOTICE BOARD

## Proposed amendments to the Industrial Disputes Act, 1947 and the Trade Unions Act, 1926.

*Recently a note has been circulated to concerned parties by the Government about the proposed amendments to the Industrial Disputes Act, 1947 and Trade Unions Act, 1926. We reproduce the entire text for our readers. As the text is long, a portion will be carried over to the next issue.*

**A. I. Industrial Relations Commissions and Labour Courts**

l. The Industrial Relations Commissions/High PoweredTribunals may be set up, both at the Centre and in the States under Article 323B of the Constitution.

2. Both the Central and State Industrial Relations Commissions should be constituted with a President having prescribed judicial qualifications and an equal number of judicial and non-judicial members. The total strength of the Commission including the President may not exceed seven.

3. An enabling provision would be made for the constitution of the benches of the Industrial Relations Commissions.

4. The President and the judicial members should be appointed from among persons who are eligible for appointment as Judges of a High Court. The non-judicial members need not have qualifications to hold judicial posts but should be otherwise eminent in the field of industry, labour and management.

5. (a) The President and the judicial members of the Central Industrial Relations Commission will be appointed by the Central Government in consultation with the Chief Justice of India. As regards non-judicial members of the Central Industrial Relations Commission, they will be appointed by the Central Government in consultation with the President of the Commission.

(b) The appointment of the President and judicial members of the State Industrial Relations Commissions shall be made by the State Governments in consultation with the Chief Justice of India. As regards the non-judicial members, these will be appointed by the State Governments in consultation with the Presidents of the State Industrial Relations Commissions.

6. Terms and conditions of service of the members of the I.R.Cs may generally be the same as in the case of High Court Judges. This would also apply to non-judicial members who will be persons of eminence from industry, labour and management. It would be appropriate to give the President somewhat higher emoluments as compared to other members of the Commission. The age for superannuation may be fixed as 65 years. There should be a minimum term of three years subject to the age requirement.

7. It may also be provided that neither the salary or emoluments nor the other terms and conditions of service of the President and the members of the Comission shall be varied to their disadvantage after their appointment.

**II. Labour Courts**

8. Standing Labour Courts should also function at the Centre and in the States under the overall supervision of the Central and State Industrial Relations Commissions, as the case may be. They would be appointed by the appropriate Government. It will be appropriate if the Presiding Officers of the Labour Courts are appointed in consultation with the President of the I.R.C. or a Committee under his Chairmanship is appointed to prepare the panel of names.

9. As regards qualifications of the Presiding Officers of the Labour Court, the following may be considered :-

(1) He has been a District Judge or an Additional District Judge;

(2) He has held any judicial office in the country for not less than 5 years;

(3) He has practised as an Advocate or an Attorney for not less than 7 years in a High Court or in a Court subordinate thereto;

(4) He has been the Presiding Officer of a Labour Court constituted under any Provincial Act or State Act for not less than 5 years.

A provision may also be made to save any relaxations already in existence in respect of particular State(s).

**III. Power and functions of State Industrial Relations Commissions.**

l0. (i) Adjudication of industrial disputes other than those assigned to the Labour Courts and where the State Government is the appropriate Government. The Central Government shall also be enabled to refer the disputes etc. to the State I.R.Cs.

(ii) Appeals against the final orders of the Labour Courts.

Note.: Registration of Trade Unions will be done by the Registrars of Trade Unions and the small nucleus of staff of Registrar, Deputy Registrar, etc., will be under the supervision and control of State IRCs.

**IV. Powers and functions of Central Industrial Relations Commissions**

(i) Adjudication of industrial disputes other than those assigned to Labour Courts and where the Central Government is the appropriate Government.

(ii) Appeals against the final orders of the Labour Courts.

Decisions or orders of IRCs, both Central and States, will be executed as orders or decrees of a Court.

**V. Functions of Labour Courts**

The Labour Courts will normally discharge the following functions :-

(i) Individual disputes relating to the discharge, dismissal, retrenchment or termination of a workman.

(ii) The application and interpretation of standing orders of establishments.

(iii) The propriety or legality of orders passed by an employer under the standing order.

(iv) Illegality or otherwise of strikes or lockouts.

# NOTICE BOARD

(v) Individual claims arising out of rights and obligations under the provisions of law or agreements.

(vi) Certification of collective bargaining agent/council.

(vii) Individual disputes relating to tenure including confirmation, seniority, promotion, reversion, premature retirement, superannuation, leave of any kind, disciplinary matter, remuneration (including allowances) and retirement benefits.

(viii) To avoid delays in the disposal of disputes a provision may be made for reference of disputes and applications in Central sphere to notified Labour Courts under the States.

(ix) There shall be no appeal against the interlocutory orders of the Labour Courts unless the appellate authority for special reasons to be recorded in writing consider it essential to entertain the appeal. In such cases where appeal is entertained provision should be made for disposal of the appeal within a short specified period.

(x) The Labour Courts/Industrial Relations Commission may utilise the services of the officers of the Central or State Governments and could also appoint/depute commissioners as may be necessary.

**VI. Constitution of Special Tribunals/Commissions**

The Central Government may constitute such special Tribunals/Commissions under Article 323B of the Constitution to adjudicate industrial dispute(s) which in the opinion of the Central Government involve questions of national importance or are of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by such disputes (on the pattern of Section 7B of the Industrial Disputes Act). As regards composition, such special/Adhoc Tribunals may consist of the President of the Central Tribunal, at least two Presidents of the State I.R.Cs. and one judicial and non-judicial member from amongst the members of the Central/State I.R.Cs.

**VII. Other matters**

1) On the analogy of Section 17-B of the Industrial Disputes Act which provides for payment of full wages in case of positive awards of reinstatement, even when challenged in the higher courts to the workman, provision should be made for giving relief by positive awards in other categories of cases.

2) As the function of the certification/verification is being assigned to the Commissions, the definition of industrial disputes would be amended to cover disputes relating to certification and verification.

**B. Verification of membership/check-off system**

(1) Minimum membership for registration

For registration of a new union the minimum membership required should be 25 per cent as against the existing requirement of seven members. In the case of existing registered unions, it would be necessary to give them some time, say six months, to fulfil the new criteria. In case of trade unions/federations of Trade Unions in one industry in a local area the membership of the Trade Unions which will be members of such Trade Unions/Federations in that Industry in the local area, should also have the same percentage of the strength of workmen in that Industry in the local area.

(2) Membership open to all

The rules of the Trade Unions shall provide that the membership is open to all workmen employed in an industrial establishment, or a class of industries, as the case may be, and not confined to specific crafts/occupations/sections.

(3) Office-bearers

The rules of the Trade Unions should also provide that

(a) The appointment of the Office-bearers shall be made every year within the dates specified in this behalf.

(b) The meeting of the executive shall be held at least once in every three months; and

(c) All the resolutions passed whether by the Executive Committee or by the General Body of the Union shall be recorded in a minute book for the purpose.

(4) Trade Unions shall be registered by the Registrar within 60 days and there should be a gap of six months before re-registration. Trade Unions indulging in illegal strikes would be deregistered.

(5) The provision in Section 22 of the Trade Unions Act, 1926 may be changed on the following lines

"All except (two) or 25% of the total number of the office-bearers of every registered trade union shall be persons actually engaged or employed in the unit or the industry, as the case may be, with which the concerned trade union is connected.

Provided that appropriate Government may by special or general order declare that provisions of this section shall not apply to trade unions in a particular industry in a local area."

(6) It may be appropriate to fix the limit of some trade unions in respect of unit-wise unions and industry-wise unions/federations in which a person who is not actually employed in that unit or industry as the case may be can be associated or made an office-bearer.

It is also for consideration whether the organisations of employers at the industry level should be represented on the bargaining council only if they are organised on the same pattern as is applicable to the workers unions.

(7) Trade union disputes can be resolved by arbitration or by Labour Court adjudication. Either party can directly take up matter with the Labour Courts for adjudication and the Government need not have the authority to refer such disputes.

(8) Annual returns of Trade Unions shall be verified by the Registrar.

(9) The penalty for non-submission of annual returns should be raised to Rs.25/-.

(10) The following persons would be disqualified from becoming office-bearers

(a) Persons who have been convicted (including office-bearers of trade unions) of any offence under the Industrial Disputes Act, 1947.

(b) Persons who have been convicted for taking part or for instigating illegal strikes.

(c) Persons who have been convicted for any cognizable offence under I.P.C.

(11) The period of disqualification should be three years.

(12) The existing membership subscription of 25 paise may be increased to Re.1/- but an enabling provision may be made to empower the State Government to fix lower subscription fees in respect of trade unions of workmen or employees engaged in employments specified in the Schedule to the Minimum Wages Act.

(13) No Minister in the Central Government or the State Government should be a member of the executive or office-bearer of trade unions or federation of trade unions.

(14) Membership fee of Re.1/- per month should be deducted from the emoluments of the workman. For this purpose, each workman will indicate to the management the union of his choice and authorise the deduction of subscription from his wages. Deductions thus made will be remitted to the concerned union. This authorisation by the workman may be valid for a period of three years. With a view to ensure that the authorisations are freely made and not under the influence of the management, arrangements may be made in which the workman may make authorisation in the presence of an Officer of the Labour Enforcement/Conciliation machinery or any other person specified by the representative of the Registrar of trade unions.

(15) Check-off system should be adopted for verification. However, where the difference between the principal bargaining agent and the next two topmost unions is less than three per cent and the Labour Court is of the opinion that there are exceptional circumstances to suggest that check-off has not given open expression of honest opinion, it may decide for a secret ballot confined only to the unionised membership in the establishment.

(16) The employers would be required to maintain records relating to the check-off system and after expiry of the stipulated period of three months or as may be specified in the rules, the management will publish the list on the notice-board under intimation to the unions in the establishment, the registrar of Trade Unions the CIPM and it will be open to the concerned unions to raise objections. In its absence, the management/unions will apply to the Labour Courts for a certificate. Where no objection is received by the Labour Court, it will issue the certificate.

(17) The work relating to verification and certification or recognition of trade unions as collective bargaining agent will be entrusted to Labour Courts.

(18) If a union feels aggrieved by the certification, it could appeal to the Industrial Relations Commissions.

(19) Where objections have been received the Labour Court shall make necessary enquiries including verification of records, etc. and pass final orders.

(20) The Labour Court shall have powers for cancellation of and recognition/certification of unions as collective bargaining agent in cases such as fraud, misrepresentation or by mistake or when the union has ceased to exist or has contravened any provisions of the Act, after giving opportunities to the parties.

(21) Details of the procedure shall be incorporated in the rules to be framed.

### C. Collective Bargaining Agent

(1) The Act shall provide for a statutory recognised collective bargaining agent/council for a unit or an industry.

(2) Selection of Collective Bargaining Agent

(i) Where there is only one registered union, the same shall be certified as the sole bargaining agent.

(ii) Where there is more than one registered union, the one with the highest membership but not less than a specified percentage, say, 35% or 40% will be the principal bargaining agent and the remaining unions will be the associate bargaining agents in the Bargaining Council in proportion to their relative strength.

The principal Bargaining Agent will have the right to be the Chairman of the Council.

(iii) If there are no unions with more than the prescribed percentage of membership shall registered unions will jointly form the Bargaining Councils and one with the highest membership will be the Chairman. The representation on the Council should be on the basis of relaative strength of different unions.

(iv) Where there is no registered union, a Workmen Council will be set up by the appropriate Government as prescribed under the Rules framed by the Central Government.

(v) At the State level for industries for which the State Government is the appropriate Government, the State Government will constitute an industry-wise Bargaining Council. In respect of industries falling within the Central sphere, the Central Government will constitute an industry-wise Bargaining Council.

The Central Government may in consultation with the States, constitute Bargaining Council at National level in respect of industries for which the appropriate Government is the State Government. Further, Central Government may also constitute separate Bargaining Council(s) at the national level for all or a group of central Public Sector Undertakings in respect of which the appropriate Government is the State Government. The State Government will be represented on such National Bargaining Councils. The representation of the Workers's Organisations in these countries will be on the basis of certification by the Labour Court.

Term of Collective Bargaining Agent

(i) The term of Collective Bargaining Agent shall be three years.

(ii) They could be derecognised for commission of unfair labour practices.

The collective bargaining agent would have direct access to the criminal court or police in case of all the offences. Similar provision may be made in case of the employer of an undertaking or trade union/association of employers.

Derecognition

A union will be derecognised as collective bargaining agent if it is found guilty of unfair labour practices listed at item No.1 (illegal strike) and No.8 (violence) of Part II of Schedule V of the Industrial Disputes Act.



*To be continued*

# Divorce Under Different Personal Laws

*A separate table indicates the various grounds available to parties for divorce under different codified personal laws. Nilima Dutta draws out the comparison under these statutes.*

### Cruelty and Desertion

Under all five matrimonial acts, cruelty and desertion are grounds of divorce. The Hindu Marriage Act, 1955, the Special Marriage Act 1954 and the Parsi Marriage and Divorce Act 1936 allow both parties to petition for a divorce on the grounds of cruelty which may be physical or mental cruelty or both. The Dissolution of Muslim Marriages Act, 1939 which provides grounds for divorce exclusively to the Muslim wife, also includes cruelty.

The only Act which does not allow the wife to obtain divorce on grounds of cruelty alone is the Indian Divorce Act, 1869. The wife has to prove that her husband was not only cruel but that he also had voluntary sexual intercourse with some person other than his spouse, to claim a divorce.

Desertion is again a common ground of divorce under all the personal laws. Under the Hindu Marriage Act and Special Marriage Act, desertion for a period of two years is sufficient to constitute a ground of divorce. However, under the Parsi Marriage Act, the period of desertion has to be three years. The Christian woman has to again prove dual matrimonial offences by her husband, viz. adultery coupled with desertion.

The Muslim wife can obtain a divorce if her husband has deserted her for four years or more. However, there is an onerous qualification - the decree of divorce is not effective for the first six months. If the husband appears in person or through an agent within these six months and satisfies the court that he is willing to perform his conjugal duties, the decree shall be set aside.

### Adultery

Adultery is again a ground which is not available equitably under the different personal laws. The Christian male can easily obtain a divorce on proof of his wife's adultery whilst she cannot get a divorce unless she proves her husband's adultery combined with another offence such as cruelty, desertion, bigamy or incest. Adultery is not a ground of divorce under the Dissolution of Muslim Marriages Act.

### Insanity

Incurable insanity or unsoundness of mind is another ground of divorce available under all the personal laws except under the Indian Divorce Act. The Parsi Marriage and Divorce Act while providing this ground also stipulates that the Plaintiff should have been ignorant of the fact of the defendant's insanity at the time of the marriage and that the suit must be filed within three years of the date of marriage.

### Leprosy and Venereal Disease

Leprosy is another ground available under all acts except the Parsi Marriage and Divorce Act and Indian Divorce Act.

The latter Act prohibits Christians from obtaining a divorce even if they suffer from venereal diseases.

The Hindu Marriage and Special Marriage Acts stipulate that the respondent should have been suffering from venereal disease(s) in a communicable form. The Parsi Marriage Act requires the defendant to have transmitted a venereal disease to the plaintiff. The Muslim wife can obtain a divorce if she proves that her husband is insane or has leprosy or venereal disease for two years.

### Not heard of for seven years

Disappearance of one spouse for a period of seven years or more is a ground for annulment of the marriage under the Hindu and Special Marriage Acts. The period of disappearance has to be only four years under the Dissolution of Muslim Marriages Act and can also be construed as the offence of desertion described earlier.

### Apostacy

Apostacy or conversion to another religion has been included as a ground for divorce under the Hindu and Parsi laws. It is not available under the Special Marriage Act because that would defeat the purpose for which it was enacted i.e. facilitation of inter-religious marriages. Under uncodified Muslim Law the husband's apostacy automatically dissolves the marriage although this ground is not available under the Dissolution of Muslim Marriages Act. Hindu law provides for a divorce on the grounds of renunciation of the world by entering some religious order. This is peculiar to Hindu Law.

### No Cohabitation After Judicial Separation and Maintenance

If a decree of judicial separation has been passed and there has been no cohabitation for a period of one year or more between parties to a marriage such a decree forms a ground of divorce for both parties under the Hindu Marriage Act and also the Parsi Marriage & Divorce Act. The Special Marriage Act permits the wife to file a petition for divorce on this ground also. However, it is not available under Christian & Muslim Law. When an order of maintenance is passed against the husband in favour of the wife and there is no cohabitation for a year or more the wife can get a divorce under Hindu Law, and the Special Marriage Act.

### Mutual Consent

Divorce by mutual consent is available under the Hindu Marriage and Special Marriage Act when both parties petition for a divorce on the ground that they have been living separately for one year, they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. Divorce by mutual consent is possible under uncodified Mohamedan law.

Bigamy is recognised as an offence under the Hindu, Christian and Parsi law. There are some qualifications to obtaining a divorce on this ground. Hindu law takes cognizance of a bigamous marriage by the husband prior to the enactment of the 1955 Act. A second marriage after 1955 is void ab initio. A similar provision exists in the Special Marriage Act. A Christian woman can seek a divorce on grounds of her husband's adultery coupled with bigamy. Under Parsi law, both parties can seek a divorce on the ground of bigamy provided that the suit for dissolution should be filed within two years of knowledge of the

fact.

### Sexual Offences and Imprisonment

Rape, sodomy and bestiality are grounds of divorce available exclusively to the wife under Hindu and Christian laws as also under the Special Marriage Act. Both parties can avail of this ground under Parsi law. Imprisonment of the Respondent/ Defendant for a period of seven years or more constitutes a ground of divorce under the Special Marriage Act and also under Parsi and Muslim law. Parsi and Muslim Law require that the imprisonment sentence should be made final.

### Impotency and Non-consummation

A marriage is voidable on grounds of impotency/non-consummation of marriage under Hindu Law, Parsi Law, Special Marriage Act and under the Dissolution of Muslim Marriages Act. Further, under Parsi law, if the wife was pregnant at the time of the marriage and the husband was unaware of the fact he can sue for divorce within two years of the date of the marriage and no matrimonial intercourse should have taken place since knowledge of the fact.

### Uncodified law

The Dissolution of Muslim Marriages Act provides grounds of divorce exclusively to the woman. In addition, under uncodified Muslim law both parties can dissolve their marriage by mutual consent called Mubara'at, the husband can divorce his wife at will or 'talak' orally or in writing and the wife can divorce her husband under an agreement giving her the power to divorce her husband called 'talak-i tafweez'. Another consent divorce is the Khula divorce where the wife agrees to give a consideration to the husband for dissolution of the marriage.

### Repudiation

A woman married before the age of fifteen can repudiate her marriage before attaining the age of eighteen under Hindu and Muslim law.

There are striking similarities in the various grounds of divorce available under different personal laws and yet there are several differences already discussed above. Discriminations in the various personal laws can be abolished only with the implementation of a common civil code.

## Grounds Of Divorce Under Various Acts And Parties To Whom Available

| Ground | Hindu Marriage Act, 1955. | Special Marriage Act, 1954 | Parsi Marriage And Divorce Act, 1936. | Indian Divorce Act, 1936 | Dissolution Of Muslim Marriages Act, 1939 |
|---|---|---|---|---|---|
| 1) Cruelty | To both | To both | To both | Not Available to wife when coupled with adultery. | To wife only |
| 2) Adultery | | To both To both | To both | To husband only, To wife with another offence | None |
| 3) Desertion | To both | To both | To both | Coupled with adultery (To wife) | None |
| 4) Incurable insanity | To both | To both | To both | Not available | To wife |
| 5) Leprosy | To both | To both | None | Not available | To wife only |
| 6) Venereal diseases | To both | To both | To both | None | To Wife only |
| 7) Disappearance | To both | To both | None | None | None |
| 8) Conversion to another religion | To both | None | To both | To wife only | None |
| 9) Renunciation of the world | To both | None | None | None | None |
| 10) No Cohabitation for one year after judicial separation/ maintenance order | To both | To wife | To both | None | None (But available under uncondified Muslim Law) |
| 11) Mutual consent | To both | To both | None | None | |
| 12) Bigamy | To wife | To both | With adultery (to wife) | None | |
| 13) Rape, sodomy or bestiality | To wife | To wife | To both | To wife | None |
| 14) Repudiation of marriage before attaining majority | To wife | Not applicable | None | None | To wife |
| 15) Imprisonment for seven years or more | None | To both | To both | None | To wife |
| 16) Impotency/non-consummation of marriage | Marriage voidable (to both) | Voidable (to both) | To both | None | To wife |
| 17) Fradulent consent | Voidable (to both) | None | None | None | None |
| 18) Pregnancy at time or marriage | Voidable (to husband) | None | To husband | Not available | None |

# Existence of Dispute: Whether Necessary For Arbitrator's Jurisdiction

*An Arbitrator assumes jurisdiction if in the agreement there is an Arbitration clause. However, the law also requires that a dispute should exist before an Arbitrator can step in.* ***Anil Mehta*** *examines the law on the subject.*

The Arbitration Act, 1940 defines "Arbitration Agreement" under Section 2(a) to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

Section 2(e) of the Act defines "Reference" to mean "a reference to Arbitration."

Although, the expression used in Section 2(a) is "present and future differences....." and the definition does not use the word "dispute", for the purpose of this article,we shall use the expressions, "difference" and "dispute" interchangeably. In an old decision of the House of Lords in *L & N. W. & G. W. Joint Railways Companies vs. J.H. Billington Ltd.*, [(1899) AC 79], Lord Halsbury had observed:-

"It would be a condition precedent to the Arbitrator entering upon any form of enquiry that the person who insisted that there was a difference, to show that, the difference had arisen between the parties before the submission to arbitration was made. That is a matter which has been repeatedly decided and I should think that no lawyer should hesitate to say that is the true condition of law."

## Dispute - Condition Precedent

In Uttam Chand Saligram vs. Mahmood Jewa Mamooji [AIR 1920 Cal. 143 = 54 IC 285], it was held that it was an essential condition for the Arbitrator's jurisdiction that at the time when Arbitration is demanded there should be in existence a dispute at all events, and that this was a condition precedent for a valid award. If two people who argued as and when it suited each of them that the accrued debts due from him should not be paid, and each resisted the same as and when it suited him on the ground that this was absurd, that was a dispute.

It has often been pointed out that there are two elements or aspects of every debt, the *debitum* and *solvendum*. A dispute as to the latter would be just as much a dispute as would a dispute as to the former. The Law Reports are full of questions as to the right of set-off, and the Courts have taken much time and pain in deciding them. If they give ample room for "litis contestatio", one does not see why, when parties are at loggerheads about them, it cannot be held that there is no dispute. If a party were to say "I owe the money and I am bound to pay it at once but I am simply not going to do so" and if this position was maintained exactly and consistently, it may be that there was no room for an arbitration. Such a position would be one of "unstable equilibrium." It would be like the position of the extreme skeptic in philosophy who affirms that there is no true knowledge. This is quite unanswerable until you assert it; when you do, you contradict. Certainly, any person who is desirous of evading arbitration by taking up such a position would be well advised to write letters to explain and justify his conduct.

In *Chandmull Goneshmull vs. Nippon Munkwa*, [AIR 1921 Cal. 326] the Calcutta High Court held that a dispute implied an assertion of a right by one party and a repudiation of it by another. There was a contract between the parties for the sake of certain number of bales at a certain price, shipment during a certain period. The contract contained an Arbitration Clause in these terms:

"Any dispute as to damage, difference, inferiority.....etc. to be referred to Bengal Chamber of Commerce.....etc."

The goods were supplied. The buyer wanted a variety of information from the seller to enable him to judge whether the goods supplied were according to the contract. The seller refused to give that information. At no stage was there an assertion by the buyer that the goods had not been supplied according to the contract and consequently there was not and could not be any repudiation. Hence it was held that there was no dispute in existence and the Arbitrator had no jurisdiction.

## Mere Failure To Pay: No Dispute

In *Dawoodbhai Abdulkader vs. Abdulkader Ismailji* [AIR 1931 BOM. 164 = 33 Bom. L.R. 51] a single Judge of the Bombay High Court held that a failure to pay was not necessarily a difference. The facts of this case are interesting.

P was the sub-partner of D in certain business. Clause 20 of the Agreement between D and his partner provided that any dispute or difference arising between the partners in regard to the construction of any of the articles contained in the agreement or to any division, act or thing relating to the said partnership or the affairs of it, shall be referred to arbitration. P called upon D to render an account and to pay the amount due by him to P. On D's failure to pay, P instituted a suit praying that D be ordered to render a true account and pay the amount due to him. D applied for the stay of the suit in order to enable the parties to refer the matter in dispute to arbitration according to the agreement. The High Court held that the mere fact that a party could not or would not pay, did not in itself amount to a dispute unless the party who chose not to pay, raised a point of controversy. The High Court further held that a dispute implied an assertion of a right by one party and repudiation thereof by another. It was argued that the mere fact of calling for an account and failure to pay

constituted a difference or dispute, and came within the terms of the Arbitration Agreement. The Court held that the mere failure to pay the amount was not necessarily a difference. There can be no arbitration where there was no controversy, and hence the court held that the Arbitrator had no jurisdiction.

This view was accepted by the Calcutta High Court in *Mathuradas Goverdhan vs. Khusiram Benarshilal* [53 CWN 873].

In this case there was a contract between the Appellant and the Respondent under which the Respondent had sold to the Appellant 3 lakhs yards of hessian at Rs.28/- per 100 yards. Delivery was to be made from April to June at the rate of 1,00,000 yards per month. There was an arbitration clause in the contract. It was admitted that the goods were delivered in respect of the April delivery but there was a default in respect of half of the quantity for May and June portions, and the result was that a total quantity of 1,00,000 yards of hessian remained undelivered. The Appellants requested extension of time for delivery but the Respondents refused on the ground that they were unable to deliver the goods as they had not received the goods from their own sellers. On receipt of the communication to this effect from the Respondents, the Appellants wrote to the Respondents stating that they would hold the Respondents responsible for any loss that the Appellants would suffer in the transaction. The Appellants seemed to have given up their case for extension of time as subsequently the Appellants raised two bills and claimed a difference of Rs.3.8 per 100 yards. These bills viz., the difference bills were sent by the Appellants through the Gunny Traders Association which were accepted by the Respondents and the Appellants were asked to send their person to collect them but nobody turned up to receive the payment. Nothing happened after that, until one fine day when the Appellants sent a letter of reference to the Registrar, Tribunal of Arbitration, Bengal Chamber of Commerce, claiming Rs.14,250/- on the basis of the market rate then prevailing. The Respondents filed their reply and stated that they had admitted the liability on the basis of the earlier difference bills but not the due increased claim. The Tribunal, however, made an award for Rs.11,000/-. The question which came up before the High Court was whether the Arbitration Tribunal had jurisdiction to entertain the Appellant's claim for Rs.14,250/- when that claim was never put forth before the Tribunal and the Respondents never had any opportunity to deal with the same.

The Calcutta High Court relying upon Uttam Chand's case came to the conclusion that assuming that there was any failure or neglect to pay the amount of Rs.3,500/- mentioned in the two difference bills and that there was no dispute with regard to that amount, the Court came to the conclusion that there was never any demand for Rs.14,250/- on the basis of the market rate prevailing and could not be set up as any dispute between the parties with regard to the same. The Court held that the existence of the dispute was an essential condition for the jurisdiction of an Arbitrator. If there was no dispute there could be no right to demand arbitration at all. Justice Mitter, whilst referring to the L. & N. W. & W. Joint Railway Companies Case [1889 AC 79] pointed out that before the Arbitrator could enter upon the reference, it must be shown that a difference had arisen between the parties before the "submission" and that the Arbitrator would have jurisdiction only to adjudicate upon the particular difference which had arisen before the submission.

The Calcutta High Court also cited with approval the view taken in *Dawoodbhai's* case. It observed that "in order to make out the jurisdiction of the Tribunal of Arbitration, the Appellants must show that the subject matter of the reference was some dispute between the parties and that the particular dispute had arisen actually before the matter went before the Arbitrator. The claim that was referred to in two bills was the only claim which was before the parties. The claim that was made in the letter of reference viz., the demand for Rs.14,250/- was never communicated to the Respondents. A dispute implied an assertion of right by one party and repudiation thereof by another. There was no such assertion of right and therefore, there could be no repudiation with regard to the matter which was actually referred to Arbitration. The jurisdiction of an Arbitrator depended not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute.

"It is unfair that a party should be driven to a Tribunal of arbitration and confronted with a claim there which had never been put forward previously and which he had no chance of considering at all. We are not resting our decision on the ground of equity or fairplay. It is a question of authority or jurisdiction. It is only the existence of a difference or a dispute which confers jurisdiction upon a private forum to adjudicate upon that dispute." The Court, therefore, held that since there was no pre-existing dispute between the parties which could be arbitrated upon, the Bengal Chamber of Commerce had no jurisdiction to deal with the matter.

### Failure To Pay Coupled With Circumstances May Be A Dispute

In *Nandram Hanutram vs Raghunath & Sons Ltd.* [AIR 1954 Cal. 245], the Calcutta High Court made a slight departure from its views expressed earlier and held that "a dispute implies an assertion of right by one party and repudiation thereof by another. The repudiation by another party may be either express or implied and may be by words or by conduct. Failure to perform the contract and to pay the amount claimed may take place under such circumstances as may justly lead to the inference of repudiation and denial of the right of the other party. Coupled with other circumstances, the failure to pay the claim may constitute a difference between the parties. Failure to pay under a claim of a right is certainly a dispute."

This was a case of a contract for sale by the Respondents to the Petitioner of Hessian Cloth, delivery in April to June in equal monthly instalments. The Respondents had tendered the goods but the Petitioner failed to take delivery and thereupon, after due notice to the Petitioner, the Respondents re-sold the goods and submitted the bills of difference in price which were not paid. There was unusual silence on the part of the Petitioner throughout and the Petitioner did not even send any letters to the Respondents in answer to the several demands made by the Respondents. The Respondents referred their claim to the

Arbitration of the Bengal Chamber of Commerce and the Chamber made an award. In this case, the Calcutta High Court having regard to a very wide Arbitration Clause which provided that the Bengal Chamber of Commerce had jurisdiction to decide all the matters, questions, disputes, differences and/or claims arising out of the contract, held that even though the Petitioner was silent, the Bengal Chamber of Commerce had jurisdiction and the Court held that there was sufficient dispute or difference prior to the reference.

The Madhya Pradesh High Court in *Dilip Construction Co. vs. Hindustan Steel Ltd.* [AIR 1973 MP 261], held that (i) "the existence of a difference or dispute was an essential condition for the Arbitrator's jurisdiction to act under an arbitration clause in an agreement; (ii) the jurisdiction of an arbitrator depended not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute; (iii) A dispute implied an assertion of a right by one party and repudiation thereof by another; (iv) a failure to pay was not a difference, and the mere fact that a party could not or would not pay did not in itself amount to a dispute unless the party who chose not to pay raised a point of controversy regarding for instance, the basis of payment or the time or manner of payment, etc.

In coming to this conclusion the Court followed 1899 AC 79; *(Jt. Railway Companies* Case); AIR 1920 Cal. 808 *(Balmukund's case);* AIR 1921 Cal. 342 *(Chandmull Goneshmull's* case); AIR 1931 Bom 164 *(Dawoodbhai's* case) and AIR 1954 Cal. 245 *(Nandram Banutram's* case).

From the above decisions it is apparent and clear that the existence of dispute or a difference is a condition precedent to the exercise of jurisdiction by an Arbitrator.

## Counter Claims Also Must Be A Matter Of Dispute

In *Bharat Barrel and Crum Mfg. Co. (P) Ltd. vs Indian Oil Corporation and Another* [84 CWN 672], an interesting question arose whether "a counter claim" or "a cross-claim" could be entertained by an Arbitrator in a reference if a counter claim or cross-claim was not made prior to the reference.

After the claims had been filed by the Petitioner before the Arbitrator as provided by the terms of contract, the Managing Director of IOC by a letter allowed IOC to make a counter claim as follows:

"The Learned Sole Arbitrator is hereby empowered to consolidate the claims of both the Claimants and the Respondents to adjudicate the dispute of the parties and give his award."

After that, IOC filed a counter claim of Rs.9,51,885.55 before the Arbitrator.

A contention was taken that this counter claim was never put forward nor any demand ever made prior to the filing of the counter claim and hence the Petitioners had no opportunity either to admit or to dispute this counter claim which was for the first time brought to light. It was contended that there was no dispute in existence when this counter claim was made and as such, the Arbitrator did not have jurisdiction to entertain the same.

The High Court held that "a counter claim in a reference is a cross claim analogous to making counter claim in a civil suit. If a counter claim in a civil suit cannot be entertained unless there is a cause of action in the existence of a cross claim in a reference cannot be entertained by an Arbitrator unless there is a dispute in existence."

The Court also held that even if a counter claim had arisen out of the same contract, if there was no dispute in existence, it could not be referred to arbitration. It held that there might be successive references in respect of different disputes arising out of the same contract at different stages. It was true that if mutual claims could be decided in one reference, that would save money, time, energy and trouble for both the parties. The Court observed that a separate reference would mean inconvenience for the parties, further expenses and delay but then the law of the land had to be followed. Absence of a "dispute" regarding a "claim" means "complete absence of jurisdiction" of the Arbitrator to try that matter. On that account, the Court held that the counter claim in question could not be entertained by the Arbitrator and held that the consolidation of the claim of IOC made by its Managing Director was without any authority.

## Enlarging Time & Consent For Reference

Any discussion on the question of "the existence of a dispute being a condition precedent to the jurisdiction of the Arbitrator", would be incomplete if we did not consider two other important aspects viz., (A) whether the Arbitrator, Court or the parties has or have the power to enlarge the time of the Reference to enable the Arbitrator to make and publish his Award having regard to the provisions of Sections 3 and 28 of the Arbitration Act, 1940 read with Clause 3 of Schedule I to the said Act and (B) whether consent of both the parties was necessary under an Arbitration Agreement for a Reference to Arbitration to be valid.

As for enlarging time, in *State of Punjab vs Hardyal,* [AIR 1985 SC 920]. the Supreme Court has held that a perusal of Sections 3 and 28 and clause 3 of Schedule I of the Act indicates that it is open to the parties to an Arbitration Agreement to fix the time within which the Arbitrator must give Award, but it has to be stated in the Agreement itself. Under no circumstances does an Arbitrator have any power to extend the time of the Reference and a clause in an Arbitration Agreement giving the Arbitrator power to enlarge time shall be void and of no effect under Section 28(2) of the Act, except where all the parties consent to such an enlargement. The Supreme Court also held that the law precluded parties from extending time after the matter had been referred to the Arbitrator but the Court had the power to extend time even after the Award had been given or even after the expiry of the period prescribed for the Award.

As for consent for reference, in *Banwari Lal vs P.C. Aggarwal* [AIR 1985 S.C. 1003], the Supreme Court was considering S.2 (a) which defines the expression "Arbitration Agreement" and S.2 (e) which defines a "Reference." The question was whether, in a given case having regard to the terms of an Arbitration Agreement, a party to the contract could unilaterally make a Reference of disputes to Arbitration without the assent of the other party to the contract and in the absence of such assent, the party desiring arbitration was bound to apply to Court under S. 20 of the Act. The Supreme Court held that where an Arbitration Agreement

conforms to the definition given in S. 2 (a) the party desiring arbitration can straight away approach the Arbitrator or Arbitrators and resort to Section 2 of the Act was unnecessary because consent to such actual reference to arbitration shall be deemed to be there as the concept of making an actual reference of a particular dispute or disputes for adjudication to a named Arbitrator or Arbitrators, was included in the Agreement signed by the parties and the aspect as to whether the differences or disputes arose subsequently would be inconsequential because the Arbitration Agreement as defined in Sec. 2 (a) covered not merely present but future differences also.

The Supreme Court, whilst dealing with the observations made in *Thawardas Pherumal's* case (AIR 1955 SC 468) further held that the true effect of the observations of the Court in that case was that in the case of an Arbitration Agreement which squarely falls within the definition of the expression "Arbitration Agreement" as given in Sec. 2 (a), there would be included in it a consensual actual reference by the parties of all their disputes including questions of law that may arise later but the Arbitrator's Award on such questions of law cannot be said to have been referred to him as required by the law of Arbitration. However though the Reference would be valid, the Award and his decision on questions of law, if erroneous on the face of it, would be liable to be set aside by the Court.

### Conclusions

1. If there was no dispute there could be no right to demand Arbitration.
2. A dispute implied an assertion of a right by one party and repudiation thereof by another.
3. Mere fact that a party could not or would not pay, did not in itself amount to a dispute unless the party who chose not to pay raised a point of controversy.

AND FINALLY: Is the Law of the land such an ass, that we must have volumes and volumes of Law Reports before some one wakes up from the deep slumber of KUMBHAKARNA and suitably (but quickly) amends the law of Arbitration to avoid this collossal waste of time, money and energy in Arbitration.

# Misconduct Under Standing Orders

*From the days when misconducts could be enlarged at the whims of an employer, the struggle by labour has given way to misconduct regulated by statute and specifically enumerated.* ***P.D. Kamerkar*** *elaborates.*

The essence of the relationship of master and servant is the control exercised by the master over the servant. The servant contracts to carry out the orders of the master for remuneration. Any breach of this arrangement constitutes misconduct inviting penalty. By necessary implication the employer became the unquestioned arbiter of the right and wrong of the conduct of his employee. This concept was at the root of the old notion that the list of misconducts enumerated in the standing orders of an industrial undertaking was not exhaustive but merely illustrative.

The advance of technology in industry brought in specialisation and the growth of specialisation narrowed the scope of control over the worker's manner of performance of the duties. The growing strength of organised labour also challenged the absolute right of the employer to dictate what constitutes misconduct and to alter its concept according to what suits him at a given occasion.

### Industrial Employment (Standing Orders) Act, 1946

The Industrial Employment (Standing Orders) Act, 1946, came to be enacted with the object of 'defining with sufficient precision' the conditions of employment in industrial establishments. In *Glaxo Laboratories (India)Ltd. v Presiding Officer, Meerut* [AIR 1984 SC 505] the Supreme Court has observed thus:

".....The developing notions of social justice and the expanding horizon of socio-economic justice necessitated statutory protection to the unequal partner in the industry namely, those who invest blood and flesh against those who bring in capital. Moving from the days when whim of the employer was supreme law, the Act took a modest step to compel by statute the employer to prescribe minimum conditions of service subject to which employment is given. The Act was enacted, as its long title shows, to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. The movement was from status to contract, the contract being not left to be negotiated by the unequal persons but statutorily imposed.....".

The concept that the misconducts enumerated in standing orders could be enlarged and added to at the will of the employer is contrary to the very object and scheme of the enactment which prohibits 'adding to or otherwise varying or contradicting' standing orders applicable under it.

### Misconduct Must Be Enumerated

In Rohtak and Hissar District Electricity Supply Co. Ltd. Vs Uttar Pradesh (AIR 1966 SC 1471) the Supreme Court repelled the conclusion that acts other than those enumerated could per se be misconduct, ruling that it cannot be left to the vagaries of the management to say ex post facto that some acts of omission or commission nowhere enumerated in the relevant standing order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant standing order but yet a misconduct for the purpose of imposing a penalty. On this journey from loyalty to the master to loyalty to the job, labour has had to pay a very heavy toll.

The law is now well settled that misconduct in industrial relations is not an abstract concept of conduct incompatible with the due and faithful discharge of one's duty nor does it have any connection with ethics or morality. What will constitute misconduct must now be expressly stated in the contract of service

and, where the Standing Orders Act applies, in no document other than the standing orders approved by the Certifying Authority constituted under the Act and in their absence the Model Standing Orders prescribed under the Act. The Schedule to the Act gives the matters to be provided in Standing Orders.

Item 9 of Standing Orders being, "Suspension or dismissal for misconduct and acts or omissions which constitute misconduct". The proviso to sub-section (1) of Section 3 prohibits any deviation from the Model Standing Orders relating to any matter set out in the said schedule to the Act. Therefore, for any act of an employee to constitute the certified Standing Orders must conform to the Model Standing Orders.

The text of the provisions of the Model Standing Orders promulgated by the Government of Maharashtra enumerating acts constituting misconduct are reproduced separately (See BOX). The following need close scrutiny:

(i) Wilful insubordination or disobedience of lawful and reasonable orders.
(ii) Dishonesty in connection with the business or property of the employer.
(iii) Act subversive of discipline on the establishment.

### Disobeying orders

In order that non-compliance of an order should amount to disobedience it will be necessary to show that the impugned act is deliberate or wanton. In order that such disobedience should have penal consequence, it must not only be lawful but also reasonable. The employee is entitled to consider whether such order is consistent with his contract of employment. Will it be proper for an employee to refuse to perform an act involving risk to life or limb? Can one refuse to carry out orders which will expose him to ridi-

## Bombay Industrial Employment Rules, 1959. (Standing Orders)

### Model Standing Orders

#### Standing Order No. 24.

The following acts and commissions on the part of a workman shall amount to misconduct:-

(a) wilful insubordination or disobedience, whether or not in combination with another, of any lawful and reasonable order of a superior;

(b) going on an illegal strike or abetting, inciting, instigating or acting in furtherance thereof;

(c) wilful slowing down in performance of work, or abetment or instigation thereof;

(d) theft, fraud or dishonesty in connection with the employers' business or property or the theft of property of another workman within the premises of the establishment;

(e) taking or giving bribes or any illegal gratification;

(f) habitual absence without leave, or absence without leave for more than ten consecutive days or overstaying the sanctioned leave without sufficient grounds or proper or satisfactory explanation;

(g) late attendance on not less than four occasions within a month;

(h) habitual breach of any Standing Order or any law applicable to the establishment or any rules made thereunder;

(i) collection without the permission of the Manager of any money within the premises of the establishment except as sanctioned by any law for the time being in force;

(j) engaging in trade within the premises of the establishment;

(k) drunkenness, riotous, disorderly or indecent behaviour on the premises of the establishment;

(l) commission of any act subversive of discipline or good behaviour on the premises of the establishment;

(m) habitual neglect of work, or gross or habitual negligence;

(n) habitual breach of any rules or instructions for the maintenance and running of any department, or the maintenance of the cleanliness of any portion of the establishment;

(o) habitual commission of any act or omission for which a fine may be imposed under the Payment of Wages Act, 1936;

(p) canvassing for union membership or the collection of union dues within the premises of the establishment, except in accordance with any law or with the permission of the Manager;

(q) wilful damage to work in process or to any property of the establishment;

(r) holding meetings inside the premises of the establishment without the previous permission of the Manager or except in accordance with the provisions of any law for the time being in force;

(s) disclosing to any unathorised person any information in regard to the processes of the establishment which may come into the possession of the workman in the course of his work;

(t) gambling within the premises of the establishment;

(u) smoking or spitting on the premises of the establishment where it is prohibited by the employer;

(v) failure to observe safety instructions notified by the employer or interference with any safety device or equipment installed within the establishment;

(w) distributing or exhibiting within the premises of the establishment hand-bills, pamphlets, posters and such other things or causing to be displayed by means of signs or writing or other visible representation on any matter without previous sanction of the Manager;

(x) refusal to accept a charge sheet, order or other communication served in accordance with these Standing Orders;

(y) unauthorised possession of any lethal weapon in the establishment.

Explanation - No act of misconduct which is committed on less than three occasions within a space of one year shall be treated as habitual.

cule or which are calculated to cause insult? The answer is yes. The reason is that in order to be compulsive involving penal consequences, the order must not only be lawful but also reasonable. It must, however, be borne in mind that it is for the person disobeying an order to show that it is unreasonable or unlawful. One must be circumspect in undertaking the course of refusal and it must not appear to be an act of sheer sentimentality or truculence.

There are no limits on the ingenuity of a dishonest person. Therefore, there can never be an exhaustive list of dishonesty. There is no dishonesty without the intention of causing wrongful gain to oneself or wrongful loss to some one else. All that one can say is that a contract of employment enjoins every employee to be honest in his dealings with the business and property of the employer.

### Subverting Discipline

It is the so-called act subversive of discipline which gives rise to several conflicts. The generally accepted view was that the words "on the premises of the undertaking" govern "discipline" and not "committed." Therefore, what was important was whether the impugned act subverts the discipline on the premises of the undertaking, no matter where it is committed. This interpretation provided a handy weapon for an employer to indulge in victimisation of trade unionists. Pick any incident occuring outside the premises, put up witnesses who will implicate the intended victim, engage a professional inquiry officer to uphold the charge and proceed to eliminate the unwanted. This was the well settled conduct. An industrial arbitrator must not interfere with a finding which is not perverse, even if through it he can perceive the mischief.

In the *Glaxo* case the Supreme Court observed, "the employer has hardly any extra-territorial jurisdiction. He is not the custodian of the general law and order situation nor the guru or mentor of his workmen for their well regulated cultural advancement. If the power to regulate the behaviour of the workmen outside the duty hours and at any place wherever they may be was conferred upon the employer, contract of employment would be reduced to contract of slavery."

*P.D. Kamerkar is an advocate practicing in the Bombay High Court.*

**These Grey Pages are a regular feature of the magazine. They have separate running page numbers. At the end of the year they will be compiled and indexed allowing the reader to use them as a ready reference.**

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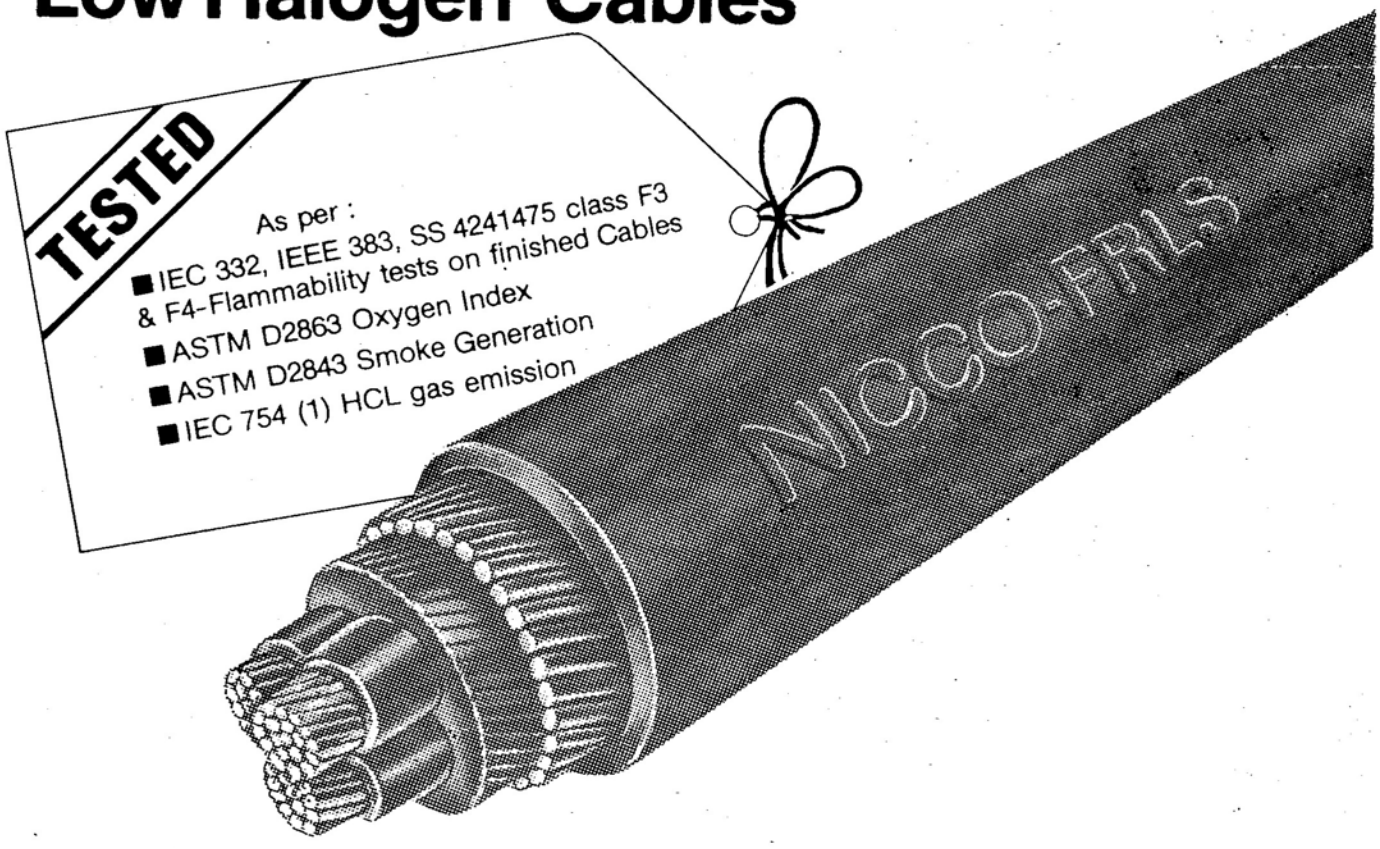


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## SPECIAL REPORT

# No Rehabilitation for Project Affected

*Though the Maharashtra Resettlement of Project Displaced Persons Act was enacted in 1976, its implementation, like a host of other laws enacted for the benefit of the poor, has been tardy.* ***Deepti Gopinath*** *reports on displacement of people on account of the proposed dam at Andhali at Satara and how the Act is being breached.*

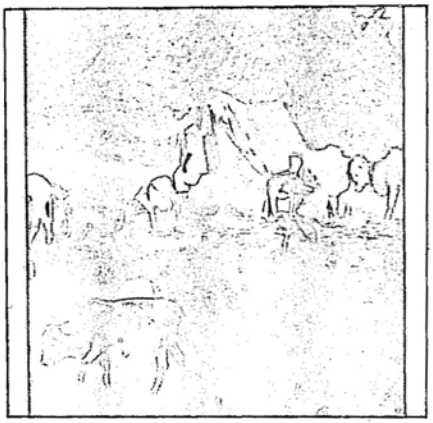
### Dam Proposal And Objections

In the year 1956 a proposal was made by the State of Maharashtra to construct a dam in the district of Satara in Maharashtra. After the proposal was sanctioned a site was chosen in the village of Bodake on the river Mann. It was to be known as the Andhali Medium Irrigation Dam. The estimated expenditure was then Rs.1,14,85,000/-. The estimate has now gone up to Rs.5,32,32,000/-.

The site was first selected in 1954. Since then the project has been vehemently opposed by the villagers of Bodake and its neighbouring villages of Andhali and Boratwadi whose cultivable land would be totally submerged in the river by the construction of the dam, and its residents rendered destitute. They suggested another site at Joradi which would be, comparatively, suitable for the construction, less expensive and the area submerged would be only 125 acres. Though the Goverment undertook to survey the alternate site, nothing was disclosed or discussed with the people.

Instead, all of a sudden in 1957 land acquisition proceedings were started and 1300 acres of land were acquired according to the Government's original proposal. The Irrigation Department estimated the costs of acquisition at Rs.22,36,000/- out of which only Rs.2,36,000/- was set aside for compensation. Many of the farmers raised objections to this as their land was under cultivation and it had several wells on it and pipe lines running through it by which it was irrigated. They suggested that the Government conduct a spot check to estimate the loss.

As a result of this, a survey was conducted by the Revenue Department, of the area to be submerged, by which a loss of Rs.24,40,426/- was estimated, on account of submergence of irrigated land and fruit bearing trees. In 1960, the Commissioner of Pune, who was



**Project Displacement**

formerly the Director of Agriculture, submitted a report to the Government in which he stated that the proposal of the construction of the dam at Andhali was not feasible on account of the heavy costs which would be incurred as a result of the loss of the cultivable lands to the farmers.

### Proposal Dropped

The farmers raised objections to the technical feasibility of the construction of the dam and convinced the authorities that the trial pits would not yield hard rock even upto 33 feet in accordance with the plan map. Convinced by these arguments and the report of the Commissioner and the spot check inspections in 1965, the Government finally declared in the State Assembly its intention to drop the proposal of building the dam in the village of Bodake because of the uneconomic benefit ratio.

Between the period of 1966 and 1972, the Government incurred heavy expenditure on nala banding, levelling and the construction of percolation tanks in the catchment area. The farmers, now assured by the Government's public declaration to drop the proposal of the dam, and also seeing it incurring expenditure on land improvement, started investing time, energy and money on the land by digging wells and relay pipe lines, thus substantially increasing the irrigated land.

This victory of the people was, however, shortlived. Between 1971-72, persons who were going to benefit from the building of the dam at the expense of the others, together with "social workers" demanded that the project be restarted. They gave a notice to go on a hunger strike. Conceding to the demand, the Government assured the people that rehabilitation of the displaced persons would be their prime responsibility and that it would be carried out to the satisfaction of the people. It also promised that all information maps, papers, statistical data of valuation would be made available on demand.

In August, 1978, once again Land Acquisition proceedings were started. The farmers of the effected area made five representations to the Government demanding information, copies of the plan, measurement particulars, record of rights, valuation measures and rehabilitative measures for the project affected farmers. They repeatedly requested the Government to make clear to them what measures were being taken for their rehabilitation. The Land Acquisition Officer gave no reply to any of these requests. However, in 1978, the Maharashtra Resettlement of Project Displaced Persons Act of 1976 (the Act for short) was made applicable to this project by the issuing of notification from the Government.

### Maharashtra Resettlement of Project Displaced Persons Act

Under the Act certain benefits are conferred on the project affected persons. By virtue of the construction of the dam the land belonging to the affected persons is likely to be totally submerged. They will therefore be classified as displaced persons from the affected zone. Under the Act, the State is obliged to resettle the affected people in the benefitted zone. This Act has

been made applicable to the Andhali Project by the notification issued by the Government under section 11 of the Act. Though the farmers have made repeated requests to give them details of the extent of land from which persons are likely to be displaced and extent of land which may be available to be granted to the displaced persons, no such information has been forthcoming. Under Section 13 of the Act, the State is liable to publish this information and to assess the land. They are also liable to indicate the location of such land where the resettlement is to be made.

Under Section 17, the State must, as far as practicable, grant land to displaced persons according to the provisions of Part I of Schedule B of the Act. The State is also obliged to issue a notification calling upon the affected persons to state whether they require land. So far it is unknown whether such notification has been issued.

Under Section 20 of the Act the Resettlement Officer is required to prepare a draft scheme for resettlement of displaced persons, indicating the date of submergence. This scheme must also give detailed information of actual numbers of persons to be benefitted and affected, the extent of land in either area held by each person, the list of names of displaced persons, the extent of land proposed to be granted to each such person from the available land and the site of such land, and such similar lists in the benefit area and also to account for the extent of land available here for reallocation. The draft Scheme is required to indicate the time schedule for the shifting of the displaced persons from the affected zone to the new allocated area according to the submergence schedule of the project. No scheme has till date been published.

Sub-section 4 of Section 20 of the Act requires the Deputy Director to afford facilities to the displaced persons to see for themselves the agricultural land proposed for their reallocation on occupancy price. A copy of this draft scheme is to be submitted to the Director Commission and Zilla Parishad. None of this appears to have been done.

Under Section 21 the Deputy Director is required to publish the draft scheme in the official gazette and call for objections from the displaced persons. After the objections are received he is required to publish the scheme with or without modifications and the aggrieved persons have the right to approach the Commissioner within 30 days of publication of the scheme. Under Section 23 the Deputy-Director, after publication of the sanctioned scheme may grant land, on payment of occupancy price, to the displaced persons. This has obviously not been done.

At a meeting of the Committee of the Project Affected Persons in April, 1983, the Collector convinced the people that the question of valuation of land in the submerged area would be treated on par with the land of the benefitted area. However, the Committee was suddenly dissolved without giving any reasons, and the people were informed that the Award was passed and that every affected person would have to accept the compensation finally decided by the Land Acquisition Officer.

## Land Acquisition Award

On 19th September, 1986, an Award was made for 84 hectares of land on which the project is to be commenced. Abysmally low rates of compensation have been awarded. Though it is mandatory for the Land Acquisition Officer to visit the site and make a detailed inquiry into the objections made by the farmers he did not do this. Instead, the Head Quarters of the officer was set up at a distance of 125 km. from the affected area and it is virtually impossible for the farmers to visit the office and lodge their complaints. It was with an intention to harass the farmers that this office was kept at this distance, where even an S.T. bus ride costs Rs.30/- a trip. Though the notice under Section 6 of the Land Acquisition Act was published on 1 June, 1978 the Land Acquisition Officer filed his award on 19th September, 1986, that is after a period of eight years

Much to the surprise of the farmers, in November, 1986, the Government forcibly commenced construction of the dam at the villages of Boratwadi and Bodake with the help of the police. Standing crops were destroyed and bulldozed and the land was forcibly occupied. No panchnama was made of the standing crops.

For some strange reason fresh notices are being issued under Section 4(1) for the same land for which notices were issued in September, 1985. The Land Acquisition Officer has valued the land to be acquired as on 1.6.78 which is grossly below the current market value, leading to a heavy loss to the affected farmers. In view of the fact that notices have been reissued under section 4(1) on 20.7.86, the land ought to have been valued on that date,not as on 1.6.78. The Award dated 19.9.1986 in respect of the said 84 hectares is worked out at a total value of Rs.11,07,441.32 which comes to an average of Rs.5,000/- per acre of irrigated land which is far below the prevailing market value.

## Violation of Article 21

Most people in the affected area are entirely dependent on the land for their livelihood. Each individual does not hold more than half an acre of land. Their only source of income is from cultivating the land which is barely sufficient to support themselves and their families. Forcible taking away of their land in this unjust and unreasonable way has resulted in a loss of livelihood, thus violating their right under Article 21 (right to life) of the Indian Constitution.

Proper reading of the provisions of the Maharashtra Resettlement of Project Displaced Persons Act of 1976 will make it abundantly clear that the obligation to provide land to the displaced persons from the project affected areas must be fulfilled either simultaneously with or prior to their displacement.

Though the Maharashtra Resettlement of Project Displaced Persons Act of 1976 has been made applicable to this project since the year 1978 nothing concrete has actually happened in terms of rehabilitating the displaced persons. None of the provisions of the Act have been put into practice. On the contrary, the people have forcibly been evicted and their property destroyed, leaving them destitute. Some of the displaced persons together with a voluntary organisation working with them and the local panchayat plan on taking up the issue by filing a writ petition in the High Court of Bombay. Unless the displaced persons are rehabilitated immediately, the project itself will be self-defeating.

## COMMENT

# Wife's Right to Reside in the Matrimonial Home

*In a recent judgement in an Appeal from Order, Justice Daud of the Bombay High Court held that the wife had no right of re-entry to the matrimonial home.* **Rabindra Hazari** *points out the established law which runs counter to the judgement.*


Does a Hindu wife have a right to reside in the matrimonial home? No, says Justice S.M. Daud of the Bombay High Court in *Sagarmal Pukhraj Jain (Sanghvi) & Ors. vs Naina Indirmal Jain & Ors.* (Appeal from Order No.1003 of 1986, dated 12th December, 1986 Unreported).

In this case, after being married for five years, the wife was driven out of her matrimonial home in 1984. She took refuge with her parents. In 1985, the death of their minor son effected a reconciliation for two months. Thereafter, in desperation, the wife tried to re-enter her matrimonial home. As entry was refused she spent the night outside the home. The next day the wife entered her matrimonial home. Shortly thereafter, she secured ad-interim orders restraining her husband and others from throwing her out or interfering with her free access to the premises.

### Wife's Reentry And Public Disorder

In appeal, Justice Daud vacated the ad-interim injunction. Justice Daud held that the wife's re-entry into her matrimonial home amounted to "forcibly capturing the premises." The wife had argued that the premises was the matrimonial home in which she had the right to reside. The fact that she had been kept away from the place for two years made no difference to her right to come back and recommence living in the matrimonial home as and when she wanted. Justice Daud held that "if this argument was accepted in all its implications, it would be impossible to prevent public disorder on a very wide scale. Today it is a case of a wife entering her alleged matrimonial home. Next, it will be others, including persons with all sorts of claims,existent, bonafide, dubious and dishonest. A state subject to the rule of law, and India certainly is one,cannot permit this to happen - nay, not even in the name of feminism or for protection of the deserving."

Justice Daud, however, noted that it was not known whether the matrimonial home was owned by a joint Hindu family or the husband alone. This was important as "the question as to who the owner is and who is in possession, would make a great difference to the right of an abandoned wife."

### English Law

However, the decision is quite contrary to established law. As the right to reside in a matrimonial home is not provided for by a statute- resort has to be taken to common law - hence English law. The English courts have so fashioned law as to give women personal and proprietary rights which never existed before. The Christian Church always insisted on the obedience of a woman to her husband. The conon law of the Church translated this precept into a legal obligation. Moreover, upon marriage all the wife's property automatically belonged to her husband. Lord Denning observed in *Bendall vs Mc Whirter* [(1952) QB 475] that under the old common law the wife "had no rights at all apart from those of her husband. She was treated by the law more like a piece of his furniture than anything else. The husband could not sue her in ejectment or tresspass, but neither could he sue a piece of furniture. He could bundle his furniture out into the street, and so he could his wife. The law did not say him nay."

However, by various Acts of Parliament, especially the Married Womens' Property Act, 1882, women were entitled to own and dispose of property separately from their husbands. In the post-war years it was under this Act that the further question as to whether a wife has the right to reside in the matrimonial home was decided.

In 1942, in *Bramwell v/s Bramwell* [(1942) I KB 370 at 374], Goddard LJ held that the husband's only way of getting his wife out of the house was to make an application under section 17 of the Married Women's Property Act, 1882. This section gave the court a very wide discretion in the matter. Accordingly in H v/s H, when a husband claimed that he had an absolute right to turn his wife out, it was held that he had no such right, but that it was a matter of discretion for the court. This was followed in *Stewart v/s Stewart* [(1948) 1 KB 507 at 573]. It is now settled law in England that a deserted wife has rights as against her husband to stay in the matrimonial home unless and until an order is made against her under section 17.

A major problem was whether the right of the deserted wife was binding on the husband's successors in title. In *National Provincial Bank v/s Ainsworth* [(1965) AC 1175], the Law Lords unanimously overruled a long line of

decisions by holding that, if the husband remained himself as the sole owner of the house, with the title vesting in him, he could not himself turn her out. She had a personal right as against her husband. But she had no equity in her favour. She had no right at all against any one else.

## Matrimonial Homes Act, 1967

Public opinion demanded legislation to overrule the Law Lords decision. This led to the enactment of Matrimonial Homes Act, 1967. The Act protects a spouse who has no proprietary, contractual or statutory right to remain in the matrimonial home. Thus, the principal objects of the Act are to confer on the non-property owning spouse, usually the wife, statutory rights of occupation, which are made a charge on the property-owning spouse's estate or interest and can be registered, so that there is now better protection for the wife's occupation of the matrimonial home.

However, the position of a wife who was a joint owner with her husband was altogether on different footing. She was not covered by the Matrimonial Homes Act, 1967. As a joint owner, the wife had a legal right to own and occupy the house. However, in *Gurasz v/s Gurasz* [(1969)3 All.ER.82] where the wife fled the matrimonial home with her children to escape from her husband's extreme cruelty, the court ordered the husband out of the matrimonial home, even though he was a joint owner and allowed the wife and children to return.

Under a recent legislation, the Domestic Violence Act, 1976, County Courts can grant injunction to protect a battered wife, even though the home is only in the husband's name and it belongs to him without her having a share in it. She can get an order excluding him from the house and even have him arrested if it is necessary for her protection. In *Davis v/s Johnson* [(1979) AC 264] it was held that a woman living with the man together in the same house as man and wife has the same protection under the Act as a lawfully wedded wife.

## Hindu Law

Under Hindu Law the right of a wife to reside in the matrimonial home is not explicit but it can be inferred from the provisions of the Hindu Adoption and Maintenance Act, 1954.

Section 18 of that Act deals with maintenance of the wife. A Hindu wife, whether married before or after the commencement of that Act, is entitled to be maintained by her husband during her lifetime. Marriage revolves around conjugal rights which require the spouses to live together in the same house, i.e. the matrimonial home. The maintenance of wife contemplated in S.18(1) necessarily means maintenance in the matrimonial home. This is the normal state of affairs. Over and above this, the Act contemplates under S. 18(2) an abnormal state of affairs whereby the spouses remain married but do not reside together and do not enjoy conjugal rights, yet the wife's claim to maintenance continues. S. 18(2) reads :

"A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance".

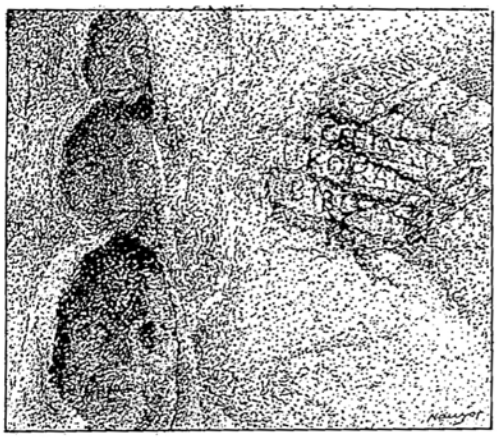
The right of a wife for maintenance is an incident of the status or estate of matrimony and a Hindu husband is under a legal obligation to maintain his wife. The obligation to maintain the wife is personal in character and arises from the very existence of the relation between the parties.The rule laid down in S.18(1) cannot, however be said to be absolute although the right exists independently of the possession of any property by the husband ancestral or self-acquired. (*Mulla: Principles of Hindu Law*, 14th Edition P.1017).

Thus, the emphasis made by Justice Daud as to whether the matrimonial home is the self-acquired property of the husband or the Hindu joint family property should not obstruct the right of a wife to reside in the matrimonial home.

## COMMENT

# Towards A Non-sexist "Civil Code"

*The abstract slogan repeated about the "Uniform Civil Code" does not attempt to criticize the sexist bias in all personal laws.* ***Gail Omvedt*** *argues in this article that the Code should not only be concretely formulate but that couples should be allowed to opt out of it in the transitional phase towards a non-sexist Indian Civil Code.*



After the reverberations of the "common civil code" fiasco of the last two years it is time for the women's movement to think seriously and collectively about the issue. As long as it remained at the level of sloganeering it turned out to be harmful. It is not only that the term "common civil code" was used in a reactionary way - by Hindu fundamentalists who took it as a stick to beat the Muslims with or by Muslim fundamentalists who turned around to treat any talk of the rights of women as an attack on their religion.

The term itself is also quite vacuous and open to misuse. Its primary meaning has always been that there should be one common law as between the different religious communities in India; by itself does not define this law as necessarily non-sexist and a equalitarian. It is quite possible for a "common" code to be patriarchal - this after all has been true in European countries for centuries (remember the saying, "In English common law the husband and wife are one, and that one is the husband"!). The women's movement in India has indulged in a certain amount of wishful thinking that "common civil code" means a non-sexist code - but for the masses of people it seems clearly to have a different meaning, referring to a certain way of conceiving "national integration." To put it more bluntly, Muslim men should not be allowed to oppress their women in any way different from Hindu men!

### Concretizing the Code

What women want is not a "common" code but an equalitarian one. This in fact was the resolution adopted after intensive debate at the December 1985 women's conference in Bombay. The resolution calling for an equalitarian civil code made it clear that all religions oppressed women. Yet so small was our voice and so loud the voice of reaction that the conference resolution was simply headlined as giving support to a "common civil code".

What is urgently needed is to get out of the abstract and emotive field of slogans and talk concretely about exactly what legal provisions should exist in regard to marriage, divorce, maintenance and child support, child custody (and generally the righs of children), property and other factors. It is necessary to think not only legally but also politically-- What will be the process of moving towards instituting and implementing any kind of ideal code we might formulate? We need to organize discussions, workshops and seminars at all levels with lawyers and women activists, as well as on a broader basis with ordinary women and men who are perhaps more capable of understanding the basic issues than many think and who will, after all, provide the force behind any move to change and implement laws.

This process should be possible now because there seems to be increasing concern about such issues among the masses of women as well- particularly with the number of divorced or deserted women among all communities growing daily, women who seem increasingly ready to fight for their rights. Those who have seen adivasi women in Dhule district voicing their demand for legal reform, or the peasant women coming up to the platform of the Shetkari Sanghatana at Chandwad to say "we want our hissa!" will realize that such women, given some scope, are ready to stand up on such issues. But it is necessary to give a framework for such a fight, to provide organizational support, and to provide legal expertise and rationale. This task is all the more urgent now because the government itself is moving to formulate a "common civil code"- and though this will only be optional; it will undoubtedly provide the frame work for future laws and action.

### Towards An Equaltarian Code

In the interest of furthering such a discussion, here are a few comments about some major points:-

Perhaps we should start by saying something about the process. At present there is an incredible variety of different and very messy "personal laws in India, and a tremendous amount of emotional and political force (not to mention economic self-interest) organized around them. We know we are not going to wake up one morning either after an imagined revolution or as a result of some sudden decision by the existing state and suddenly find our ideal "equalitarian civil code" declared applicable to all. Then how are we going to move in the direction of a rational law?

Here, the formulation of the issue in the Shetkari Sanghatana's Chandwad session is very interesting. Their resolution reads as follows:

(4) every citizen of the Republic should be a priori considered as being governed by the common civil code; however, any citizen or his guardian should have the possibility of opting for the civil system of any of the established religious codes;

(5) the official judicial system should

not intervene in civil disputes between citizens opting for a given religious code;

(6) the disputes between citizens opting for a single religious code shall be decided according to the common civil code, should any of the parties take recourse to the official judicial system."

This is a way of formulating the issue that points to a useful transitional stage or process between the existing plurality and an equalitarian, common law. But I would make two amendments-

(1) Replace the emotive and vacuous term "common civil code" by the term "Indian code" or better yet, "Bharatiya code";

(2) Let the choice of codes be as follows. At the time of marriage every couple shall declare before a government registrar whether they wish themselves and their heirs to be governed by the Hindu code, Muslim code, Christian code etc. or the Bharatiya code.

## Marriage

Now we have to come to the important substantive questions- what provisions and laws should be in such a code? All the complex issues of marriage, divorce, maintenance, property have to be well formulated before we can organize some support behind them. At this point perhaps only a few comments can be made about marriage and the general concept of the "family."

Practically all religious codes embody very concrete forms of male chauvinism in their marriage ceremonies. The Hindu code is far from an exception: after all the reform, *saptapadi* is still taken as the legal criteria for the ceremony to be valid. (Actually by this, the majority of marriages among non Brahmans, at least in Maharashtra, are invalid). However, there are not only a variety of actually existing customary forms, there are also several progressive traditions of marriage ceremonies have had some mass popularity- the Satyashodhak marriages of Maharashtra, the Self-Respect marriages in Tamilnadu, "Gandhi weddings" in the days of the national movement, "Jayamala" marriages in some parts of North India. These, apparently, sometimes have a formal legal status and sometimes are only informally certified if and when a marriage is registered. The best way to get around all the confusion would be to simply set up a registration procedure for all marriages, with the legal provision that any couple swearing before such a registrar that they have been married by their chosen methods shall be legally registered as married. (It is at this time that the couple would choose the "civil code" which they desire to be applied to them). Such a registrar could also confirm legally all existing marriages in the village. Undoubtedly it would require some expense and training to set up the government machinery to have such a registrar in every village but it would be more than compensated for by the savings on unnecessary court cost, not to mention the protection to countless women who even today have no proof that they were ever legally married.

## Definition of "Family"

Before even beginning further discussions it might be noted that almost any use of the concept of "family" in existing laws is likely to be patriarchal. As an example, take this definition of the family written into a contract between the World Bank and the Government of Gujarat regarding provision of land for families evicted for the Sardar Sarovar dam (part of the Narmada project):

"(1) A family shall include husband, wife and minor children and other persons dependent on the head of the family, e.g. widowed mother.
(2) Every major son will be treated as a separate family."

This came to light during a discussion in Dhule of the Narmada Dharangrast Sahhayak Samiti, and only after some intervention by women activists present was the second clause changed to read "Every major son or unmarried, widowed or divorced daughter will be treated as a separate family." (It also seems that this aspect was also dropped from the committee's proposals by the time a further petition was made to the Maharashtra Government regarding the Maharashtra evictees of Sardar Sarovar). It should be clear that this change in the second clause does not really solve the problem: a "patriarchal" definition is embodied explicitly in the second clause and implicitly in the first clause - for every time the concept of "head of family" is used in the Indian context it is bound to be taken to refer to the main adult male.

It also seems clear from this example that all of the movements that have been going on in India to get land or other property for evictees from dam and other development projects - as well as all the initiatives from the Government to give land to the landless, houses or house-sites to the homeless etc.-- overwhelmingly have gone on reaffirming and re-legalising the existing patrilineal, patriarchal family structure, in which the male is head of household and holder of the basic property. Unless land or other property is given explicitly in the name of both husband and wife, the patriarchal family structure will simly go on functioning. In fact, provision for "joint pattas" in the case of land distribution was written in as a policy provision in the Sixth Plan, but few Government officials know about it and it is rarely implemented. But why blame the Government when peoples' movements themselves seem unconscious of the issue?

## Demands

Before we even get into the complicated tangle of inheritance, maintenance and property laws, then, there are some very simple legal demands that might be made:

(1) Eradicate any legal reference to "head of family";

(2) Any land, houses or other property given to the landless, homeless, etc. should be given as joint pattas, in the names of husband, wife and any other adult members of the family;

(3) Any ongoing process of registration of existing land rights or revision of the "record of rights" shall also be in the form of joint pattas, including female members of families;

(4) In all current processes of awarding land, houses etc. to the landless and homeless, preference shall be given to the most needy group among them-families in which no adult male is present, i.e. "female-headed families".

*Gail Omvedt is a researcher who has authored many papers and a social activist in Kasegaon, Maharashtra.*

# TAXFILE

# Taxation of Capital Gains

*The provisions for taxation of capital gains have undergone dramatic changes in the last few years.* ***R.L.Kabara*** *discusses these changes.*

## Capital Gains

The essential ingredients of capital gains are as follows:

1. It is essential for an asset to be a capital asset to qualify for benefits falling under the provisions of capital gains. Broadly one can say that everything is a capital asset except business assets and personal effects.

2. A particular asset for a particular assessee can be a capital asset but for another assessee, the same asset may be stock-in-trade or a business asset. Therefore, if both opt for sale, the treatment of profits for Income Tax purposes will be different.

3. Under certain circumstances, even if an asset is not sold but merely converted into the stock-in-trade of a business, it can be chargeable to income tax (Sec.45(2).

4. When capital gains are deemed to be "income", much revolves around the interpretation of the word "transfer" as certain transactions are excluded even if they are transferred (Sec.47)

5. Capital assets are of two types: short term and long term.

A short term capital asset is a capital asset which is held for not more than 3 years from the date of its transfer (changed from 5 years with effect from assessment year 78-79 onwards). What is not a short term capital asset is a long term capital asset.

6. If short term capital assets are sold they will be short term capital gains and if long term capital assets are sold they will be long term capital gains.

We can now discuss certain important provisions of capital gains which are useful to assessees in their everyday life.

The most important provisions regarding cpaital gains relate to the sale of a residential house. One can consider the following alternatives.

## Sale Of A Residential House

Where an individual assessee owns no other residential house other than the one he is selling, and he sells his house, the income of which is chargeable under the head 'Income from House Property,' then, if his full sale value does not exceed Rs. 2 lacs, no long term capital gains is chargeable at all under section 45. However, if the full sale price exceeds Rs.2 lacs he gets the proportionate deduction. These are new provisions which came into effect from the assessment year 1985-86 onwards. Earlier, the sale proceeds were exempt only if the full aggregate sale value did not exceed Rs.25,000. (Sec.53).

Over and above this, an individual assessee is not liable for long term capital gains on the sale of a residential house if he has, within a period of one year before or two years after the sale, bought another house, or within a period of 3 years, he constructs a new residential house. Until the assessment year 86-87, the assessee, to save long term capital gains, had to purchase another residential house within one year after the sale of the first. This period has been extended to two years from the assessment year 1987-88.

With effect from assessment year 85-86 one can avail of both the above exemptions upto a limit of Rs. 2 lacs under Sec. 53. Exemptions relating to investment or construction of a new house comes under Sec.54.

## Investment In Specified Assets

Over and above this, all categories of assessees are given a further choice 54E to invest within 6 months of transfer in any specified assets to save themselves from capital gains taxes. Therefore if an assessee is not able to take the full benefits of Sec.53 and Sec.54, he has a further choice under section 54E to invest in specified assets.

The provisions of Section 54E apply not only to long term capital gains on a residential house but also on other long term capital assets.The specified assets now include a) Central Government securities, b) capital units c) National Rural Development Bonds, d) debentures of HUDCO and e) Bonds issued by any public sector company. These specified assets have undergone many changes from time to time and under the present circumstances an assessee would benefit from investing in public sector bonds which bear an interest rate of 14.7% to 15% per annum with secured benefits.

With effect from assessment year 83-84, section 54F has been inserted whereby an individual assessee can get tax benefits on long term capital gains, viz., on the sale of shares, jewellery.

However, Section 54F applies only if an assessee does not own any other residential house.

## Cost Of Acquisition

It is important to know the definition of cost of acquisition as many assessees sell old assets either gifted to them or inherited by them long ago. Under the provisions of Section 55 such cost would be either the cost in the hands of the donor or if it is acquired earlier than 1.4.74, (uptill assessment year 86-87 it was 1.1.64) then either the fair market value of the asset as on 1.4.74 or the cost to the assessee, which ever he opts for.

From assessment year 1973-74 to 75-76, even capital gains on transfer of jewellery held for personal use was not charged to tax. However, it has been decided by various judicial authorities that silver utensils meant for personal use by the assessee or any member of his family are not liable for capital gains as it is not a capital asset.

## Exemption Under Section 80T

Under this new section, with effect from assessment year 87-88, a basic deduction of Rs.10,000 on account of long term capital gains is given and thereafter a straight deduction of 50% in case of long term capital gains relating to buildings, land or gold jewellery, etc.; and 60%, in case of other assesses will also be available. However, companies are excluded from these benefits. This means that an assessee, even if he is in the highest tax bracket of 50%, will have to pay tax @ 25% or 20% only on his capital gains.

However, short term capital gains are not eligible for any exemptions or deductions and they are taxed as other incomes.

# Pragna Patel

*Recently, both in Europe and the U.S. there has been a profliferation of Emergency Services Centres catering to persons, particularly women in distress, in need of immediate help.* ***Pragna Patel*** *is closely associated with Southall Emergency Service Centre. We talked to her about these Centres.*

**Q.** *Can you explain to us what the Emergency Services Centres in the U.K., and particularly the one in Southall with which you are associated, do?*

**A.** In the U.K. one Group of Emergency Service Centres are known as Monitoring Groups. Most of the Monitoring Groups deal with police and racial harassment. The Southall Monitoring Group, unlike other Monitoring Groups, also takes up the issue of violence to women that includes violence in the home and sexual violence such as rape. It also takes up emergency immigration cases which predominently concern Asian people who are about to be deported or removed out of the country.

**Q.** *What is the reason for these Monitoring Groups or Crisis Centres to have come up? Is there lack of legal services?*

**A.** Predominantly because of lack of police response to issues like sexual violence, domestic violence, police harassment and racial attacks. The Monitoring Groups can come into picture by trying to put pressure on the police to enforce certain laws that are available. For example, in England, there exists a body of laws such as the Domestic Violence and Matrimonial Proceedings Act 1976. It allows women to seek protection from violence in the home by getting an injunction and orders either to prevent their husbands from further molesting them under the Act or getting them arrested under ordinary criminal laws. However, the primary difficulty for women facing violence in the home is that if they call the police, the police tend to view domestic violence as a private family matter and, therefore, take a non-interventionist stand. Here is a situation where the police can do one of two things. Either they can inform the woman of her rights under the laws that are available, like the Domestic Violence and the Matrimonial Proceedings Act and encourage her to seek further advice and how to obtain the

protection or they can arrest the perpetrator of the violence, in this case the man, under the criminal law, where assaults to another person is a criminal offence. This would save her from immediate danger. Unfortunately, neither of this is done.

**Q.** *Are you saying that the problem is about the implementation of laws?*

**A.** What is happening is that domestic violence is not recognised as a crime and, therefore, we have a situation where, though the laws exist, implementation is very difficult. Even if a woman does go to court, what tends to happen is that back-up evidence which is required, such as friends, witnesses, etc. is not available. Again people are very reluctant to go in court and give evidence. Moreover, the courts are very reluctant to hand out heavy sentences or punishment to men because they tend to view domestic violence as a secondary crime.

**Q.** *How do the Emergency Centres overcome these problems?*

**A.** As far as the legal side is concerned, such as obtaining injunctions, Emergency Services can do very little. Where the Emergency Services are of help is in trying to ensure that a woman in need of immediate help can ring up the Centre at any time in the night if she is in trouble and get help. However, the chances are that she will call the police, and when the police fails to respond, she will call us.

**Q.** *Is it then correct to say that the existing institutions are not able to provide help when it is required?*

**A.** Yes, because the existing institutions such as the police which is not implementing or enforcing laws that are available or not helping women by just refusing to take cognizance of violence in home or violence against black people as a crime. In contrast, in other circumstances, the police will turn up and will give proper advice to the person concerned or take proper action.

**Q.** *How does the Emergency Centre work?*

**A.** The Emergency or Crisis Centre was set up by a group that already existed in Southall, the Southall Monitoring Group. The Group's daily work was to look at the day-to-day cases of police harassment, racial harassment, some immigration cases and employment. The Emergency Service is a project, if you like, of the Group. It came up 2 to 3 years after the Group was set up.

It requires a system of volunteers which are split into two tiers, the first and the second tier.

The major task of the first tier volunteers is to be near a phone so that should any one in need of urgent help call, whether it is because of police harassment or racial attacks or domestic violence, they will be able to deal with the situation themselves. Their major role is to advise the person seeking help to contact the concerned authorites, usually the police, try to put pressure on the police to intervene in these circumstances. They receive proper training and are fully equipped

to deal with the situation themselves. The other work for the first tier volunteer is to ensure that the woman in need of help is taken out of the emergency. We are in touch with refuge homes for women. We can take the woman there at any time of the night. For this purpose, we have a special arrangement with cab services available on telephone, who take the woman from her house to the refuge home, if necessary.

**Q.** *Concretely, what happens?*

**A.** In cases of racial attacks, for instance, if the family rings in, of the fear of being attacked, any moment, the task is to give immediate assistance to them, if necessary. Otherwise we ask them to come in the morning. The telephone number of the Emergency Service Centre is well publicized. The person needing help phones this number. This number has an answering machine from where she will get the number of first tier volunteer, who she can ring up. After she rings in, the first tier volunteer will take down all the necessary information. After that the volunteer will ring the police and try to put pressure on the police to go to the scene of the impending attack and to use various methods so that they can arrest the perpetrator of that violence.

If the first tier volunteer is not able to get an adequate response from the police or unable to handle the situation, he or she will ring a second tier volunteer. The second tier volunteers consist of people who have specialised skill or knowledge in their respective areas. He would either be a solicitor, who obviously knows which relevant provisions of the law are necessary to put pressure on the police to act, or take out the case himself, or an activist, who might be forced to go to the scene of the attack, if it is necessary.

After all this is over, the first tier volunteers are required to complete a case sheet, which they are provided with, in which they record the time of the call, the information received, the name of the caller, the action taken etc. The case sheet when completed, is passed to the relevant person in the morning, who can follow up the case and ensure that whatever action was required to be taken was taken, find out whether the police have followed their course of duty and what further work needs to be done. Cases are passed on to relevant volunteer groups that exist. For example, racial and police harassment cases are referred to the Monitoring Groups which specialise in these cases. Many of the matters regarding women are referred to the Women's Centres to follow up.

A roster is prepared of the volunteers in advance. Once the roster is prepared, it is the duty of the supervisor to ensure that volunteers are on duty at the particular time. The supervisor has to ensure that there are no last minute cancellations from the duty volunteers, and if that is likely, to ensure that there is a substitute. The service is available between 7 p.m. and 7 a.m. every night.

**Q.** *The whole system is based on the telephone. Doesn't that make the intervention a bit impersonal, especially with the answering machine?*

**A.** Really, the answering machine, with the recorded message, is very simple. You have to understand that people in a desperate situation, in need of help, will respond to the answering machine also. We have had no problems. It is impossible to be physically present in the office at night. The telephone is the next best answer. Of course you have to have a fairly good telephone system for the service to function.

**Q.** *In the U.K. not only do you have a good telephone service but there are plethora of refuge homes to put up a woman at night. Do you feel in India these conditions can be met for a Crisis Centre?*

**A.** Though the telephone service in India is not as good as the one in England, I think that it is sufficiently good for a Crisis Centre to function. Refuge homes in England, compared to India, are easily available. It is always possible to try and get an emergency place in a hostel or refuge home in London. Moreover, the local authorities are obliged to provide accommodation to homeless persons. But I am sure that in India too something can be worked out.

**Q.** *How are the Crisis Centres funded?*

**A.** They are funded by the local Councils. Southall is under the jurisdiction of Ealing Borough Council. As the Monitoring Group covers areas outside the Ealing Borough, the other Borough Councils also fund the Monitoring Group.

**Q.** *How do people get to know of the Emergency Service?*

**A.** We publicise the service through leaflets, advertisements in local newspapers and most importantly, through word of mouth.

**Q.** *How has the Emergency Centre worked out?*

**A.** Though we have been at it for only a short time, it is working out quite well. For a small area of and around Southall we have on average 3 cases a week.

**Q.** *What is the pre-requisite of running the Emergency Service successfully?*

**A.** A very good and a large number of well-trained volunteers, is probably the most important pre-requisite. The larger the number of volunteers, the easier it is to cope up with problems. Also it is better to have half of the volunteers who are women, because you have to face different types of persons in the case of police harassment, domestic violence etc. In the latter category of cases women are better equipped to do the work than men.

**Q.** *What about the training of volunteers?*

**A.** The training procedure is also very important. Volunteers are required to deal and respond to problem in a particular manner. All volunteers are required to undergo training in which they are informed about the objectives of the emergency service, the role of volunteers, the do's and the dont's, and procedures to follow in various situations. The set of instructions is compiled in a file, which is regularly updated. The volunteers are required to keep the compilation with them on duty. In case of difficulty, they have the option of getting in touch with second tier volunteers.

**Q.** *Do you think it would be better to have professionals in their respective disciplines, say psychologists, lawyers, counsellers, to deal with the situation, or do you think committed lay people can be trained up to do the job?*

**A.** We have a two tier system. The first tier does not require professional personnel. The only professional people needed are solicitors. They are on the second tier. Any one can do the work after they are imparted training. Commitment is more than helpful in any voluntary set up.

# ADAALAT ANTICS

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## The Two Avtars of Palkhivala

*N.A.Palkhivala has a steady band of admirers who all turned out to hear his valedictory address at the Silver Jubilee function of the Maharashtra Bar council at the Taj Mahal Hotel.*

*Palkhivala said that the trouble with our countrymen is that they have too litle moral character and too much intelligence. What is wanted is more men of character. The audience roared with approval.*

*Recently, the appointment of Daya as Sheriff of Bombay was challenged as Daya had disclosed an income of Rs.43 lacs under the Voluntary Disclosure Amnesty Scheme. Sheriff Daya is, therefore, allegedly not a man of "unimpeachable integrity", according to the Petitioners. To the horror of his admirers, it is reported that N.A. Palkhivala is advising Daya, notwithstanding his Rs.43 lacs tax evasion. But then where would tax experts be without tax evaders?*

## A Royal Dispute

*We are all in favour of expeditious disposal of disputes. The delays in courts are intolerable. N.A.Palkhivala was, therefore, understandably upset when the Delhi High Court adjourned the dispute over the family fortunes of the Royal Family of Jaipur. The obvious remedy was to file a Special Leave Petition in the Supreme Court.*

*Royal disputes must require royal counsel to mention them and, therefore, N.A. Palkhivala was permitted to mention the case for urgent listing. The following day, he appeared and protested that the Delhi High Court had no business to adjourn the royal dispute.*

*Nobody knows what hapened thereafter but one of the judges on the Bench was overheard saying "Chief, since when have we started entertaining petitions against orders of adjourment?". He was not the only one protesting. Madhu Limaye is reported to have written a letter to the Chief Justice complaining about the misuse of court time.*

## No More Dinners

*The movement against Dinner Diplomacy is gaining ground. The Supreme Court Bar Association has condemned the tendency among lawyers to throw five star dinners for judges. The meeting also condemned the photograph mania which caused embarrassment to judges, in addition to being abused by vested interests.*

*All dinners are not however ruled out. Lawyers are at liberty to give a send off party on the eve of the retirement of a Judge of the Supreme Court. But remember no reception is called for when a Judge assumes office. Advocates all over the country, please note the new rules of the game.*

## A Very Expensive Railway Ticket

*Referring to the attempt by legal heavy weights to reopen the* **Frank Anthony** *judgement, Soli Sorabjee is reported to have said that judgements of the Supreme Court were like railway tickets, valid only for the day and time of issue. We wish he had expounded the proposition in greater detail, in true legal style.*

*The variations to the railway ticket analogy could be endless. They come with different price tags; you can travel first class or second class; air conditioned or non-ariconditioned, reserved or unreserved. Naturally the comforts and services vary according to the price of the ticket. One wonders whether the validity of "railway ticket judgment" will also vary in direct proportion to the financial and legal inputs.*

*And soon we may also have air ticket judgement. All that will change is the price of the ticket. Perhaps a stage will come when more expensive the legal inputs, the longer the judgement will endure*

## Bonded Warehouse

*A litigant friend tells me that a few days ago he walked into Court Room No.46 of the Bombay High Court and waited patiently for his name to be called out by the Court Associate. Within minutes he started feeling uncomfortable, wondering whether he had not, by mistake, walked into the wrong place. One after the other people got up to file "minutes of the order" and got permission to clear goods on filing a bank guarantee. He began to wonder whether he was in the Customs Bonded Warehouse. He got up to leave when suddenly he heard the Court Associate call out his name. He then realized that he was in the High Court after all.*

## Tax Holiday

*The Tax Advocates Forum is obviously feeling over taxed. Their latest demand is that all lawyers should be given a tax holiday for the first ten years of practice. This would give relief to the three lacs of "struggling" lawyers in the country.*

*With this, the profession can rightly claim to have achieved the status of a massive industry. And yet judges continue to delude themselves that a lawyers establishment is not a commercial establishment and therefore, not covered by protective labour legislation. Only recently Y.V.Chandrachud and V.S.Tulzapurkar decided that law is a noble profession and, consequently, persons employed in a lawyers' office could not claim the right to minimun wages and an eight-hour day.*

*To the credit of Mr.M.R.Gandhi, Convener of the Tax Advocates Forum, New Delhi, it must at least be said that he is closer to recognising the true nature of an advocates work than the Hon'ble Judges of the Supreme Court.*

## Litigation for Lawyers

*Chairman of the Bar Council of India, V.C. Mishra, is one up on his former colleagues. When faced with the No Confidence motion brought by them, he got 17 U.P. lawyers to file a suit against the two former chairmans, Ranjit Mahanti and B.N. Bajpayee, alleging that they had not accounted for Rs.6 lacs, allegedly spent by them on conferences in Berlin and Belgrade.*

*Well, what's the difference between one chairman and another anyway!*

## Devil's Advocate

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