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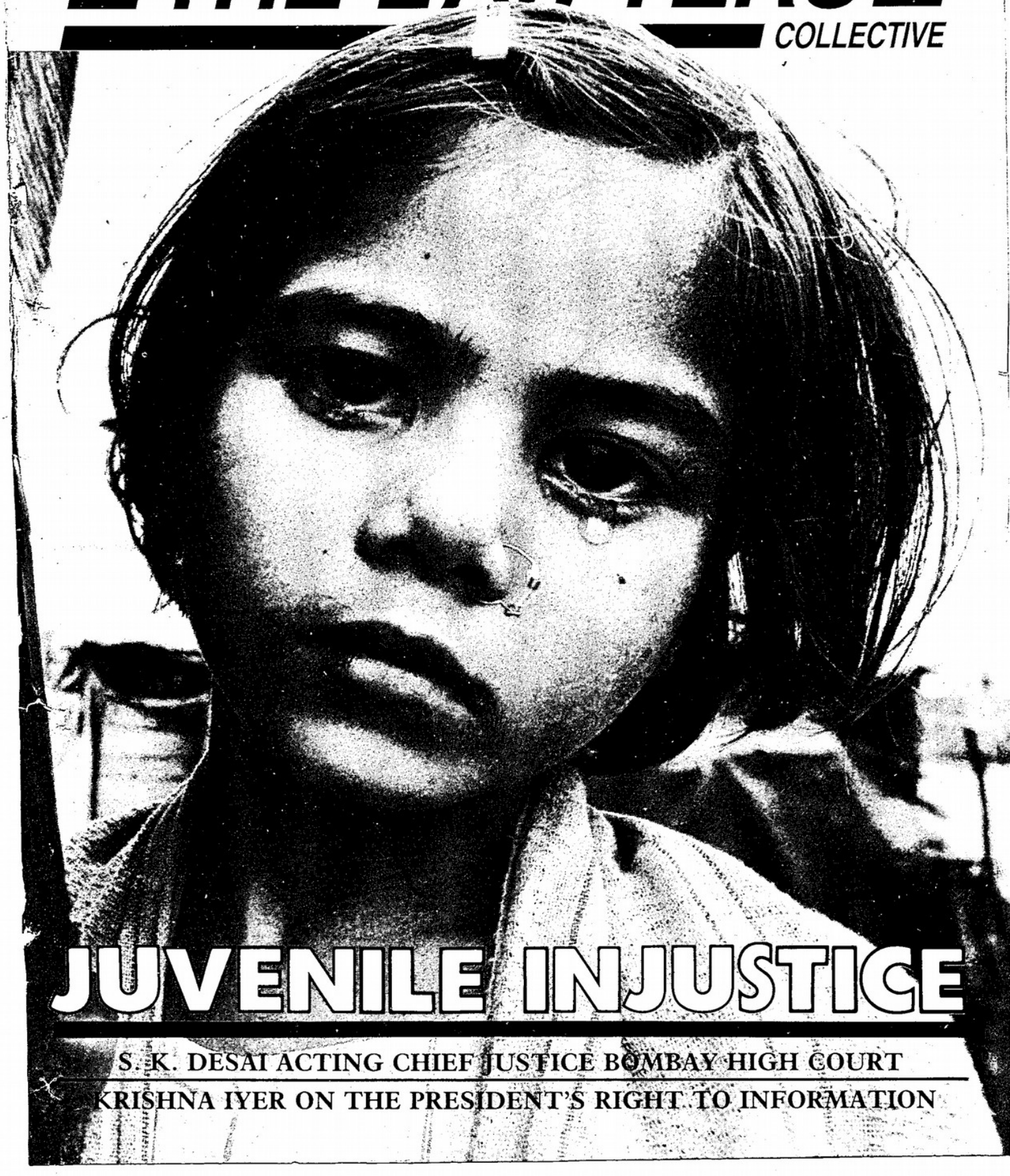
FROM

THE LAWYERS

COLLECTIVE



JUVENILE INJUSTICE

S. K. DESAI ACTING CHIEF JUSTICE BOMBAY HIGH COURT

KRISHNA IYER ON THE PRESIDENT'S RIGHT TO INFORMATION

EDITORIAL

A Patently Just Decision

The Letters Patent Appeal jurisdiction of the Bombay High Court has finally been abolished. The Act came into force on 1st July, 1987, but has been challenged and its operation has been stayed.

There is patent discrimination between litigants who file petitions under Article 226 within Greater Bombay and those who do so from outside Greater Bombay. The former is heard by a single Judge of the High court whose judgement or order is appealable whereas the latter is filed and heard by a Division Bench from which no appeal lies. To the litigant this means a person from Greater Bombay has a right of appeal in the High Court but the person from outside Bombay has no such right. How such patent discrimination could have been allowed to continue for so long by a vocal and 'enlightened' body of lawyers constantly swearing commitment to Article 14 baffles one's imagination. The abolition of the Letters Patent Appeal will at least have the merit of doing away with this ridiculously unfair law.

Opponents of the new law insist that there must be at least one appeal to every litigant. Yet for years together, judgements in petitions under Article 226 filed on the Appellate Side have never been appealable and nobody said that justice was thereby denied. It is only the litigants of Greater Bombay who claim that the new law denies them justice. The bulk of the litigation on the Original Side is for and on behalf of the moneyed industrialists who can lobby successfully for appeals without number. The drug and pharmaceutical manufacturers, the importers and exporters of diamonds and beef tallow have money and time enough to buy their way through appeals. It is no wonder then that the new law has been challenged.

It is high time that the High Court regained its status as basically an appellate and constitutional court. There seems no reason why all original suits or petitions under Special Laws should not be filed in District Courts with first appeals to the High Court. If administrative tribunals can be created to take away service litigation from High Courts, there is no reason why revenue, excise, and company cases also cannot originate in Tribunals, instead of cluttering the High Court Docket. First appeals can then lie to the High Court.

Indira Jaising.

FROM THE LAWYERS COLLECTIVE

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LETTERS

Shackling Labour

As you are aware, the Government of India in 1966, appointed a high powered Labour Commission headed by Dr. Gajendragadkar, the former Chief Justice of India, to give concrete proposals on labour reforms. The Commission consisted of independent members, and representatives of industry and the working class. The most important and unanimous recommendation made in 1969 was regarding the appointment of a high powered independent Industrial Relations Commission (IRC) at the Centre as well as in the States, to improve the industrial relations scenario of the land. The Government, for a variety of reasons, did not implement this recommendation. For the first time in Indian history, the present Labour Minister at the Centre has come forward to act. He has now fully realised that the "patch work" approach has not shown results.

The appointment of an independent IRC at the Centre as well as in the States was to create confidence and trust in the parties, (mainly labour). As the Commission rightly pointed out "there have been allegations of political pressure and interference", and the replacement of the old machinery by an independent body might improve the scene.

I am really pained to read your criticism that this is a "bitter pill" to swallow. The National Trade Union Centres in our country can definitely get an assurance from the Government, that the proposed IRC will be a highly independent body, like the Election Commission. The lead should now be given by the Unions and Management for a "real basic change" in the industrial relations set up.

Let us go a step further. If the move is opposed as before, the Government will again go slow on labour reforms, and the critics will have to take up the full responsibility for the delay in reforms. The question of recognition of unions, development of responsible unionism for the success of collective bargaining, reducing multiplicity of unions, and institutionalising the collective bargaining process will get further delayed. We are confident that you will not be a party to that unfortunate position. As an industrial nation, we have to march forward and responsible unionism should grow for the country's industrial growth. If we go backwards historians will blame us.

Let us not frighten labour at this juncture when the Government is sincere to give effect to the recommendations of the Gajendragadkar Report. Let us try to build up a national consensus on important issues taking into account the realities of the situation. Labour is hopelessly divided after 1947 and our aim should be now to consolidate it for the country's growth. Appointment of the IRC and the amendments to the TU Act are certainly on right lines.

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Judicial Mal-administration

A news item in Maharashtra Times of 30.3.87 reads that the members of the Bar Association at Dharani in Achalpur Taluka, Amaravati district have started an agitation of non-cooperation since 17-3-87 to protest the injustice which is being done to litigants by the Judicial department of the Government. Dharani is the principal place of the Melghat area which is exclusively populated by Adivasis. There is no regular Judicial Court at Dharani and hence Adivasi litigants have to perforce traverse a distance of 100 miles, incurring travel expenses of Rs.100, for reaching Achalpur in search of justice. In the process they are compelled to lose three days' earnings amounting to above Rs.100. One can easily imagine the privations that these litigants are put to, "augmenting" their poverty and suffering.

The news report further says that the Government spent about 8 lakhs of rupes in constructing a building at Dharani for starting a regular civil and Criminal Court but it was all of no use. In a democracy run by the rule of law the Government owes an explanation why Courts have not started functioning in the newly constructed building at Dharani.

There is an administrative judge in the High Court meant for subordinate Courts in the mofussil below the District Court level. He and the Law Department of the Government must know where the rub is and what is the unavoidable reason for not starting the functioning of law Courts at Dharani.It is regrettable that members of the Bar at Dharani were required to launch an agitation, entailing further loss to litigants. Mal-administration in every department and a crisis of character have become the order of the day. In the absence of a devoted band of judges at the High Court and District level bent on sweeping the administration clean, the prospects of getting speedy trials and relieving litigants of their misery and hardships are bleak.

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Service of Notice

In order to provide a stop-gap arrangement for the benefit of neglected wives, minor children and aged parents, provisions for grant of maintenance were made and included in the Criminal Procedure Code 1973. While these proceedings are of quasi-Civil nature, the mode of service of notice to the Respondent is the same as the procedure for service of summons on the accused. Thus poor applicants are left to the mercy of the Court's Constable for service of notice within the City of Bombay and on the District Magistrates for service of notice on the Respondents outside the City of Bombay. This procedure has resulted in great delay in service of notice particularly in cases where the Respondents are staying outside Bombay. When under the Civil Procedure Code the summons are served on the opposite party by Registered Post why this different procedure for proceedings which require early disposal? The law and judiciary department of the Government of Maharashtra should make the necessary amendment in the Criminal Procedure Code and allow the service of notice on the Respondent in proceedings under S 125 by Regd. Post and under Certificate of Posting.

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Juvenile Injustice

For years, juvenile justice was governed by indifferently implemented Children Acts in different states. These Acts are now being replaced by a Central Act, the Juvenile Justice Act. **Sanober Keshwar** *discusses the existing Acts and the new Legislation.*

Just as the personality of an adult is built in his or her formative years, the development of a nation is determined by the priority given to the child. In our country, the responsibility to clothe, feed, shelter, educate and nurture the child lies entirely with the family. In socialist countries, on the other hand, every child is considered primarily as the responsibility of the state. In Yugoslavia and Romania, children from families with lower income are entitled to a child allowance till they are 16. This allowance is also available to socially handicapped children born out of wedlock, adopted children or children of divorced parents. In China and the USSR, the governments have reduced taxes on children's goods like clothes, shoes, reading material etc. Education is absolutely free upto the higher secondary stage and special clinics have been set up for giving medical care to children.

True, in India the state has provided for subsidised education but this has no meaning for the over 44 million children who have to sacrifice their childhood to work long hours in hazardous jobs just to survive. Thus, it is ridiculous to bemoan the lack of parental affection, care, attention and guidance when the child is not even provided with the necessities of life. Moreover, economic hardships are a source of frustration and insecurity for all the members of the family but more so for the child. The child, in such a situation cannot develop in a healthy, normal manner.

Delinquents Made Not Born

Why juveniles turn delinquent has been a question about which social thinkers have been propounding theories for a long time. From the earlier impressionistic notions of evil effect and innate depravity to the modern behavioural psychology theories of cultural conflict and alienation.

In our country, the roots of juvenile delinquency lie in the abysmal poverty of the majority of the people. It is self defeating to treat the juvenile offender as one would an adult criminal, for in such cases the child is not the criminal but the victim. It is society, the state, this very system which is the criminal.

Hasina comes from a lower middle class family of Bangalore. Her father died in an accident when she was 9. In order to keep the now impoverished family's body and soul together, a relative brought her to Bombay promising her a job as a housemaid. Instead, he sold her to a brothel in Kamathipura, Bombay's notorious red light area. Here the young child was raped night after night by men who believed that they would rid themselves of V. D. by having sex with a virgin. Hasina hated her 'work', but there was no escape. In a few months, she was initiated into brown sugar and became an addict in a matter of days. And then she was ready to do anything to secure enough money to buy her quota of brown sugar to give her a few moments of bliss-a respite from her wretched existence. Hasina is just 11 years old. And she has not yet attained puberty.

Kailash's father was a construction worker who died by falling from a scaffolding while at work. No compensation was paid by the contractor and the family starved. Kailash's mother had just given birth to her third child and was too weak to even move. So Kailash had to provide for them all. He set out to do the only thing he knew-pick rags and scrap. On his rounds he once gathered a good haul of iron scrappings from near an Industrial Estate. And just that day some constables accosted him, checked his ragbag, found the iron scrappings and promptly charged him with theft. Kailash spent an agonizing time in the custody of the police and was later sent to a Remand Home. He does not know what has become of his brothers or his ailing mother, or even where they are.

Uttam witnessed his drunkard father beat his mother to death when he was six years old. After that the police took his father away and he never returned. A relative then took Uttam to live with him, but he ran away and used to steal to survive. "In school we learnt of Veer Savarkar, and all those others in our history who ran away from home and became great. But when I ran away from home, I was caught and branded a criminal. My mother used to tell me stories of little Lord Krishna who used to steal the 'makhan' from the milk pots all for fun. But when I stole a few things, I was locked up in prison".

Genesis Of Juvenile Legislation

Till the beginning of the 19th Century, in all corners of the civilized world, juvenile offenders were not dealt with by the authorities any differently than adult offenders. Thus a child could be hanged for arson or murder. In India too the situation was no different. Records show that in Bengal, juvenile delinquents were sometimes abandoned in the dense

forests of the Sunderbans for petty offences. In other areas, child convicts were flogged and branded or condemned to dark cells.

With economic development the State diverted more attention to the welfare of children, and philanthropists in England, the U.S.A. and France set the trend for a change in the treatment of juvenile offenders all over the world. In 1817, in England, Elizabeth Fry and her associates established the first institution for the reformation of juvenile offenders. This grew into a movement resulting in the passing of the Reformatory Schools Act in 1854 and the Industrial Schools Act in 1857, the first aimed at institutionalizing separate treatment for juvenile delinquents, the second for setting up schools for neglected children to prevent them from turning into delinquents. These Acts were later refined and in 1908, the British Government passed the Children Act under which the Juvenile Court system was set up.

But it was in the U.S.A. that the concept of "probation" and juvenile courts was first introduced. The first separate trial for children was held in Chicago in 1861. The State of Massachussets led the country in the passing of probation laws in 1878 whereby juvenile offenders could be released on a bond of good behaviour for a specified period. By 1925, nearly all the states had juvenile court laws.

In India, the statutory recognition of the jurisdiction of courts in cases of juveniles was given first by the Reformatory Schools Act, 1897, whereby juvenile offenders were sent to reformatory schools, instead of imprisoning them. In 1920, the Madras Children Act established the first juvenile court in India. This occasioned the Legislature to amend the Criminal Procedure Code in 1923 to add Section 29B which provided for a different kind of procedure for juvenile offenders.

Only Acts, No Deeds

After Independence, the states of Andhra Pradesh, Maharashtra, Punjab, Uttar Pradesh and West Bengal enacted their own Childrens' Acts providing for juvenile courts and the measures of correction, treatment and rehabilitation of child offenders. In 1960, the Central Government enacted the Children Act which was applicable to the Union Territories. Thereafter, most of the remaining states passed separate acts modelled largely on the provisions of the Childrens Act, 1960. It is depressing to note that the States of Orissa, Sikkim, Tripura and Bihar only found it necessary to enact a Childrens Act 35 years after Independence. The State of Nagaland has not yet enacted an Act The Governor issued the Bihar Children Ordinance in 1970 but it was allowed to lapse. Thereafter, a Children's Bill was passed by the State Legislature but it inexplicably took the State Government 12 years to obtain the Governor's assent in order to make it an Act.

The Children Acts remain a dead letter unless Juvenile Courts, Observation Homes, Child Welfare Boards and Aftercare Institutions are set up in order to implement the provisions. No juvenile courts have been established in 11 States and six Union Territories, and no Observation Homes have been set up in 9 States and 6 Union Territories. Even in those states where juvenile courts have been set up,the picture is dismal: West Bengal with 16 districts has only one juvenile court, Punjab with 12 districts has 2, Himachal with 13 districts, has 2, U.P. with 57 districts has 31 and M.P. has 23 for 45 districts.In states where there were no juvenile courts the juvenile offender was exposed to the rigours of trial in the ordinary criminal courts along with adult accused persons, thus defeating the very purpose of having juvenile justice legislation.In states where there were no Observation Homes the neglected and delinquent children were incarcerated first in police lock-ups and then in jails, sometimes even in the same barracks as adult prisoners. One shudders to think what must have happened to the hundreds of tender young children who were perforce lodged in the company of hardened criminals.

Loopholes and Pitfalls

"The Law, in the past, has lashed the child, not loved it, whatever its pretensions... Correction informed by compassion, not incarceration leading to degeneration, is the primary aim of juvenile justice... Regrettably, our juvenile justice system still thinks in terms of terror, not cure, of wounding, not healing, and a sort of blind man's buff is the result." Justice V.R. Krishna Iyer has in those words succinctly summed up the pitfalls of the juvenile justice system in our country.

In the first place, the Childrens Acts vest unbridled and undefined power in the hands of the police, the institutions and the Juvenile Courts. It is stated that if in the opinion of a police officer or a person or organisation authorised by the Government in this regard, a certain child seems to be a "neglected child", they may "take charge" of him and bring him before the Child Welfare Board within the next 24 hours. A child can thus be deprived of his liberty by the subjective opinion of a policeman, who is under no obligation to submit any concrete reasons to the

Board as to why he arrested the child. Where the case of juvenile delinquents is concerned, no statutory limit of 24 hours has been laid down within which the child must be produced before a Juvenile Court.

The various acts do not specifically provide for the "arrest" of children, but in actual fact the police do arrest children in order to bring them before the Juvenile Court. This is inconsistent with the idea of special treatment for children to be corrective and not punitive. Even though the power of arrest cannot be waived, yet legal limits to its use must be laid down. With a view to narrow down the scope of this power, it should be used only in the case of non-bailable offences.

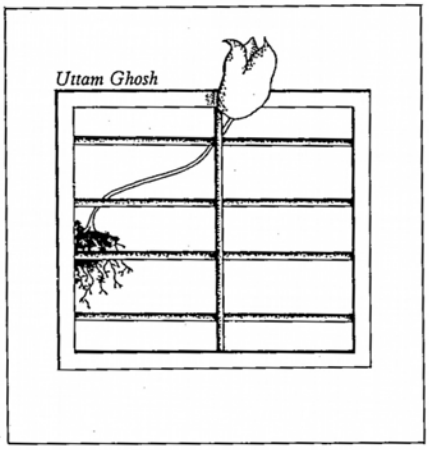
Once the neglected child or child offender is brought before the Board or the Court respectively, the Magistrate will either release the child on bail, restore him/her to the custody of his parents or guardian, or remand him to an Observation or Remand Home till the inquiry instituted into his behaviour is completed. No time limit has been laid down on how long a child can be detained in a Remand Home. The police usually shrug off all responsibility once the child is handed over to the Remand Home and file a charge-sheet months later at their own convenience. Spending a long period of time in a Remand Home does not benefit the child because here he or she is not given any educational facilities at all.

Lacunae In Existing Legislation

It has often been pointed out that the Magistrates in the Juvenile Courts never interview the children brought before them but blindly give them remand on the recommendation of the Police Officer. Moreover, in these Courts, the usually bewildered child is pitted alone against all the authorities. No legal practitioner or social worker is allowed to assist him or her. In several instances, the police have been known to pressurize the juveniles to take the easiest way out - by pleading guilty. Under the circumstances, it is imperative that children brought before the courts must be given legal aid to ensure that their legal rights are not violated. As the law stands today, lawyers are allowed to assist children before the Court and the Board only after obtaining its specific permission.

The Magistrates of the Juvenile Courts are usually appointed from the juniormost cadre in the criminal judiciary, having a limited legal background, whilst the Honorary Magistrates of the Boards are usually political appointees. The law does not specify that only qualified experts in child psychology and development should be appointed to the Courts and Boards.

Thus the usual procedure prescribed in Criminal Procedure Code and the various Police Acts is followed in making the investigation of offences committed by children. It is imperative that the procedure for investigation in the case of a child is different from that in the case of an adult offender, because while in the latter case the punishment



for culpability is the issue in the former, the idea is to investigate the conditions, factors and associations of the delinquent child to identify the circumstances which prompted him to act criminally.

A very serious lacuna in all juvenile justice legislation is that it does not make it mandatory for the probation officers, the supervisors, nannies and other employees in the Remand Homes and Childrens Home to be trained in child psychology and social work. Certain minimum qualifications must be laid down as regards this. Most of the children in these homes, are in distress and are victims of neglect, and need professional help. Otherwise even sincere attention can work adversely.

Under the Childrens Act, no provision is made for ensuring the maintenance of standards in the education and vocational training provided for the children. The key to rehabilitating these children is to prepare them for gainful employment, otherwise they can create havoc in society. But text books and other educational material are perennially in short supply in these homes and the vocational training given to these children (e.g. broom-making, rope making, sewing, etc.) is so out dated that it does not prepare them for jobs later in life. The overwhelming majority of these homes are overcrowded and "neglected children" are not segregated from "juvenile offenders" but are herded together in less than hygienic conditions. Such places are a breeding ground for disease and scabies is endemic here.

Sheela Barse V/s Union of India

In 1986, Sheela Barse an activist who has been focusing attention on the plight of neglected children filed a writ petition in the Supreme Court against the Union of India and all the States and the Union Territories wherein she prayed for the release of all children below 18 years from jails, for the production of complete information of children in jails, for information as to the existence of juvenile courts, homes and schools, for a direction that all District Judges must visit jails and sub-jails within their jurisdiction to ensure that children were properly looked after while in custody, and for a direction to the State Legal Aid Boards to appoint counsel for the juvenile offenders.

This petition was heard by the then Chief Justice P.N. Bhagwati and Justice Ranganath Mishra, who first directed all the District Judges to furnish the relevant information within a stipulated time. The District Judges were rather slow in complying with this order and the time limit had to be extended several times. The Judges then delivered a Judgement *[Sheela Barse Vs. Union of India* (1986) 3 SCC 632] directing all District Judges to visit jails in their jurisdiction at least once every 2 months, take particular care of juvenile prisoners, and draw the attention of the administration and the respective High Court to any problem regarding these children. The Supreme Court also directed the State Legal Aid Boards to provide the facility of a lawyers' service to undertrial children. From the information provided by District Judges the Judges

observed: "..we find in many of the States there are no Juvenile Courts functioning at all, and even where there are Juvenile Courts, they are nothing but a replica of the ordinary criminal courts, only the label being changed. The same Magistrate who sits in the ordinary criminal court goes and sits in the Juvenile Court and mechanically tries cases against children."

1400 Children In Jails

From the reports submitted by the District Judges, it was found that there were at least 1,400 children lodged in various jails of the country, as there were no Childrens' Homes. West Bengal was found to have the highest number of children in jails - a whopping 490. The States of Orissa, Bihar and Assam who, along with West Bengal, had 60% of the children kept in jails in India, were found to have no juvenile courts at all. Further, the conditions of the jailed children were shocking. Mentally and physically handicapped children were incarcerated for months without any medical treatment whatsoever. In a few jails, the children were not even kept in a separate barrack from the adult offenders. In some jails the children were not given adequate food. In Bhubaneshwar jail, each child

Remand Home And Juvenile Courts

***Mallika Dutt** describes her impressions on a visit to the Observation Home at Umerkhadi and the Juvenile Court for Bombay City.*

All children who are arrested or picked up by the police in Bombay are brought directly to the Remand Home at Umerkhadi. They are kept there only until their case is settled before the Juvenile Court Magistrate. Once settled the children are either released, returned to their guardians, or institutionalized in one of the other homes.

The Remand Home functions as a clearing house for abandoned children, child prostitutes, runaways and juvenile delinquents. More than 50% of the children are runaways who come to Bombay from other states. As soon as the children are brought to the Home, they are asked for family addresses and examined by the resident doctor. Word is then sent to their families. However, many children who are runaways give false addresses. Sometimes, parents themselves do not respond. Child prostitutes often give the address of their pimps or madams because they have been threatened with dire consequences if they return to their families.

Twelve probation officers work for the Home and have to investigate the circumstances of each case. All the probation officers and the supervisors are postgraduate degree holders in social work. With 3000 children passing through the Home each year they are extremely under-staffed. The case cannot be brought before the Judge until the police have conducted their own investigation and charge-sheeted the child. The police are very slow and often postpone even preliminary action until they receive the probation officer's report. In addition, a child psychologist and a social worker are on the premises to counsel children.

The boys and girls live in separate buildings and there are approximately 3 boys to every girl. The children range in age from 5 to 18. The buildings in which they are housed were originally jails during the colonial period. They were converted into a Remand Home in 1927.

Because of the lack of facilities at the Remand Home, abandoned children, runaways and juvenile delinquents are all housed together. Most of the juvenile delinquents have been arrested for theft or assault; a few are accomplices to murder. The children whose cases take longer to investigate are sent to the New Observation Home at Mankhurd.

The children are divided into groups and are responsible for the cleaning, cooking and washing. Short term classes are held in crafts like pottery, sewing, and cooking. Since the children are there for only a short period of time, it is difficult to engage them in vocational classes. Some children who are trusted by the administration are appointed as monitors. These children work in the offices and are responsible for discipline among their groups. These children often help the officers with information like the correct addresses of children who lie about their homes to the Remand Home officers.

Unfortunately, mentally retarded children end up staying at the remand home because the Home for mentally deficient children is filled to capacity.

In the Juvenile Court children who have been released on bail stand in line with their guardians. The children who are in the Remand Home are in a separate room and are brought out individually when their case is called. The police officer and probation officer present their material and the case is discussed between them, the judge and a social worker who is also present. In one instance, the child was represented by a lawyer. The time spent in the Remand Home varies from case to case. It can be as little as a week if the parents of a runaway child are easily located or as long as a couple of months depending on the problems and delay in investigation.

Guards are posted all around the complex because the children are prone to running away. Boys arrested for theft are particularly adept at scaling the walls. Approximately 30 children run away every year.

got 2 meals of one chapati and some jaggery. In Cuttack Jail, each child was given 60 grams of gram and 15 grams of jaggery. Here children were made to serve adult convicts, and though these jails had TV sets, the children were allowed to watch TV only for an hour on Sundays.

As a consequence of these reports, the Supreme Court made a second order in *Sheila Barse's* case prohibiting the authorities from keeping children

in jails. The Court also directed the state government to immediately shift mentally and physically handicapped children lodged in jails to a home where they could be rehabilitated and given vocational training to earn their livelihood.

Further, every State Government was directed to set up one Juvenile Court in each district, and set up a separate cadre of Magistrates suitably and adequately trained for dealing with

Kidnapping Juvenile Justice

Children homes prove a fertile ground for unscrupulous persons to get the children declared "destitute" and adopted by foreign parents. By a recent judgement, the Bombay High Court, has tried to put a stop to this practice. We discuss the Judgement.

A major portion of the Children's Homes are occupied by destitute children who are usually lost and whose parents cannot be traced, due to the indifferent attitude of the police machinery. Some of these children, once they are declared destitute, are then used by adoption racketeers and transferred to adoptive parents abroad. In a recent judgement of the Bombay High Court [Brenkt Ingmar Ericksson v/s Jamnibai Dhangde] Justice Pendse laid down certain precautions that must be taken before declaring a child as "destitute" under the Bombay Children Act, 1948.

Two minor girls, aged 5 and 2, were kidnapped from their hut in a remote forest village of Thane district, then abandoned on the streets of Central Bombay, picked up by the Police and sent to a Remand Home. The police made some cursory attempts to trace their parents and expectedly filed a report soon after stating their inability to do so. Within a few months, the Juvenile Court declared the girls as "destitute" and they were promptly adopted by a Swedish couple, the Erickssons, and were taken away to Sweden.

Meanwhile the mother of these girls, a tribal woman called Jamnibai left no stone unturned to trace her daughters. She filed a missing report in the police station, inserted advertisements in the papers, sent letters to the Thane District Superintendent of Police and finally found out that her daughters had been adopted and were in Sweden. Upon which she approached the High Court (with the legal assistance of the State Legal Aid Board) to direct the Erickssons to produce and hand her daughters over to her.

In his judgement dated 8th June 1987, Mr. Justice Pendse held that the interest and welfare of the girls was the paramount consideration in this matter, and therefore the girls must continue to live in Sweden in their adoptive homes as removing them fromn there would be detrimental to their welfare.

The Judge observed that in this case innocent persons would have been spared so much trauma if the police had made serious efforts to trace the parents of the missing girls and had properly attended to the reports lodged by Jamnibai.

Suggestions

The Judge has made some concrete suggestions to be implemented by the State Government

(a) A separate register of missing children should be maintained at each police station;

(b) An entry should be made immediately on production of any missing child at the police station and the child's photograph kept in the register;

(c) Copies of the entries in the register with the copies of the photograph should be forwarded at the end of each month by each police station to the office of the Commissioner of Police in Greater Bombay and a central register should be maintained at the office of the Commissioner of Police. In the mofussil areas the copies should be forwarded to the office of the District Superintendent of Police and a central register of each district head quarters should be maintained;

(d) The state government should give wide publicity to the fact of recovery of the missing children in local news-papers, on the radio and on the television. This information shall be given within a period of 15 days from the date of production of the child before the Juvenile Court.

The Judge has also directed Juvenile Court Magistrates to take utmost care before declaring a child as "destitute" by interviewing him/her personally, by perusing the reports made by the police officer and Social Welfare Officer (Probation) and also take the help of some social welfare agencies who work with children, in order to try and trace his/her parents. Moreover, the Court should allow a period of at least 3 months to elapse from the date of production of the child before it, before declaring him/her to be "destitute". This intervening period would allow for the police to trace the parents and the State Government to publicize the issue in the media which would enable the parents to trace back the child.

cases against children.

The Judges also directed that in a complaint lodged against a juvenile for an offence punishable with imprisonment of not more than 7 years, the investigation should be completed within 6 months from the date of lodging of the complaint, and if this is not done, the case should be treated as closed. They also directed that a case must be tried and disposed of within 6 months from the date of filing of the charge-sheet, and if not, then the prosecution was liable to be quashed.

In conclusion, the Judges mooted a suggestion that instead of each state having its own Children Act, the Central Government should initiate legislation on the subject so that there is complete uniformity in the juvenile justice system in the entire country.

Palashranjan Bhaumick

A Uniform Legislation At Last

This suggestion of the Supreme Court was seriously considered by the Central Government and on 1st December, 1986 the Juvenile Justice Act received the assent of the President. This Act introduced a uniform juvenile justice system throughout India as it extends to the whole of it. This Act states that the Children Acts of various states shall stand repealed from the date on which it comes into force in that particular state. This Act attempts to ensure that no child shall be kept in a police lock up or a jail under any circumstances whatsoever.

This Act provides that every Juvenile Court shall be assisted by a panel of 2 honorary social workers appointed by the appropriate state governments, possessing the prescribed qualifications, of whom at least one shall be a woman. This will ensure that the juvenile offenders will get some assistance when produced before the court, but the Act has failed to make it mandatory for the State Legal Aid Boards to provide the juvenile offenders with the services of a lawyer.

The Act has laid down a time limit of 3 months within which an inquiry regarding a juvenile must be completed, but has failed to incorporate into law the other limitations prescribed by the Supreme Court to ensure the juvenile a speedy trial. This Act has increased the punishment to be awarded to people who commit offences in respect of juveniles (Sections 41 to 44). Whoever assaults, abandons, exposes or wilfully neglects a juvenile under his actual charge shall be punishable with imprisonment upto 6 months and fine. Whoever uses a juvenile for begging, or whoever gives a juvenile intoxicating liquor or narcotic drug or psychotropic substance (except under competent medical advice) or whichever employer withholds the earnings of a juvenile, shall be punishable with imprisonment upto 3 years and fine.

Welfare And Rehabilitation

Taking into account the phenomenal increase in drug addiction amongst children, Section 48 of the Act makes provision for a juvenile narcotic addict to be given adequate treatment in a rehabilitation centre for drug addicts.

Section 52 of the Act directs that the State Government may choose to set up a Fund for the welfare and rehabilitation of juveniles to attract voluntary donations from individuals and organisations. It is also upto the State Government to constitute an Advisory Board composed of experts and representatives from voluntary agencies working with children, to advise it on matters relating to the establishment and maintenance of homes, mobilization of resources, provision of facilities for education, training and rehabilitation of neglected and delinquent juveniles and for co-ordination among the various official and non-official agencies concerned. Thus an attempt has been made to provide a link between the formal system of juvenile justice and voluntary agencies working among children.

Section 54 of the Act also provides for the nomination of upto 3 non-officials by the state government as visitors for each of the homes established under this Act to periodically visit and report to the State Government about them.

Even though the Juvenile Justice Act still suffers from many lacunae inherited from its predecessors, it is a step in the right direction. Yet the inglorious history of the non-implementation of the provisions of the earlier Childrens Acts belies much hope in any radical change in reality. In conclusion one cannot but concur with the Supreme Court when it remarked: "It is not enough merely to have legislation on the subject, but it is equally, if not more important to ensure that such legislation is implemented in all earnestness and mere lip sympathy is not paid to such legislation and justification for non-implementation is not pleaded on grounds of lack of finances on the part of the State. The greatest recompense which the State can get for expenditure on children is the building up of a powerful human resource ready to make its place in the forward march of the nation."

NOTICE BOARD

Construction Workers (Regulation of Employment and Conditions of Service) Bill, 1986.

Bill No. 126 of 1986

A Bill to provide for the regulation of employment of construction workers, their conditions of service and for matters connected therewith.

Be it enacted by Parliament in the Thirty-seventh Year of the Republic of India as follows:-

CHAPTER 1
PRELIMINARY

1.Short title, extent and commencement

(1) This Act may be called the Construction Workers (Regulation of Employment and Conditions of Service) Act, 1986.

(2) It extends to the whole of India.

(3) Sections 3 to 5, clauses (1) and (2) of section 6, and sections 8 and 9 shall come into force at once in all the States and the remaining provisions of this Act shall come into force in a State on such date, not being later than six months from the date of assent of this Act, as the appropriate Government may, by notification in the Official Gazette, appoint.

2.Declaration as to expediency of regulation

It is hereby declared that it is expedient in the public interest that the construction work as an industry, employing, as it does, a very large number of workers, both men and women, and whose conditions of work and living need amelioration and to whom regularity of employment must be assured, should be regulated by law, so that the Directive Principles of the Constitution, more particularly the relevant provisions in articles 39, 41, 42, 43 and 43A of the Constitution, are given effect to by a law made by Parliament.

3.Definitions

In this Act, unless the context otherwise requires,- (a) 'adolescent' means a person who has completed his fifteenth year of age;
(b) 'adult' means a person who has completed his eighteenth year of age;
(c) 'Board' means a Construction Labour Board established under section 8;
(d) 'child' means a person who has not completed his fifteenth year of age;
(e) 'construction work' means-

(i) the construction, alteration, repair, maintenance or demolition of a building, which includes the work of masonry, carpentry, painting, electric work, plumbing and fittings or any such other work which goes into making of the aforesaid construction or the preparation for and the laying of the foundation of an intended building including boundary walls, or construction of wells and includes the construction of furnace, chimney, well or any ancillary structure;

(ii) the construction of any railway line or siding otherwise than upon an existing railway, the construction, structural alteration or repair, maintenance and laying of foundation or demolition of any dock, harbour, canal, dams, embankments including river-valley projects, tanks and water course, inland navigation, road, tunnel, bridge, viaduct, water works, reservoir, pipelines, aqueduct, sewer, sewage works, river works, oil fields, sea defence works, gas works and any steel or reinforced concrete structure other than a building, or any other civil or constructional engineering work of a nature similar to any of the foregoing works or construction operation connected with the installation of machinery in any of the aforesaid construction activities; and

(iii) any other ancillary construction operation such as stone breaking, brick-kiln and construction work for the purpose of erection or installation of machinery, wherever such installations takes place in a factory establishment or any engineering construction or in a mine;
(f) 'construction worker' means a person engaged in construction work but does not include any person who is employed in a managerial or administrative capacity;

(g) 'employer' means any person who utilises construction labour for the purpose of construction work and includes any agent or contractor, by whatever name called, who undertakes the construction work on behalf of the employer;

(h) 'establishment' means any establishment or industry engaged in any construction work as defined in clause (e).

4.Overriding effect of the Act.

The provisions of this Act shall have effect notwithstanding anything inconsistent therein contained in any other law for the time being in force or in any contract or instrument drawing effect by virtue of any law other than this Act or any other decree or order of any court, tribunal or authority.

5.Interpretation.

For the purposes of this Act, 'may' means 'shall', wherever it refers to some obligation to be discharged or power to be exercised.

CHAPTER II
DRAWING UP OF SCHEMES AND CONSTITUTION OF BOARDS

6.Scheme for ensuring regular employment of workers.

(1) The Central Government may, in consultation with the State Governments and subject to the condition of previous publication, and after consulting the Central Construction Board, frame a scheme to be called the Construction Workers (Regulation of Employment and Conditions of Service) Scheme, 1986 for ensuring greater regularity of employment, for regulating the employment of construction workers and for prescribing conditions of service for the construction workers in the State.

(2) In particular, the Scheme may provide (a) for the application of the scheme to such classes of construction workers and employers as may be specified therein;

(b)for defining the obligation of employers and construction workers, subject to the fulfilment of which the scheme may apply to them and the circumstances in which the scheme shall cease to apply to any construction worker of employer;

(c) for regulating the recruitment and entry into the scheme of construction workers, (and the registration of construction workers and employers) including the maintenance of registers, the removal, either temporarily or permanently of names from the registers and the imposition of fees for registration;

(d) for regulating the employment of dock workers, whether registered or not, and the terms and conditions of such employment, including rates of remuneration, hours of work and conditions as to holidays and pay in respect thereof;

(e) for ensuring that, in respect of period during which employment, or full employment, is not available to construction workers, to whom the scheme applies and who are available for work, such workers shall, subject to the conditions of the scheme, receive a minimum pay;

(f) for prohibiting, restricting or otherwise controlling the employment of construction workers to whom the scheme does not apply and the employment of construction workers by employers to whom the Scheme does not apply;

(g) for creating such fund or funds as may be necessary or expedient for the purposes of the Scheme and for the administration of such fund or funds;

(h) for the training and welfare of construction workers, in so far as satisfactory provision therefor does not exist;

(i) for the welfare of the officers and other staff of the Board;

(j) for the health and safety measures in places where construction workers are employed in so far as satisfactory provisions therefor do not exist;

(k) for the manner in which, and the persons by whom, the cost of operating the Scheme is to be defrayed;

(l) for constituting the authority to be responsible for the administration of the Scheme;

(m) for such other incidental and supplementary matters as may be necessary or expedient for the purposes of the Scheme;

(n) for setting up authorities at state levels to be responsible for the administration of the Scheme at the State levels;

(o) for constituting adjudicating and appelate bodies to deal with disputes that may arise between the construction workers and the employers or between the construction workers and the Board.

(3) Any contravention of any provision of the Scheme shall be punishable with imprisonment for a term not exceeding three months in respect of first contravention or six months in respect of any subsequent contravention, or with fine upto rupees five thousand in respect of first contravention or rupees ten thousand in respect of any subsequent contravention, or with both.

7. Variation of Scheme

(1) The State Government may in consultation with the State Construction Labour Board, established under section 8, and by notification in the Official Gazette and subject to the condition of previous publication and with the prior approval of the Central Government, which shall be accorded after consulting the Central Construction Labour Board, amend, alter or vary the Scheme made by it for the purpose of more effective implementation of the Scheme having regard to any special condition prevailing in the State and for conferring additional benefits to the construction workers.

(2) Pending the final publication of the Scheme by the State Government, the provisions of the Scheme framed by the Central Government shall be applicable in that State.

8. State Construction Labour Boards.

(1) The Central Government shall, by notification in the Official Gazette, establish a Construction Labour Board for each State by such name as may be specified in the notification.

(2) Every Board shall be a body corporate as defined in Section 5A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948).

(3) Every Board shall consist of a President to be appointed from amongst its members by rotation annually and such members shall be appointed by the Central Government in consultation with the State Government:
Provided that every Board shall include such number of members representing both the State Government and the employers of construction workers as not to be in excess of the number of members representing the construction workers.

(4) The Central Government shall appoint Construction Labour Boards, on the same lines as provided under sub-sections (1) to (3), for each of the Union territories of Delhi, Chandigarh, Pondicherry and Goa, Daman and Diu and for such other Union territories as the Central Government may decide.

9.Central Construction Labour Board.

(1) The Central Government shall, by notification in the official Gazette, establish a Central Construction Labour Board consisting of a President to be appointed from any of its members by rotation annually and such members shall be appointed by it.

(2) The board shall have such number of members representing construction workers as is equal to or in excess of the total number of members representing both the Government and the employers.

(3) The representation of workers shall include at least one representative from each of the State Governments and of the Union territories where a Construction Labour Board has been set up.

10.Tripartite bodies.

(1) Every State Government shall after consulting the State Construction Labour Board, by notification in the Official Gazette and subject to the condition of prior approval of the Central Government, set up tripartite bodies, consisting of representatives of the State Government, employers and constructions workers at the district level and below on the same pattern as the State Construction Labour Board.

(2) The representatives of workers shall be elected on the basis of secret ballot, in the manner to be prescribed.

Abortion: The Doctor's Dilemma

Ever since the passing of the Medical Termination of Pregnancy (MTP) Act, 1971, the task of the doctor advising a woman for or against abortion has been a difficult one. ***P. M. Bakshi*** *elaborates on the dilemma faced by the doctors.*

The Background

Until the MTP Act was passed abortion was permissible only to save the life of the woman. Now it is permissible not only to save the woman's life, but also to prevent serious risk to her physical or mental health. It is also lawful to terminate a pregnancy resulting from rape. In addition, the Act, by a series of circuitous provisions, lays down that if the couple has practised contraception which has failed, that may be taken into account in deciding whether abortion should be resorted to or not. The verbal gymnastics which one finds in the Act obscures the very wide scope which the Act has come to acquire in practice. Abortion is now resorted to at will although it still goes under the name of "medical" termination of pregnancy. The very title suggests the heavy burden thrown on the doctor.

The Doctor's Problem

By the very text of the language of the Act, the doctor has a difficult role to perform. This role becomes even more difficult when the social context of the situation in which the woman is seeking abortion is somewhat unusual. For example, what attitude should the doctor adopt, if the woman seeking abortion is an unmarried one? What advice should be given if a minor girl seeks abortion but her parents are against it? What should a doctor do in the converse situation, when the girl refuses to undergo abortion but her parents insist on it because the girl is unmarried or because the girl has been raped? Similar questions arise where the wife who has become pregnant does not want the child but her parents or husband want her to carry through the pregnancy. The Act gives no guidance on most of these matters. Many of these questions have now started arising in courts and they have considerable practical importance.

Inconsistency in Law

It may be stated that the passing of laws affecting different sectors of human life, without due regard for consistency and internal harmony, sometimes gives rise to difficult questions causing hardship to citizens. On the one hand, the Indian statute book has a liberal law of termination of pregnancy. On the other hand, the statute book has now an equally widely framed law which permits divorce on certain specified grounds. These grounds include "cruelty", under the Hindu Marriage Act, 1955, as amended upto date.

Cruelty in matrimonial law is a concept of very wide dimensions, physical as well as mental. Cases are not unknown where resort to abortion by the wife without the consent or knowledge of her husband had created matrimonial tension. Such a situation arose about two years ago before the Punjab and Haryana High Court and it was at that time pointed out by some writers that the law of abortion might require a second look. A similar situation arose recently before the Delhi High Court [*Sushil Kumar v. Usha*, A.I.R. 1987 Delhi]. In this case, the couple had been married only a few months. The wife, on discovering that she had become pregnant, resorted to abortion deliberately and without the consent of the husband. This was one of the grounds on which the husband prayed for a decree of divorce against the wife on the basis of her "cruelty". The husband alleged in the petition that the marriage took place in November, 1980 and the wife left the husband in February, 1981 and after her departure, she got her pregnancy terminated in Agra. The wife, in her defence, denied the allegation that she had resorted to an abortion. Thus, there was a dispute about the facts. Besides this, there was an important question of law involved. Does the wife's resort to abortion without her husband's consent constitute matrimonial "cruelty"?

As to the factual controversy, the High Court of Delhi held that there was enough evidence that the wife had got pregnant after marriage, that she did not want the child and that she had got the child aborted. This was proved on the basis of a "consent letter" issued by the nursing home in question at Agra, where the nature of the operation performed was described as "diagonostic curettage". The High Court noted that such curettage is usually adopted in abortion, as a medical termination of pregnancy. There was also evidence that before resorting to abortion the wife had consulted a homeopath for some trouble. His prescription described the complaint as one of 'delayed menstruation'. The legal question to be considered now was, whether such recourse to abortion without the husband's consent would amount to cruelty. On this point, a Division Bench of the Delhi High Court had observed in an earlier judgment that if a wife undergoes abortion in order to spite the husband, it may, in certain circumstances, amount to cruelty. [*Deepak Kumar Arora v. Sampuran Arora*, (1983) 1 D.M.C.182: (1983) Marriage Law Journal 181]. In the instant case, the Delhi High Court held that if one party desires the child and did not consent to the abortion it would amount to cruelty.

Earlier English Cases: The Procreative Aspect

In coming to this conclusion, the Delhi High Court cited two English judgements, one of 1845 and the other of 1948. [D.E. v. A.G. (1845) 153 E. R. 1039; *White v. White*, (1948) 2 All E. R. 141]. In *D.E. V. A.G.* it had been stressed that one of the primary ends of marriage is "the procreation of children, according to the evident design of divine providence". In *White* the husband's insistence on a particular sexual practice (which practice he had adopted in order to ensure that the wife would not get pregnant) was held to amount to cruelty on his part, as the wife was very anxious to have a child. According to the Delhi High Court, these cases showed the importance attached to the procreative aspect of marriage. The Delhi High Court further pointed out that it was not necessary that the party against whom cruelty is alleged should have been guilty of conduct creating danger to life or limb. All that is required is that the opposite party should have "treated the petitioner with cruelty". In fact, even an attempt to commit suicide by the wife in order to coerce her husband has, in another Delhi case decided recently, been held to amount to cruelty. [*Savitri v. Mool Chand*, A.I.R. 1987 Delhi 52 (February)]. Cruelty in matrimonial law does not require sinful conduct, physical harassment or torture; such acts may amount to cruelty, but they do not

exhaust the entire field of cruelty.

In the end, the High Court granted divorce to the husband on the ground that the wife had treated him with cruelty.

Need for Clarification

With changing social conditions, this situation is likely to recur frequently in future. As stated above, the situation has arisen because laws regulating two different spheres of conduct interact with each other at certain crucial points resulting in conflict. The law of divorce as applicable to Hindus allows divorce on the ground of cruelty which has a very wide dimension. It focusses itself on the impact or the conduct of one spouse on the happiness of the other spouse. It thus expects that a wife or husband should, in her or his conduct, have regard for the other spouse's emotions and desires. But the law of abortion in India as enacted in the Medical Termination of Pregnancy Act, 1971 makes it lawful to resort to abortion on certain specified grounds. In practice, the Act is regarded as permitting abortion, where carrying the pregnancy to its full termination would cause mental anguish to the woman. The matter is left to the judgement of a registered medical practitioner, but it is not necessary for the wife to secure her husband's consent before resorting to abortion. The focus in the abortion law is apparently on the unilateral decision of the wife. Thus, there is an inherent conflict of approaches between the matrimonial law and the law of abortion. Until the legislature intervenes to settle the conflict, courts will be left to perform the function of rendering decisions in individual cases on considerations of justice.

P.M. Bakshi was formerly a member of the Law Commission.

Is the High Court A District Court?

The proposed amendment will take away the jurisdiction of the Bombay High Court as the District to try suits. However, there are number of 'Special Laws' under which the Bombay High Court will continue to be the District Court. ***Anil Mehta*** *elaborates.*

The title of this article may sound a bit amusing but then if one were to look at 6 statutes one would find that in several instances jurisdiction to try certain matters has been conferred upon the District Court:

(a) Guardians and Wards Act, 1890
(b) Patent Act, 1970
(c) Design Act, 1911
(d) Copyright Act, 1957
(e) Trade Marks Act, 1958
(f) Companies Act, 1956

District Court In Various Statutes

In all these statutes 'District Court' has been defined to mean the District Court or the principal Civil Court exercising Original Civil Jurisdiction, within whose local limits the cause of action has arisen.

Section 4(4) of the **Guardian & Wards Act,** 1890 defines the expression "District Court" as under:-

"District Court has the meaning assigned to that expression in the Civil Procedure Code and includes a High Court in the exercise of its Ordinary Original Civil Jurisdiction".

Section 4(5) of the Act defines the expression "Court" as follows:-

The "Court" means -

(a) The District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or

(b) Where a guardian has been appointed or declared in pursuance on any such application:-
(i) The Court which, or the Court of the Officer who appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or
(ii) In any manner relating to the person or the ward, the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or

(c) In respect of any proceeding transferred under Section 4A, the Court of the Officer to whom such proceeding has been transferred."

Section 62 (1) of the **Copyright Act** 1957 provides that every suit or other civil proceeding arising under Chapter XII of the Act in respect of infringement of Copyright in any work or the infringement of any other right conferred by the Act shall be instituted in the District Court having jurisdiction.

Section 62 (2) of the Copyright Act, 1957 provides as follows:-

"that for the purpose of sub-section (1) a 'District Court having jurisdiction' shall, notwithstanding anything contained in the Civil Procedure Code 1908, or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceedings, the person instituting the suit or other proceeding or where there are more than one such person any of them actually and voluntarily resides or carries on business or personally works for gain."

Section 105 of the **Trade & Merchandise Marks Act,** 1958, amongst other things, provides that no suit for the infringement of a registered trade mark or relating to any right in a registered trade mark or for passing off arising out of the use by the Defendant of any trade mark which is identical with or deceptively similar to the Plaintiff's trade mark whether registered or un-registered shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.

Section 2(e) of the Trade & Merchandise Marks Act, defines District Court having the meaning assigned to it in the Civil Procedure Code 1908.

Section 104 of the **Patents Act 1970** provides that no suit for declaration under Section 105 or for any relief under Section 106 or for infringement of a Patent shall be instituted in any

Court inferior to a District Court having jurisdiction to try the suit.

Section 2(e) of the Patents Act, defines "District Court" as having the meaning assigned to that expression by the Civil Procedure Code 1908.

Section 2(14) of the **Companies Act 1956** defines District Court to mean the principal Civil Court of Original Jurisdiction in a District, but, does not include a High Court in the exercise of its Ordinary Original Civil Jurisdiction.

Section 2(11) of the Companies Act 1956 defines the Court to mean:

"(a) with respect to any matter relating to a Company (other than any offence against the Act) the Court having jurisdiction under the Act with respect to that matter relating to that Company as provided in Section 10.

(b) with respect to any offence against this Act, the Court of a Magistrate of the First-Class or, as the case may be, a Presidency Magistrate, having jurisdiction to try such offence."

Section 10 of the Companies Act, 1956 provides that: the Court having jurisdiction under this Act shall be:

"(a) the High Court having jurisdiction in relation to the place at which the registered office of the Company concerned is situated except to the extent to which jurisdiction has been conferred on any District Court subordinate to the High Court and;

(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district."

Code Of Civil Procedure:

Section 2 (4) of the Civil Procedure Code, 1908 defines District Court as follows:

"'District' means the local limits of the jurisdiction of a principal civil court of Original Jurisdiction (hereinafter called a District Court) and includes the local limits of the Ordinary Original Civil Jurisdiction of a High Court."

District Court in Bombay

Until the establishment of the City Civil Court in Bombay by the Bombay City Civil Court Act, 1948, the High Court was the principal civil court of Original Civil Jurisdiction so far as the local/territorial limits of Greater Bombay were concerned and as such, the High Court was a District Court within the meaning of the definition contained in Section 2 (4) of the Civil Procedure Code 1908. The Bombay City Civil Court 1948 came into force on 16th August, 1948.

Section 3 of the Bombay City Civil Courts Act provides, that the State Government may by notification in the official gazette, establish for Greater Bombay a Court, to be called the Bombay City Civil Court. It further provides that notwithstanding anything contained in any law, such Court shall have jurisdiction to receive try and dispose of all suits and other proceedings of a civil nature not exceeding Rs.25,000/- (Now Fifty Thousand Rupees and presently proposed as unlimited) in value, and arising within Greater Bombay, except suit or proceedings which are cognizable,

"(a) by the High Court as a Court of Admiralty or Vice-Admiralty or as a colonial court or Admiralty or as a Court having testamentary, intestate or matrimonial jurisdiction or;

(b) by the High Court for the relief of insolvent debtors or;

(c) by the High Court under any Special Law other than the Letters Patent; or

(d) by the Small Causes Court.

Provided that the (State) Government may from time to time, after consultation with the High Court, by a like notification extend the jurisdiction of the City Civil Court to any suits or proceedings which are cognizable by the High Court as a Court having testamentary or intestate jurisdiction or for the relief of insolvent debtors."

Section 3, therefore, makes an exception with regard to the High Court's Admiralty jurisdiction and also High Court's jurisdiction by virtue of any special law. The special law has been defined in Sub-Section 5 of Section 2 to mean a law applicable to a particular subject;

Clauses 11 and 12 of the Letters Patent as they stood prior to the coming into force of the Bombay City Civil Court Act 1948 read as under:

"Clause 11 : And we do hereby ordain that the said High Court of Judicature at Fort William in Bengal (Madras) (Bombay) shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed within the limits declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council on the 10th day of September, in the year of Our Lord, One Thousand Seven Hundred and Ninety Four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction."

Clause 12: And we do further ordain that the said High Court of Judicature at Fort William in Bengal, (Madras), (Bombay) in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court; or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Causes Court at (Madras), (Bombay), Calcutta in which the debt or damage or value of the property sued for, does not exceed one hundred rupees."

Clause 12 of the Letters Patent has been amended by the Bombay High Court Letters Patent (Amendment) Act 41 of 1948, and the amended provision reads as under:-

"Clause 12: And we do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or in case the leave of the court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the Defendant at the time of the commencement of the suit shall

dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Causes Court at Bombay, or the Bombay City Civil Court."

On reading the provisions of Clause 12 of the Letters of Patent, it is clear that a suit arising in Greater Bombay or Bombay District having a valuation of Rs.50,000/-(now proposed unlimited) has to be filed in the Bombay City Civil Court. To this general rule Section 3 of the Bombay City Civil Court's Act is an exception.

The aforesaid Acts viz: Guardians & Wards Act, Copyright Act, Trade Marks Act and Patents Act etc. are all special laws dealing with the specific subject matters such as guardianship, copyright, trade marks, patent etc. These laws therefore exempted under Section 3 (c) of the Bombay City Civil Court Act, 1948; therefore suits covered under these special laws would have to be filed in the District Court if the cause of action arises within the jurisdiction of its local limits or the High Court if that is the principal Civil Court within the local limits of whose jurisdiction the cause of action has arisen. Thus any place where there is a High Court along with the City Civil Court then with regard to any cause of action arising under any of the special laws, the High Court would still be the principal Civil Court irrespective of the pecuniary jurisdiction. So the test is the local limits within whose original civil jurisdiction the cause of action has arisen and not the pecuniary jurisdiction.

An interesting judgement on this issue of the Division Bench of the Madras High Court *(The Daily Calendar Supplying Bureau, Shivakasi V/s The United Concern,* AIR 1967 MAD 381) bears reference. This case arose under the Copyright Act 1957 read with Section 2 (4) of the Civil Procedure Code. It was urged on behalf of the Defendants that the City Civil Court of Madras alone would have jurisdiction to try the case and not the High Court. The Division Bench of the Madras High Court held as follows:-

"Clauses 11 and 12 of the Letters Patent confers ordinary original civil jurisdiction to the High Court, over the Presidency Town of Madras. Therefore, the area of the Presidency Town will be a District as defined in Section 2(4) of the Civil Procedure Code, and when the High Court exercises its original civil jurisdiction over the City limits, it can be deemed to be a District Court, in those cases where resort to the definition in Section 2 (4) of the Civil Procedure Code, is permissible for the purpose of fixing jurisdiction, Section 9 of the Civil Procedure Code gives power to every civil court to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, and the explanation to that section, says that a suit in which the right to property or to an office is contested is a suit of civil nature. It is well recognised that copyright is property, and therefore, a suit seeking relief for infringement of copyright is a suit of civil nature. If such infringement occurs, and the cause of action for a suit based on the infringement arises within the area of the ordinary original civil jurisdiction of High Court, that court can be deemed to be a District Court as per definition in Section 2 (4) of the Civil Procedures Code and will have power to try the suit. Our attention was drawn to a case of the Calcutta High Court, Kedarnath Mondal Vs. Ganesh Chandra Adak (1908) 12 Cal. W.N. 446. which arose under the Inventions and Designs Act, 1838. That Act contained a specific clause that a District Court had the meaning assigned to that expression by the Code of Civil Procedure. After construing Clause 2 (4) of the Civil Procedure Code, Fletcher J., came to the conclusion that when a High Court exercises its ordinary original civil jurisdiction it comes within the definition of District Court as contained in the Civil Procedure Code.

"Thus it is that the High Court becomes the District Court in some cases; although it will be significant to note that for the purpose of the definition of the District Court it has the meaning assigned to it in the Civil Procedure Code, the definition under S. 2 (4) of the Code defines 'District' and not 'District Court'. A closer scrutiny of the definition will show that the expression "District Court" finds its place in the definition of the expression "District".

The Bombay High Court, in an unreported Judgement, *(Natwarlal Ramlal Gandhi Vs. Zenith Iron Works & Anr.* Suit No.91 of 1960 decided on July 31, 1962) held that having regard to the definition of the expression 'District Court' in Section 2 (4) of the Civil Procedure Code, the High Court was the Principal Civil Court of Original Jurisdiction. The relevant extract of the said judgement is reproduced below:

"After the first preliminary section the provisions of the Patents and Designs Act are placed in three parts; Part I is headed Patents : Part II Designs and Part III General. Section 29 of the Act, which falls under Part I provides that a patentee may institute a suit in a District Court against any person who makes, sells or uses the invention without his licence, or counterfeits it, or imitates it. Now, in Section 2 of the Act, the expression 'District Court' has been defined as having the same meaning as is assigned to that expression by the Code of Civil Procedure. In the Code of Civil Procedure, the expression 'District Court' has been defined as 'the principal Civil Court of original jurisdiction.' The Original Side of this Court being the principal Civil Court of original jurisdiction in Greater Bombay, it follows that the expression 'District Court' as used in the Patents and Designs Act means, so far as Greater Bombay is concerned, the Original Side of this Court. Therefore, a suit by a patentee for an infringement of his patent lies, by virtue of Section 29 on the original side of this Court."

Recently, the Division Bench of Bombay High Court consisting of S.K. Desai and Kurdukar JJ by their Judgement dated 16th April, 1987 in Appeal No.1185 of 1986 in Suit No.1844 of 1984 held that the suit under Section 105 of the Trade Marks Act could be entertained and tried only by the High Court and not by City Civil Court as the High Court was the principal civil court of original jurisdiction by virtue of the Special Law of Trade Marks and which was exempted, under Section 3 (c) of the Bombay City Civil Court Act.

The recent amendment to the Bombay City Civil Court Act 1948 by making the pecuniary jurisdiction in respect of suits of the value of Rs.50,000/- and above to be filed in the Bombay City Civil Court will not affect the exemption, or the exceptions carved out under Section 3 of the Bombay City Civil Court Act 1948 unless Section 3 itself is amended by conferring jurisdiction with regard to matters covered under such special laws to the City Civil Court.

Even as regards the definition of District Court, the position is rather anomalous under the Civil Procedure Code in as much as it is actually 'District' which has been defined in Section 2 (4) and not District Court although in the body of the definition, the expression 'District Court' appears.

Family Laws

In this entire question as to whether it is the High Court or the

City Civil Court which is the District Court, it will be of interest to note that the Hindu Marriage Act 1955 defines 'District Courts' to mean in any area for which there is a City Civil Court, that Court and in any other area, the principal Civil Court of Original jurisdiction and includes any other civil court which may be prescribed by the State Government by notification in the Official Gazette, as having jurisdiction in respect of matters prescribed under the Act.

S. 9 of the Hindu Adoption and Maintenance Act, 1956 confers competence to give a child in adoption on the father, the mother and the guardian. Sub. section (4) of Section 9 provides that when both the father and mother are dead or have completely and finally renounced the world or have abandoned the child, the guardian may give the child in adoption with the previous permission of the Court to any person including the guardian himself. Clause (b) (ii) of the Explanation to S. 9 defines "Court" to mean the City Civil Court or the District Court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

Under S. 8 of the Hindu Minority and Guardianship Act, 1956 the natural guardian cannot without the previous permission of the Court mortgage or charge or otherwise deal with or dispose of the minor's property. Sub-Sec. (6) of S. 8 defines the 'Court' to mean the City Civil Court or a District Court or a Court empowered under S. 4A of the Guardian & Wards Act 1890 within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situated and where the immovable property is situated within the jurisdiction of more than one such court, means the Court within the local limits of whose jurisdiction any portion of the property is situated.

In all the aforesaid three statutes, which we may also call special laws, the expression "Court" is deemed to mean the "City Civil Court" except in the case of the Hindu Minority and Guardianship Act, it could mean the High Court as well having regard to S. 4A of the Guardian & Wards Act, 1890 or the District Court if the property or any part thereof was within the local limits of its jurisdiction. In the first two cases, the statutes have conferred exclusive jurisdiction to the City Civil Court and in the third case concurrent jurisdiction to the City Civil Court, the High Court and/or the District Court depending upon the location of the property.

In conclusion therefore the High Court is a District Court in several cases as discussed and in some cases not. But in no case, the City Civil Court is a District Court as it always is the subordinate Court.

Anil Mehta is an advocate practicing in the Bombay High Court.

Workers As Secured Creditors

The Companies (Amendment) Act, 1985 by Section 529A has brought about far reaching changes in regard to distribution of sale proceeds realised among the creditors of the company which is being wound up. ***K. R. Chandratre*** *describes the effects of the amendment in a nutshell.*

The relevant amendments have the effect of hitting the secured creditors in an endeavour to protect the interests of the workmen of the company who have been described as "the worst victims" in the case of the company facing winding up. Thus, one class of creditors is sought to be protected at the expense of the other class of creditors when a company goes in liquidation.

In the Budget Speech of 1985-86 budget the then Finance Minister said:

"Workers are the worst victims of industrial sickness. Under the present law, however, when companies are wound up, workers' dues rank low in priority compared to secured creditors. To my mind labour is as much a factor of production as any other and it is unjust that the workers' dues should have a lower priority. In order to rectify this situation, we have taken a decision to introduce the necessary legislation so that legitimate dues of workers rank *pari passu* with secured creditors such as banks in the event of closure of the company. Such dues will rank above even the dues to the Government."

With a view to giving effect to the above proposal the Companies (Amendment) Act, 1985 has been passed which modified sections 529 and 530 and inserted new section 529A in the Companies Act, 1956. Sections 529 and 530 deal, among other things, with the rules relating to payment of dues to the creditors of the company which is being wound up. Briefly, the secured creditors of such company get their dues in priority to the extent of the amount realised from the sale of the secured assets and among the other creditors those specified in section 530 enjoy preferential treatment in regard to payment of dues.

Overriding Preferential Payments

The new section 529A and the Proviso inserted in sub-section (1) of section 529 reads as follows:

"529A. (1) Not withstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company

(a) workmen's dues, and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section 529 pari passu with such dues, shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions."

Proviso to sub-section (1) of Section 529 reads as follows:

"Application of insolvency rules in winding up of insolvent Companies

529. (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to

(a) debts provable;

(b) the valuations of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors;

as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent.

Provided that the security of every secured creditor shall be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workman's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of section 529A".

Charge *pari passu* with Secured Creditors

By virtue of these amendments the workmen's dues have been sought to be given not only statutory preferential treatment in the matter of payment of debts and liabilities of the company in winding up, but, the workmen's dues have been placed on a par with the secured creditors. A statutory charge is created in favour of the workmen and this charge is created irrespective of what the document creating a voluntary charge in favour of any other creditor provides. The expressions "workman" and "workmen's dues" have been defined in section 529.

Until the 1985 Amendment Act, the debts or dues of the kinds specified in section 530 were to be regarded as preferential payments. Of course, dues of secured creditors always ranked in priority to the debts and dues mentioned in section 530. However, after the amendments, the newly inserted section 529A, has been given an overriding effect and section 530 now provides that in a winding up of a company subject to the provisions of Section 529A, there shall be paid in priority to all other debts the debts and dues specified in section 530. Section 529A has thus an overriding effect.

The workers will be secured creditors ranking pari passu with the charge of other secured creditors. In other words, the assets of the company, movable as well as immovable, shall be deemed to be charged for payment of workmen's dues even though no charge has been created by any document. This is thus going to be a charge created by law and, therefore, it need not be registered with the Registrar of Companies under section 125 of the Act.

Moreover, among the unsecured creditors the unrealised portion of the claim of the secured creditors of the amount which has been paid to the workmen out of the realisation of securities, whichever is less, shall have a preferential claim over other creditors of the Company.

Illustration

Suppose the amount realised on sale of the secured assets is Rs.1,00,000, the total amount of the workmen's dues is Rs.1,00,000 and the amount of the debts due from the company to its secured creditors is Rs.3,00,000. Thus, the total amount payable to the workmen and the secured creditors is Rs.4,00,000 in which the workmen's share is 25% and the secured creditors' share is 75%. The workmen's portion in the amount realised by selling the security will be 25% of 1,00,000 i.e. Rs. 25000 and the secured creditors' portion will be 75% of 1,00,000 i.e. Rs. 75,000.

Now, section 529A provides for overriding preferential payment of workmen's dues and certain portion of dues of the secured creditors. In other words the preferential payments to be made under section 529A are to be paid in priority to all other unsecured debts of the company and also in priority to the preferential payments mentioned in section 530.

The use of the word 'overriding' in section 529A indicates that its provisions are to override those of section 530. Moreover, the non-obstante clause in that section is also indicative of the intention of Legislature that its provisions are to have an overriding effect as against any other provisions of the Companies Act or any other law in regard to preferential payment to creditors of an insolvent person or a company in winding up.

The effect of clause (b) of section 529A (1) is that the secured creditors shall have the right to preferential payment before any other payment is made to any other creditor to the extent of the workmen's dues paid out of the amount relised from the security sold out.

It will thus be observed that although in the first instance the workmen of the company are sought to be placed at par with the secured creditors thereby reducing their claim, yet the secured creditors have been sought to be given some relief by giving them a preferential treatment along with the workmen before the preferential claimants under section 530 are paid anything.

K. R. Chandratre is a Company Secretary with Thermax Private Ltd.

Procedure in Domestic Inquiry

Domestic inquiries are posing a grave threat to the right of workers to a fair trial. ***P. D. Kamerkar*** *outlines the legal requirements of a domestic inquiry and the precautions to be taken in their defences.*

With the invasion of professional inquiry officers, domestic inquiries have ceased to be fact finding exercise and have now become uncontrolled imitations of criminal trials with the only difference that the chargesheeted person is presumed guilty until proved innocent. Some have taken upon themselves the task of writing guides on how to dismiss an employee. Consequently the domestic inquiry has now almost become an open-and-shut operation loaded against the employee. The Model Standing Orders promulgated by the Government have not been amended so as to fall in line with Section 22 of the Mahar-

ashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, although more than 16 years have elapsed since its enactment. It is, therefore, necessary that employees should have some guidance on the precautions to be taken in their defences.

There can be no inquiry unless the employee concerned has been furnished with a chargesheet stating the facts constituting misconduct. The chargesheet must not only state the relevant Standing Order alleged to be contravened but also facts constituting such contravention. The statement of facts must not be vague, The employee may either make his written say in defence or merely state that he denies the charges. In the latter case the inquiry officer may question the chargesheeted person in order to ascertain the nature of his defence but such questions must not be in the nature of cross-examination. An inquiry will not be bad on the ground of vagueness of the charge unless it can be shown that prejudice has been caused to the employee's defence or that he had sought clarifications before the trial but received none.

Under the Model Standing Orders and the standing orders certified under the Industrial Employment (Standing Orders) Act, 1946, the workman is entitled to be defended by another workman in his department. However, there is no restriction on who should hold the inquiry and who should represent the employer; both can be rank outsiders. Section 22 of the MRTU & PULP Act confers upon an unrecognised Union the right to appear on behalf of any of its members in any domestic or departmental inquiry. The chargesheeted workman should at the outset decide whether he wants to be defended by his Union representative. He should also ascertain whether the person holding the inquiry belongs to the 'domestic or department' and if not, record his protest. He must particularly do so if the inquiry officer is a professional; for if he is, it requires no great imagination to conclude that he would not get another such assignment if he fails to render full satisfaction to the employer or if he puts on any appearance of independence.

Burden of Proof

The burden of proof that the alleged misconduct has been committed by the chargesheeted employee is upon the employer unless the latter admits the set of facts alleged and his defence consist of justification or he pleads bona fide error of judgement. What is necessary is to know the ingredients of every misconduct enumerated in the Standing Orders. For instance, in a charge of "refusal to obey lawful and reasonable orders" it is not enough to prove that an order was given and that it was not obeyed. The burden is upon the employer to show that such order was lawful and reasonable. If, however, it is the employee's defence that he had been picked-up out of ulterior motive, it will be incumbent upon the employer to show that the requirement was not excessive, that there was a fair distribution of overtime and that there was no discrimination. Overtime is not the ordinary incident of contract of employment. The existence of such term of contract will have to be proved by the employer if the worker's defence is that he was not bound to put in overtime. Where an employee is charged of wilful slow down, the employer must not only prove the production in normal conditions but also that at the time of the incident in question the work opportunities and facilities were normal. Where the production taken into account is the end product of the collective effort of workers, the employer most prove by positive evidence the participation of the individual charged and his responsibility for the same. Where a workman is charged of gross negligence the employer must prove not only that the mishap was the result of the performance of the chargesheeted person but also that there was absence of due care and caution on his part. The degree of care and caution expected will be proportionate to the technical knowledge and status held by him. Not every negligence is gross. In order to prove that the negligence was gross, the employer must prove that the worker was conscious of the possibility of the mishap but took no step to avoid it and consciously risked it. The qualifications of the employee and the state of his mind are material ingredients of the charge. It is common for employers to treat the item 'act subversive of discipline' as a residuary clause with universal application. Not every defiance subverts discipline unless it causes violent everthrow.

In any case the safer course for the employee is to allow the employer to close his case before opening his case. This problem can be easily got over by the inquiry officer framing issues to be tried.

Inspection of Evidence

Where evidence consists of documents, they must be produced before oral evidence is recorded. Both parties must, therefore, offer inspection of such documents in advance. Where defence evidence consists of documents in the exclusive custody of the employer, the employee must call for them in advance. But the common tendency of demanding inspection of voluminous records without any intention of relying upon them and wasting time over it helps no purpose except causing irritation. The employer can avoid this by furnishing copies of documentary evidence with the chargesheet or before recording oral evidence. Inspection can then be restricted to ascertaining whether the copies are faithful to the original.

Cross Examination

Cross-examination is both an art and a technique. There are useful books on the subject by authors who had achieved eminence at the Bar or had observed and studied astute performances. The present author is not competent to write on the subject. The following guidelines in cross-examination by non-lawyers should suffice.

i) be brief and pertinent.

ii) Do not ask a question of which you do not know the correct reply.

iii) When a witness claims to have been a chance eye-witness search him for particulars of any contemporaneous report he made and how he happened to be called as a witness.

Additional Evidence

By an extra-ordinary quirk of legality the employers have succeeded in establishing the right to lead additional evidence when a statutory adjudicator concludes that the finding of the domestic inquiry is perverse, meaning unsupported by any evidence at all. The employer does not have to show that he had no opportunity to produce such evidence at the domestic inquiry. He does not have to show that such evidence was not available when the inquiry was held. The fact that the inquiry officer and the employer's representative before him were well-equipped with the law and facts is also immaterial. But once it is held that the domestic inquiry was proper, the adjudicator cannot allow the aggrieved employee to produce fresh or additional evidence to prove his innocence. The grounds that the employee was illiterate, that neither he nor his representative know how to conduct oneself at the domestic inquiry, that such evidence was not available when the inquiry was held, that witnesses who were not daring to support the defence were now prepared to

brave the facts and/or disclose that they had deposed at the domestic inquiry under misconception, coercion or fraud, are of no avail. It is, therefore, necessary that care is taken to produce all defence evidence at the state of the domestic inquiry.

Written arguments are of use where there is an apprehension of vital points of defence being overlooked. This exercise is, however, useless where the findings are not appealable. In a domestic inquiry, it is counterproductive. There is nothing in law to prevent an inquiry officer from entertaining additional evidence of the employer in support of the charges, provided he does not deny defence the opportunity to counter such evidence. It is, therefore, wise not to make them wise.

Tampering with records

The law does not ensure protection of the records of inquiry from being tampered with. There is a recent case where the Hindi Prachar Sabha of Pune relied upon records of inquiry held by a professional inquiry officer who guarantees results. The Labour Court has held that no evidence could have been recorded on the date on which the proceedings were alleged to have been held and that the record of evidence produced before it had been fabricated. Several years back Shri Niloobhau Limaye of Pune, acting as an arbitrator in a case against Hotel Miramar, came across a complete record of inquiry written out without any such inquiry ever having been held. The record showed witnesses making statements and cross examined most competantly by an illiterate waiter of the hotel. Outraged by this scandalous state, he insisted on full disclosure by the manager who then sheepishly confessed that after he dismissed the worker, a Deputy Commissioner of Labour had prepared the fictitious record of inquiry, for a bottle of Scotch.

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

National Campaign for Housing Rights Workshop on Gender and Housing

Date: 30th July, 1st and 2nd August, 1987

Venue: Centre for Integrated Rural Development Studies
Madras Christian College
East Tambaram
Madras 600 059.

For Participation please contact:
Lalita Das
B-27 Clifton
Juhu Road,
Bombay 400 049

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.

In order to cater to the readers needs, we will be carrying articles in these Grey Pages on topics specially suggested by the readers. Would you like any particular topics of law to be discussed in the Grey Pages?

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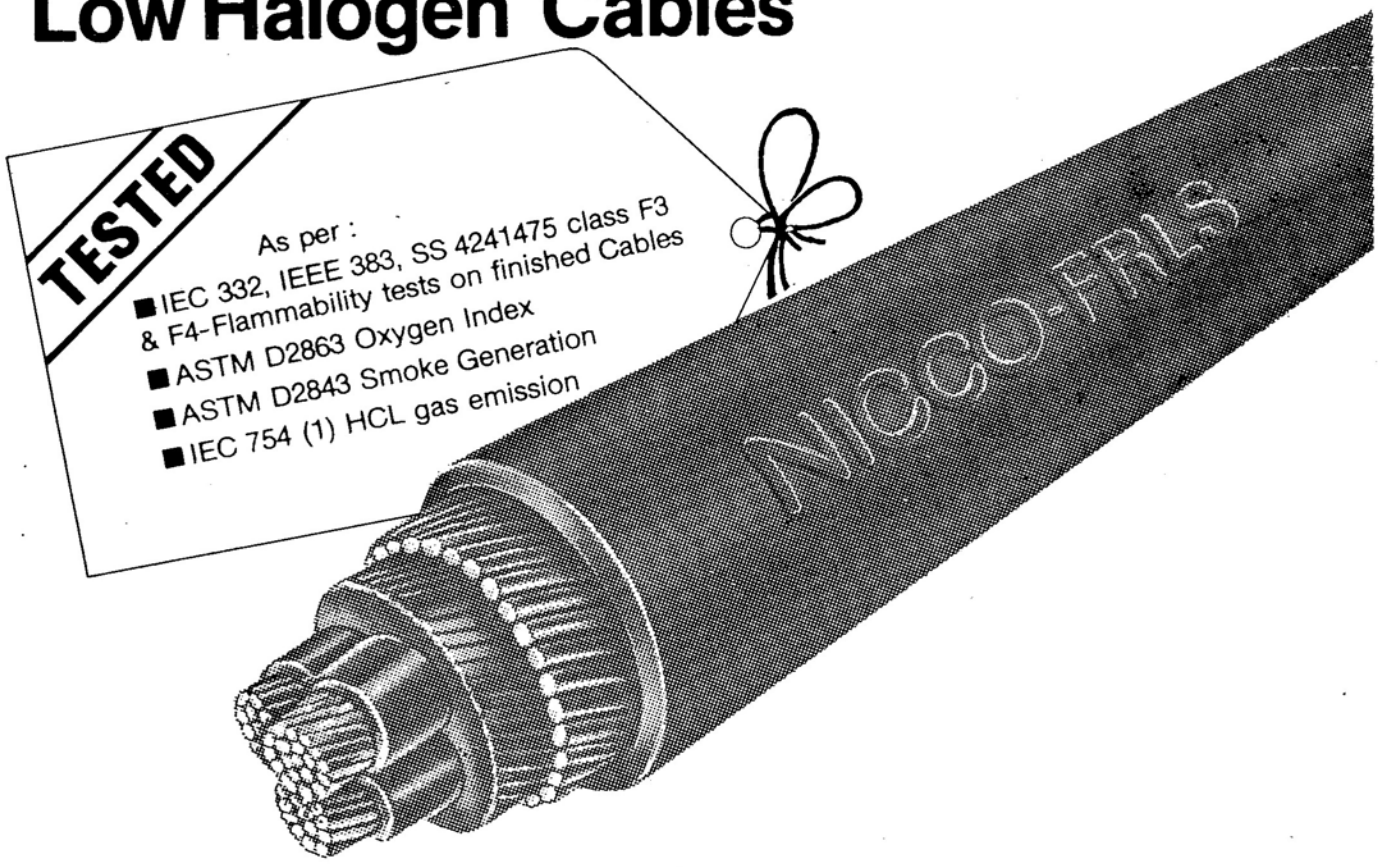

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WARRANTS ATTENTION

Bonded Labour in M. P.

Madhya Pradesh, the largest state in India has also the largest population of Scheduled Tribes and Scheduled Castes among whom bonded labour is rampant. ***Nirmala Bhat*** *comments on the prevailing situation.*

Forty years after independence, in the Raipur district of M. P. alone, there are more than ten thousand bonded labourers who have been in bondage for generations together. The Bonded Labour System (Abolition) Act, 1976 has brought little relief to these beleaguered and long suffering people. Recently, their plight was highlighted in a fourteen page letter written to the Chief Justice of India by eleven social activists of the Jan Jagriti Kendra, Pithora in Raipur, containing an appeal to release 4382 bonded labourers.

The Kamiya System

Raipur has an age-old practice called the "kamiya system" under which a labourer is kept in bondage by giving a loan/advance called "murahi". In return the kamiya works in the fields and house of the "malik" (master). The average wages are 2 tamis (1 tami = about 800 gms) of rice per day. Plus 4 to 6 "khandi" (1 khandi = 15 kgs) of rice per year for his family given in instalments. Sometimes, the kamiya is given a "baug" or a piece of agricultural land which is less than half an acre for his personal use.

Against this, the kamiya works for 12 to 16 hours a day and must be at the beck and call of his master round the clock. Women are never employed as kamiyas but have to collect the "bhuti" (wages) of the kamiya every alternate day and offer free labour in the master's house for at least half a day. However, if she wishes to work, she is bound to offer her labour first to her husband's master. Only if he refuses can she work elsewhere. Even then, the wages never exceed Rs.3 or 4 per day, in cash or kind.

There are no holidays or leave for the kamiya. Fines are imposed amounting to 5 to 6 tamis of rice per day of absenteeism, along with interest at the rate of 50 per cent. So the kamiya has to send his brother, father, wife or son

as a substitute when he is unable to work. For religious or domestic occasions, the kamiya may take a loan from the master at 50 per cent interest.

The kamiya cannot leave the services of the present master until he has refunded the "murahi" (loan/advance) which is quite impossible since his wages are extremely low. Thus for years, he remains bonded. If, the kamiya flees to another village, he is brought back with the connivance of the gram panchayat. The master can sell the kamiya to another master to recover his loan/advance or he can send him to work in the fields or house of another master. There have also been instances of the kamiya being sent to work on various government schemes and work projects, especially drought relief programmes. The wages of Rs.6 to 10 per day are pocketed by the master who pays the kamiya his agreed wage of 2 tamis of rice only.

Children Bonded

In addition to the kamiya system, there are other variations notably that of bonded child labour known as "Baila Charwaha" or "Peyjoli". Under "Baila Charwaha", children of 8 to 14 years are bonded due to economic difficulties, to work for the master for 10 to 12 hours a day, for a sum of Rs.200 to 1000 per year, paid as advance. Under "Peyjoli", children of 6 to 8 years are kept for 24 hours in the master's house to do odd jobs. For this, no wages are paid, only food is given which consists of rice mixed with water.

The Jan Jagriti Kendra has been working in Raipur since 1983 to liberate the bonded labourers. Till then, not a single bonded labourer was identified or released in Raipur even after 8 years of the Bonded Labour System (Abolition) Act. Violations of the Act have been the rule rather than the exception. The first batch of 683 bonded labourers were released by the intervention of the Supreme Court of India on a writ petition filed by a local voluntary organization the Chattisgarh Krishak Mazdoor Sangh. Since then only 903 more labourers have been freed. Even then their condition is pitiable. Their old masters do not employ them out of revenge or for fear of official action. Other avenues of work are hard to come by and they are neither provided with quick relief nor rehabilitation. It takes months for them to get what the law describes as "ex-gratia" payment of Rs.500/-.

Activists Obstructed

The laudatory work carried out by the social activists in exposing the close nexus between corrupt politicians and unscrupulous officials has made them the target of harassment. Criminal cases have been filed against some activists by the local administration to intimidate them.

Legal Intervention

The Bonded Labour System (Abolition) Act has been shamelessly flouted in Madhya Pradesh. However, acting on the appeal of the activists the S. C. has appointed a Commissioner on May 8th this year to institute an inquiry into this matter. It is hoped that with the intervention of the Supreme Court this modern day slavery system will be abolished in Madhya Pradesh and governmental action instituted to rehabilitate the freed bonded labourer.

Ms. Nirmala Bhat is a free lance journalist

OPINION

Has the Indian President Freedom Of Information?

Recently the right of the President to receive information from the Union Cabinet has been a matter of controversy. ***Justice Krishna Iyer,*** *a nominee for the post of the President, discusses the constitutional position.*

"Indeed I tremble for my country when I reflect that God is just", said Jefferson. Many of us are disturbed likewise when we view our national scene now; where constitutional summitry is an hide and seek artistry, forgetting that when a man assumes a public trust, he should consider himself as public property; issues affecting him must be the concern of the people lest apathy lose us our liberty.

Cabinet System of Government

A furious polemic has recently sprung about the right of the President to know what happens in the affairs of his Administration. Is there a right to secrecy in the Prime Minister against his own President? Is there presidential authority to command compliance when information called for is denied or delayed. These issues cannot be discussed *in vacuo* but must be viewed in perspective in the political context of the system of government. So let us briefly analyse our National Charter and the political process organized under it. After a most exhaustive review of the case law and other weighty opinions the Supreme Court in Samsher Singh's case (AIR 1974 SC 2192 at P. 2198) ruled that:

"Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and States. Under this system the President is the Constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers."

True, this dwindling stature of the President of India, like that of the wan queen of England, contrasts with the abundance of supremacy the text of the Constitution vests in him. Is he then a mere verbal marvel and boneless wonder, no more than a functional cipher?

No, and here is the haunting essence of his finer presence, often missed when extremes of power and powerlessness are attributed by partisans. In Samsher Singh, a separate but concurring opinion has floodlit this facet.

Like the King in England, he will still have the right "to be consulted, to encourage and to warn". Acting on ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers in Council, if necessary, to reconsider the matter. It is only in the last resort that he must accept their final advice. A similar result is likely to follow in India too: for, as has been well said, "the voice of reason is more readily heard when it can persuade but no longer coerce".

Not A Glorified Cipher

Again, this subtle yet significant role has been vivified in a later paragraph in *Shamsher Singh* (P 2224):

"The President of India is not at all a glorified cipher. He represents the majesty of the State, is at the apex, though only symbolically, and has rapport with the people and parties, being above politics. His vigilant presence makes for good government if only he uses, what Bagehot described, as, 'the right to be consulted, to warn and encourage'. Indeed, Article 78 wisely used, keeps the President in close touch with the Prime Minister on matter of national importance and policy significance, and there is no doubt that the imprint of his personality may chasten and correct the political government, although the actual exercise of the functions entrusted to him by law is in effect and in law carried on by his duly appointed mentors, i.e. the Prime Minister and his colleagues. In short, the President, like the King, has not merely been constitutionally romanticised but actually vested with a pervasive and persuasive role. Political theorists are quite conversant with the dynamic role of the Crown which keeps away from politics and power and yet influences both.

The President is largely ornamental yet constitutionally relevant capable of exercising his 'right to be consulted, to warn and encourage', his moral authority, his power to object, to ask the Cabinet to reconsider, but finally say 'Amen'. That is how he plays his part to run the country on the constitutional rails. To defy the cabinet is to violate the Constitution; but not to demur and demand reconsideration when he disagrees with its wisdom is to desert his triple duties, seemingly limited but pregnantly strategic. The vital nexus between the head of state and the nation's ministers is best condensed in Article 78 which is the nidus of the President-Prime Minister relations. Carefully drawn, reflecting the British position, are three comprehensive responsibilities of the Prime Minister vis a vis the President, calculated to enable the latter to fulfil his obligation under the Constitution:

Right To Know

A) The decisions of the Cabinet

must be communicated to the President so that he may know the working of his Government and bring his influence to bear upon it to the advantage of the country.

B) Similarly, the Prime Minister is duty bound:

"78 (b) - to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for."

C) If in the informed judgement of the President there is room for reconsideration by the Cabinet of any matter on which a decision has already been taken by a Minister, he may require the Prime Minister to place it for that purpose before his Council. Thus an intimate mutuality and active interaction between the President and the Prime Minister is the fundamental assumption of the Constitutional equation.

The President's power to call for information is central to his function under the Constitution to persuade the Cabinet and to 'state all his objections to any proposed course of action and...to reconsider the matter'. The demand for information is a feed-back needed to fulfil his office as mentor or counsellor exercising 'a sure and commanding influence' (William Paley). How can the President encourage or caution his Cabinet or require it to review its decision? Not by meditation but by information refined by reflection. Press rumours and Opposition channels are unreliable, sometimes even unseemly, sources.

Complementary to the President's duty the Constitution must devise a medium and methodology to lend viability and authority to his institutional functionality. Who but the Prime Minister can be commanded by the Constitution to perform this high purpose based on British conventions? In short, Article 78(b) activises the Rashtrapati, vitalises his real presence as the Constitutional sentinel and invests his high office with a Westminster relevance. To deny all the (or any) information he seeks is to stultify the solemn scheme. Be it remembered that, when all is said and done, he too is elected by a distinguished electoral college and charged with a vast range of functions and powers and unspelt prerogatives, although none of these factors belittles the reality that Rashtrapati reigns and the Cabinet rules. And in a narrow area of momentous import it is he who acts without his Cabinet's control or ken.

Conscience Of The Cabinet

The panoply of presidential powers is more a verbal display but still leaves a residium at once real, even critical.

These functions and prerogatives, which as a trustee under the Constitution he is bound to discharge, necessitate a happy, healthy and continually operative relationship with his Prime Minister. This is the conscience of the Cabinet system and any subversion of this essential principle of mutual communication may deadlock the processes and defeat the Founding Deed itself. Constitutional pettifoggery, in blind bhakti, has gone to the absurd extent of arguing that Article 78 is handcuffed by Article 74. The argument is that the President may call for such information from the Prime Minister to ask the Prime Minister a *reductio ad absurdem*! How is he to warn, counsel and urge reconsideration of ministerial action if he has no means of being briefed? Should the President ask such questions of the Prime Minister as the Prime Minister asks him to ask? Constitutional puppetry of this order is attribution of tomfoolery to the Founding Fathers. Nor indeed is such a goofy gloss found to hold good in Buckingham Palace. With charity for the sanity of the Constituent Assembly may read the constellation of provisions to mean that the President is, in ordinary circumstances, bound to act on, only on, and only to the extent of, the advice given to him by his Cabinet. This drastic limitation on the presidential personality notwithstanding, he has a counselling function, a sentinel's obligation which plays benignly upon the Cabinet's governance. The freedom of information necessary for the presidential fulfilment of constitutional functions is limited, nevertheless not illusory. He cannot cross-examine the Cabinet but may interrogate for or seek discovery of essential information pertinent to his powers.

Article 78(b) is wide in its terms and sweeping in its semantics although confined to seeking and securing facts relating to the Union Administration. When the President asks that he be furnished facts, the only questions which control the supply of these are: Does the information relate to the Administration of the Union or to the proposals for legislation? Is it information that is being called for or mere speculation or surmise, or fishing exercise? There is no restriction beyond these two. After all, in law the President is the repository of the entire Executive power of the Union and even though he cannot exercise a wee bit of this power, his awareness of what is happening in his Government is a basic postulate. There is no secrecy between him and his Government. It is as if he is not part of the Government. He is even part of Parliament (Art.79). Nothing justifies a constitutional iron curtain between the President and the Prime Minister. On the contrary Art. 78(b) is an opposite mandate. Imagine Governors in non-Congress States being told by the Chief Ministers that they decline to answer when information is sought. Indeed, the Rajpals sometimes behave beyond constitutional boundaries and deserve to be rebuffed. Never in the history of this country has any Governor been told by any Chief Minister that the information he seeks under Article 167(b) will not be furnished. If any of them had defied or denied the demand from the Raj Bhavan the Governor would have reported under Art. 356 that he was satisfied about a situation having arisen in which the Government of the State was not being run in accordance with the provisions of the Constitution in particular Article 167(b). If it is a break-down of the constitutional machinery to refuse compliance with

Article 167(b) the position is the same vis a vis Article 78(b). Repeatedly, the Supreme Court has laid down the law that the President and the Governor are virtually identical functionaries except in a marginal area which has nothing to do with this controversy. If today the Prime Minister refuses, tomorrow the Chief Minister follows him.

A Caveat

A constitutional coup relying on the text of the scripture and rejecting its spiritual texture may happen if a dangerously literal interpretation were adopted of the living words of the Organic Law. We must all oppose it. I dread to read what Prof. Alen Glendhill wrote (AIR 1974 SC. Page 2221).

"Let us assume that a President has been elected who has successfully concealed his ambition to establish an authoritarian system of Government. One-fourth of the members of a House of Parliament, suddenly aware of the danger, give notice of a motion to impeach the President. Before the fourteen days within which it can be moved, the President dissolves Parliament; a new House must be elected but it need not meet for six months. He dismisses the Ministers and appoints others of his own choice, who for six months need not be Members of Parliament and during the period he can legislate by Ordinance. He can issue a proclamation of Emergency, legislate on any subject and deprive the States of their shares in the proceeds of distributable taxes. He can issue directions to States calculated to provoke disobedience and then suspend the States' Constitutions. He can use the armed forces in support of the civil power. He can promulgate preventive detention ordinances and imprison his opponents."

I hope we love swaraj too much for Moghul Raj to return.

Prof. Keith holds in favour of the President's plenary right to 'fullest information' (see supra). De-stablisation begins, paralysis creeps in, when the tallest two swear to uphold the Constitution (against each other?).

COMMENT

Urbanization Report

The Ministry of Urban Development recently published the first interim report of the National Commission on Urbanisation. The report provides an extensive overview of many facets of urbanisation, an optimistic prognosis for the future growth of Urban Centres and an analysis of the legal constraints on urban development. ***Marjorie Berman*** *reports on and analyses the Commission's conclusions.*

The Interim Report is praiseworthy for its acknowledgement and stated commitment to improving the wretched conditions confronting more than half of India's urban population. It is optimistic that, with proper planning and administration, cities have the capacity to respond effectively and creatively to future urban growth. It's proposals however, place extraordinary demands and perhaps too much confidence on urban machinery, virtually ignoring the role that rural development could play in easing the burdens facing our cities. Further, the report is ineffective in analyzing the shortcomings of recent urban policy reforms and in suggesting how this commission can, in practice, succeed where other policies have not.

Previous Policies Criticized

According to the Commission, previous efforts to address urban development have been unsuccessful because they have been conducted in an ad hoc manner, rather than addressing the fundamental distortions in the existing urban system. These distortions include those arising out of (1) lopsided development (2) wrong priorities (3) overstressing the system (4) inadequacy of infrastructure and (5) inefficiencies in management.

Likewise the report states that urban poverty, predominantly manifested by the proliferation of slums and urban decay, results from failure to (1) supply accessible urban land to meet the demand (2) provide housing finance and (3) to properly anticipate the demands on our cities. The report asserts that the first step towards ameliorating this problem is to shed the "alarmist" view of urbanisation where the urban poor are viewed as nuisances, in favour of a view which looks to the scores of urban poor as productive additions to the urban economy.

While noting these distortions and limitations of prior policies, however, the report defers proposing concrete recommendations to later reports. Thus, it is uncertain whether the National Commission is merely paying lip service to obvious problems or whether it will be able to overcome the biases to which previous programmes have fallen prey.

Land Ceiling & Rent Control

The report is critical of the effectiveness of the Urban Land (Ceiling and Regulation) Act [UL (C&R)Act] and State-based Rent Control Acts. It correctly states that the UL (C&R) Act has fulfilled neither its objective to acquire surplus property nor to prevent speculation and profiteering. Rent Control Acts, rather than enhancing availability and affordability of housing, have been responsible for extensive disrepair of buildings, distortions in the rental market,inefficient land use and freezes in municipal revenues occuring from property tax.

The Commission stresses that while these acts must remain on the books, they must be altered if they are to meet their goals as stated. To improve performance of the UL (C&R) Act it recommends (1) speedy identification, acquisition and release of surplus land for development to respond to the housing needs of low income populations (2) permission with a minimum of bureaucratic delay to take up house construction below 80 sq.m. on surplus land or to transfer land to housing cooperatives and (3) levying of a cess/ tax and penalties for misuse, to be used for land acquisition and development of serviced sites and housing for the urban poor.

Regarding Rent Control, the Commission recommends maintaining the present statutes to assist the many who are incapable of competing under free market conditions. It recommends, however, the following modifications of objectives to encourage large scale additions to the existing Housing Stock: 1) the protection of existing tenancies (2) institution of a system of rental increases (3) delinking of non-residential tenancies from purely residential to shift the burden of market rent to commercial activities (4) offering of incentives for new construction and (5) improving the tax base of local bodies by facilitating realistic valuation of properties.

It is not clear that the prescribed rent increases can raise adequate revenues given the great cost necessary to repair the tremendous number of dilapidated buildings. This is particularly so because many urban units are less than 80 sq.m. in area and the rent increases advocated for these spaces are accordingly quite small. Without precise planning to forecast necessary expenses, such increases will impose a substantial burden on middle and lower income residents, while not raising sufficient revenues to substantially improve the quality of housing. Further, the commission assumes that the initially agreed upon rents for newly constructed residences smaller than 80 sq. m can be reached fairly. The reality is that inequality of bargaining power is certain to boost those rents higher than is either equitable or affordable. If the Commission is seriously committed to obliterating urban poverty then its first priority must be to provide basic housing, water and sanitation needs and this goal cannot be realised as an incidental by product of programmes to accommodate urban developers.

The Commission's report effectively locates the problems facing urban areas, but its proposals for reform are weak both in content and with regard to ensuring administrative and political responsiveness to its recommendations. The success of the Interim Report will be seen in the Commission's ability (or lack thereof) to deliver on its promises.

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Custody in U. S.

Laws relating to child custody in the U.S. particularly in the District of Columbia are discussed here by Ranu Basu in light of the Uniform Child Custody Jurisdiction Act of 1982.

In the U.S. the enforcement of the custody orders encompassing the care, control and maintenance of children awarded by a court to one of the parents in the course of a separation or divorce proceeding has been considerably improved with the adoption of the Uniform Child Custody Jurisdiction Act (UCCJA) of 1982 by many states. Some of the most useful provisions of this act deal with the exercise of jurisdiction, binding force and *res judicata* effect of custody decrees, recognition and modification of out-of-court custody decrees, taking testimony in another state and presentation of documents for use in other states. Most significantly, the UCCJA eliminates the physical presence of a child as the basis for jurisdiction and thus permits the parent of a child who has been snatched out of a state to file for custody in that state. The enactment of this legislation has also made it easier to enforce child support or the legal obligation of parents to contribute to the economic maintenance of their children arising out out of dissolution or custody action.

Sole or Joint Custody

Generally speaking, one parent is awarded sole custody of a child and as a consequence the major responsibility for the care and decision making in connection with the health and well being of the child. The non-custodial parent is usually granted reasonable visitation rights and, since both parents have the obligation to support the child in question, is directed by the court to pay child support to the custodial parent. While in several states, including California, there is a growing trend towards joint or shared custody, states such as the District of Columbia have no statutory or case law authority for awarding joint custody and will only award it if the parents agree to and desire such custodial arrangement. In a significant decision the D. C. Court of Appeals generally expressed disfavour towards divided custody and overturned an award of custody which provided for a child of two spending every third month in another state, although the road was left open for third agreeable parties living in the same area getting joint custody. [Utley v. Utley 364 A. 2d 1167 (D. C. 1976)].

Factors Affecting Custody

In making decisions concerning the care and custody of infant children, whether temporarily during the pendency of litigation or permanently at the conclusion of such litigation, the District of Columbia Code requires courts to be "without conclusive regard to the race, color, national origin, political affiliation, sex or sexual orientation, in and of itself, of a party" and to be primarily concerned with "the best interest of the child". [D. C. Code, section 16-911 (a)(5)]. On determining the "best interest of the child", the courts are required to consider "all relevant factors including, but not limited to: 1) the wishes of the child, as to his or her custodian, where practicable, 2) the wishes of the child's parent or parents as to the child's custody, 3) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest, 4) the childs adjustment to his or her home, school and community, 5) the mental and physical health of all individuals involved. "[D. C. Code Section 16-911 (a) (5), 16-914(a)].

The factor that is clearly emerging as the most important criterion in granting custody is the determination of who has been the primary caretaker and nurterer of the child, the rationale being that of the need to preserve the stability and continuity of such bond existing between the child and the adult providing such care. [Bazemore v. Davis, 394 A. 2d 1977, 1381 D. C. 1978]. The presumption that custody be awarded to the primary caretaker parent has been established in recent cases which have taken care even to enumerate some of the major aspects of primary caretaking as: preparing and planning meals, medical care etc.

Parental And Non-Parental Cases

In many states of the U. S., including the District of Columbia, the "tender years presumption" preferring the mother as the custodian of children of tender age has been abolished, irrespective of the marital status of the parents (D. C. Code sections 16-911 and 16-914; *Bazemore v. Davis, 394 A. 2d 1377. D. C. 1978).* Thus at least theoretically the mother and the father have been put on an equal footing in custody battles subject of course, to the guidelines presented above. Even between a parent and a non-parent, at first glance there is no immediate presumption in favour of the parent and the controlling factor is again the best interests of the child. However, the general consensus seemed to be that in ordinary circumstances a fit parent is the one capable of looking after the best interests of his or her child.

Conclusion

As the amendment of the District of Columbia Code suggests, the adoption of a uniform statute regarding the exercise of jurisdiction in matters affecting child custody by states including D. C. has served worthy purposes which also provide clues as to the diverse and continuing problems connected with the matter of custody proceedings in the U.S. In an interesting addition to the provisions made for the mutual recognition of custody decrees between the states within the U.S., the UCCJA has also paid attention to the need to ensure its international application. This has been achieved though making sure that the provisions relating to the recognition and enforcement of custody decrees of other states also apply to "custody decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons". (D. C. Code Sec. 16-4523).

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Chile Diary

From March 1-8, 1987 **Tony Gifford** *visited Chile on behalf of the United Kingdom Parliamentary Human Rights Group and the International Human Rights Federation. He reports on his investigation.*

Despite the Pinochet government's ardent claims of improvements since the early years of the dictatorship, human rights abuses in Chile continue. These violations, which include imprisonment, torture and murder are committed with the knowledge and approval of the Government of Chile. They are, indeed, conscious policies to prevent democratic transition and to strengthen the dictatorship by removing all opposition.

Detention And Torture

The process of torture and denial of justice begins with the initial arrests made by officers of the CNI (National Information Centre-Security Police). The CNI routinely exercises its power of incommunicado detention for up to 20 days following the arrest. The courts are powerless to interfere even to prevent known instances of abuse. Despite a recent agreement between the CNI and the International Committee of the Red Cross (ICRC) which provides access to the detainees by ICRC officials after a specified period, torture is still applied.

Torture is routinely used prior to judicial examination as a method of extracting confessions from suspects. It is applied indiscriminately to all those arrested for political crimes whether the action involves a student demonstration, political rally or serious crimes such as assasination attempts. These routine forms of torture include administering severe electric shock to all sensitive parts of the body, immersion for days in a bath of excrement, sexual harassment, rape and physical beatings.

Unfair Trials

Following the incommunicado period, suspects are passed to the military justice system. A series of post-dictatorship laws transferred almost entire jurisdiction of civilian criminal cases to the military courts. It is clear that military courts are incapable of administering fair trials or delivering impartial judgements. As evidence, the present Fiscal Militar, who adjudicates over the first stage of a 3-tier hierarchy of military judges, is a political appointee.

Under this system it is impossible for the truth to emerge during the trial of the accused. Military judges are accountable to the state, instructed to presume the guilt of the accused and to administer torturous methods to ensure that the accused confesses to his/her guilt. The accused are held incommunicado for up to 10 days without access to legal advice and as a result of a recent Supreme Court decision, successive renewals of detention periods are now authorized. Confessions are taken before a judge without the presence of a lawyer and often under threat of return to the CNI. Finally while there is a legal ceiling of 40 days for the investigative stage of the trial, the investigation can last up to three years.

In addition to arrests, suspects continue to be abducted and murdered by clandestine squads believed to be agents of the police. A recent judicial effort to prosecute a group of these offenders demonstrates the futility of such attempts. The decision was overruled by the Supreme Court and when the prosecuting judge refused to drop the charges, he was suspended from duty for two months. Despite widespread criticism, the Supreme Court regularly continues to condone the practices of the security forces.

Dictatorial Constitution

The 1980 Constitution purports to change conditions in Chile by providing mechanisms for transition to democratic control. In reality, these provisions are incapable of such transformation and represent a sham to effectively legalise the dictatorship. Provision 8 of the Constitution categorically outlaws persons or groups "which propose a conception of the Society, the State or the juridical order which is of a totalitarian character or is based on the class struggle". By declaring an entire spectrum of political and social thought as unconstitutional and denying these people access to many professions of public duty, the Constitution is manifestly anti- democratic. Further constitutional and statutory constraints include: 1) a requirement that political parties constitute a minimum of 0.5% of the electorate, 2) a requirement that the names of all members of the party be published and 3) a prohibition of political activity by trade unions.

The process by which the President is to be elected in 1989 is completely void of any free choice of the people. The candidate will be selected by the current dictatorship subject to ratification by the citizens. Such a plebicite is likely to be taken in a state of fear, intimidation and fraud. Should the Government's choice not be confirmed, Pinochet will remain in power for another year.

In addition to the President's power to declare a state of Siege or Emergency, he is constitutionally permitted to assume extraordinary powers in circumstances where "there is a danger of disturbance of the internal peace." Parliamentary power is subject to severe restraints, taking a back seat to power of the armed forces and police. The changes and compromises initiated by the Pinochet Government are illusory. In reality, no substantial progress has been made to protect human rights. Democratic transition and meaningful change is not possible under the present Constitution and the Military Dictatorship continues to usurp power by supressing free expression and association and maintaining an oppressive regime which is fueled by systematic violations of human rights. Human rights activists in Chile continue in their struggle for justice. Governments around the world also must continue to apply pressure on Chile to substantially alter the provisions of the 1980 Constitution and to bring the dictatorship to an end.

Justice S.K.Desai

Justice S. K. Desai, the Acting Chief Justice of the Bombay High Court, is known not only for the breadth and spread of his knowledge as well as caustic remarks from the Bench, but also for his outspoken views about the administration of justice. We spoke to him about these issues.

Q. *There were 1,06,657 cases pending in the Bombay High Court as on 30 June 1985. Of these, more that 38,533 were pending for more than 3 years. Can litigants hope to see justice during their lifetime?*

A. Litigation and particularly writ work has increased and very little has been done to keep the Judge strength abreast of the requirement. That is the principal cause, although there are other subsidiary reasons for the arrears.

Q. *Is the unlimited jurisdiction conferred on the City Civil Court going to decrease the pressure on the High Court?*

A. It will at the most relieve two Judges from the High Court and will not decrease the pressure substantially. Two Judges may be released from the Original Side but perhaps one more Judge would be required on the Appellate Side to cope with the transferred work.

Q. *Will the overburdened City Civil Court be able to cope with the increased work?*

A. I don't think so. In 1969-70, as the Principal Judge of that Court I had recommended a Judge strength of 45 Judges. After 18 years, the Judge strength is only about 38 although there has been an increase in the criminal jurisdiction of that Court. Further, that Court worked only for 210 days in a year, whereas the requirement in the Court manual is a minimum of 235 days. District Courts work for nearly 250 working days in a year. We have, therefore, proposed enhancement of working days to about 220. But, there is serious opposition to this from the Bar in Bombay.

Q. *What is the situation in the subordinate Courts?*

A. It is equally unsatisfactory. We are 150 Judges short in the basic judicial cadre, viz., Civil Judge, Junior Division and Judicial Magistrate, First Class. The appointments are made by the Public Service Commission but

there has been no selection in the last two years. Appointments even in this year are unlikely. However what is more important to note is the very poor service conditions of the lowest cadre. The salary is poor. There are no proper court-rooms at many places and not even a place to stay. On occasions we find that these judges do not even get full or proper co-operation from the bar.

Q. *What exactly is the supervisory function that the High Court exercises over the subordinate judiciary?*

A. After the initial appointment is made by the Public Service Commission, the total control of the judicial system rests with the High Court. The first stage is confirmation. We have started a practice to have a judicial committee scrutinize the judgements given by the Judges who are not yet confirmed. The Committee recommends confirmation for those Judges whose judgements are satisfactory and postponement of confirmation for those whose judgements are not. Once the Judge is confirmed as a Civil Judge, Junior Division, he waits five or six years for his turn in seniority for consideration for promotion to the cadre of Civil Judge, Senior Division.

A Judgement Scrutiny Committee,appointed by the Chief Justice reviews the judgement of the Civil Judges, Junior Division and evaluates them for promotion to the cadre of Civil Judge, Senior Division. The disposals of the Judges are considered as are the special reports and the annual confidential reports on these Judges made by the District Judge. For promotion to the cadre of Additional District Judges, which is a selection post, a certain number of Judges who have obtained a high rating are called. They are then interviewed by a Committee consisting of the Chief Justice, two Administrative Judges and three members of the Judgment Scrutiny Committee. This Interview Committee then selects 15 to 20 judges as fit for promotion. The ultimate lists are then put up before the Chamber Meeting of all the High Court Judges at which stage Judges are eliminated if there are adverse reports made against them by any High Court Judges. The performance of the Additional District Judges is also monitored by the High Court particularly at the time when they are due for promotion as District Judges.

Q. *What is the system of appointment of District and High Court Judges?*

A. We have two sources for District Judge appointments. One is by promotion from the cadre of Additional District Judges. The other is by selection or nomination from the Bar. Advertisements are given approximately every two years and candidates who satisfy the technical requirement apply Since the last 2/3 years the High Court has interviewed all candidates who satisfy the technical criteria, irrespective of the income or their lack of familiarity with the type of work done in the Court where they hope to preside. This year interviews are to be held in June and July for selection to the posts of City Civil Court Judges and immediately thereafter to the posts of District Judges. About 100 and 150 candidates respectively are to be interviewed for the two categories of posts. The interviews will be conducted by a Committee of Judges nominated by, and usually including, the Chief Justice. The selections made are put up for approval before the entire body of Judges at the annual Chamber Meeting. After the final selections are made and approved by the whole house of

Judges, the Government still takes four to six months before making the appointment.

Q. *There are growing complaints of corruption against the judiciary. What is being done about it?*

A. All complaints are investigated. In the absence of a vigilance cell, investigation is left to a District Judge or an Additional District Judge. The High Court thereafter considers the confidential report submitted and decides whether to have a departmental inquiry or not. On the basis of an adverse report in a departmental inquiry, the matter is placed before the Disciplinary Committee of the Judges of the High Court. If the Committee decides to take action, then an opportunity is given to the concerned Judicial Officer to give his explanation or submission and action is decided upon after considering these comments. Even here the Government takes its time to act upon the recommendation of the High Court. The High Court has made certain proposals to the Government of compulsory retirement of a few Judges against whom there were complaints of impropriety. They were below average in judicial performance also. Even such recommendations are not being acted upon immediately. Such people may have Godfathers who have put in a word to prevent action against them.

Q. *There are growing complaints that lower courts do not follow the law laid down by the Higher Courts. For example, Magistrates grant remand to the police without so much as looking at the police diary or giving reasons for the remand. What is being done about it?*

A. Some of the difficulties such as failure to apply mind properly to the question of bail and remand are due to the pressure of work. You must have realised that Police want denial of bail as a matter of course and pressure seems to be brought on the lower Magistrates and even the Sessions Judges to keep the accused person in custody contrary to the law laid down by the Supreme Court. In this matter even the media has not appreciated the proper judicial position.

Q. *Should there be a code of conduct for Judges? At least one Judge of the Bombay High Court has suggested that Judges should be subject to vigilance.*

A. Certainly there should be a code of conduct. But the first requisite should be that Judges should sit in Court and work for the full period. Judges must not attend parties which are thrown by businessmen and corporations which are likely to be litigants before them. At least when Judges attend parties, they should conduct themselves in a manner befitting their position. However, Judges are also human beings and if society wants judges to be learned, to be hardworking, to have integrity, to give up their friends and to remain aloof, it must be willing to pay the price. You cannot expect Judges to observe all the requirements and run about trying to secure a place to stay and admission in schools and colleges for their children.

Q. *What are the issues taken into consideration for appointment of High Court Judges? Is it true that the income of the lawyer is one of them?*

A. The proposal ordinarily emanates from the Chief Justice of the High Court though recently proposals have also emanated from the Chief Minister. Income from legal practice is and must surely be taken into account but cannot be a decisive criterion. The income to a certain extent indicates the quantity of work of a member of the Bar. However, there have been cases where members of the Bar have worked free or at nominal fees in various types of cases, i. e. in service matters or for trade unions or workers or for matters involving public causes. The Chief Justice is presumed to be aware of the calibre of the Advocate, the type of work done by him and his integrity and these would be the principal factors to be considered. This would certainly mean that the Advocates practising before the High Court have a better chance of being proposed for elevation. We have, however, had a few instances recently of Advocates practising before the subordinate Courts also being elevated. There is a desire, and a proper one, to have Judges from what are known as the backward classes (including the scheduled castes), from the minorities and women and in all the three cases the criterion of income would have to be totally ignored.

Q. *There is a practice of appointing at least 60% of the judges in the High Court from the Bar. Why this bias in favour of advocates?*

A. There are certain types of litigation in which members of the Bar will prove more useful. For example, in the Bombay High Court, various types of work such as matters arising under the Companies Act, the Insolvency Act, Patents and Trade Marks Act as well as the ever expanding writ jurisdiction can be better handled, I think, by Judges elevated from the Bar. Indeed, certain types of the work enumerated above will not have been handled by the District Judges at any time. Members of the Bar are also found to be quicker in bringing about settlements of matters or passing workable orders. It is the general impression that members of the Bar are more decisive and almost aggressively impartial where the Government is a litigant before the Court. I think that a wholly professional judiciary will bring down the calibre and the impact of the Court and particularly of the High Courts.

Q. *What do you think of the calibre of Government Pleaders? Is the Government properly defended? What should be the method of selection?*

A. It is well known that appointments of unsuitable persons are being made for collateral considerations which results not only in Government not succeeding in many matters or getting adverse orders but also in contributing to delays. In matters where the writ petition should be rejected in limine, rule is issued (i.e. it is admitted) because of the lack of competence of the Government Pleader

Nearly 20 to 30 per cent of the matters which are admitted would not be admitted were the facts and the law properly put by the Government Pleader and at least 10 to 15 per cent of the final decisions which go against the Government also emanate from the incompetent way in which the matter has been presented. Government pleaders are unprepared both on facts as also on law.

Earlier, the Judges of the High Court used to give their opinions on the performance of Government Pleaders. It was then observed that the Government paid no attention to these recommendations, so the High Court stopped the practice of giving its evaluation. Probably Gresham's Law (of Money) also applies and bad Government Pleaders drive out good Government Pleaders.