FEBRUARY 1986 Rs. 5

FROM THE LAWYERS COLLECTIVE

A Civilized Decision

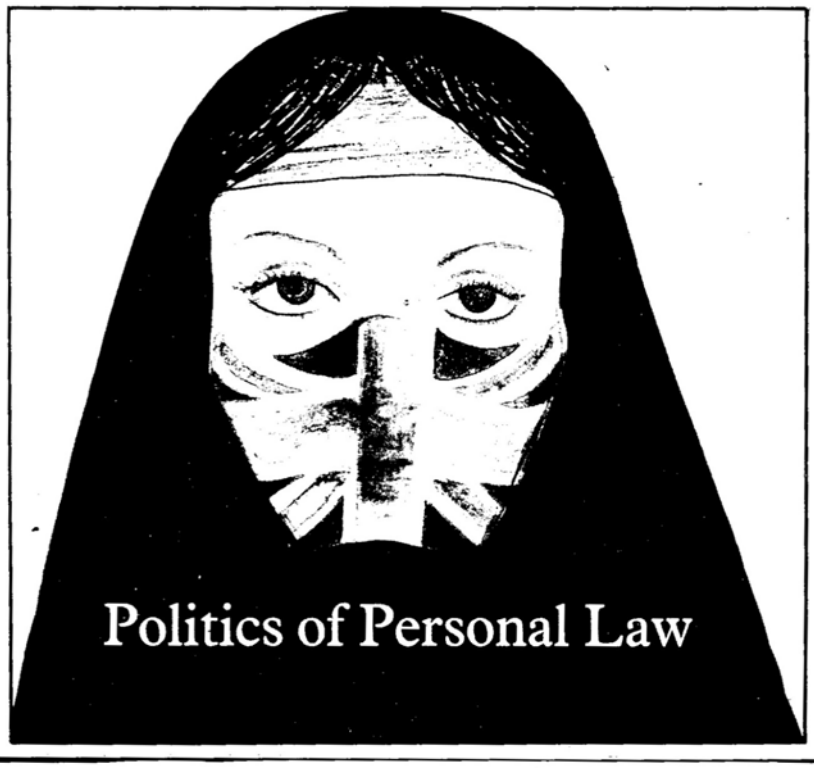
At last the Government of Maharashtra has picked up the courage to do away with the ordinary original civil jurisdiction of the High Court at Bombay for all suits of a civil nature. In virtually every other District of the country, the District Court, (in Bombay it would be the City Civil Court) has jurisdiction to deal with money claims of unlimited value. Not so in Bombay. Our metropolitan businessmen have the privilege of having their business dispute against each other decided not by the District Court, but by the High Court of Judicature at Bombay.

The lawyers of the Presidency High Courts always considered themselves a class apart from lesser mortals. A bit of class of the clients they represented rubbed off on to them. So deep rooted is their mark of distinction that its almost casteist overtones are reflected in the existence of two separate Bar Associations, each with its separate eating houses, lounges and libraries.

Last month the State Government passed two important laws, one enhancing the Jurisdication of the City Civil Court and the other abolishing the right of appeal from a single Judge of the High Court to a Division Bench of the High Court. The combined effect of these two new laws is that all claims of the value of Rs.25000/- and above will be decided by the City Civil Court and there will be no intra-court appeals in the High Court. The High Court will then be freed from the task of deciding disputed money claims of the moneyed class and become a Court of Appeal.

What is more important, High Courts and the Supreme Court are unique in that they possess constituent powers to interpret or strike down legislation, quash executive and administrative orders and actions which are arbitary, direct public authorities to perform their public functions and direct, by affirmative action, the State to protect the rights and interests of citizens. They must be freed from the relatively unimportant job of deciding monetary claims between private parties and discharge their true functions as Constitutional Courts and Courts of Appeal.

The new laws do not completely do away with the original jurisdiction of the High Court in purely commercial matters. Several petitions under special laws will continue to be filed directly in the High Court. Company petitions, innumerable in number, will still be filed directly in the High Court.



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* *Editor* Indira Jaising

EDITORIAL

In these days of increasing Tribunalisation, why should we not have a separate Tribunal for Company matters? We have just had the example of the Administrative Tribunals Act and a transfer from the High Court to the Tribunal of all service matters.

The two laws must, therefore, be welcomed. We hear that the lawyers of the High Court are busy drafting a petition to challenge these new laws. One can of course sympathise with them as the laws are bound to take away a substantial portion of their business. But it is tragic that the arguments against the new laws are being presented in the name of the unsuspecting litigant. The City Civil Court, the argument goes, is already over-loaded, and to add to its docket will do more harm than good. In the Financial Memorandum accompaning the Bill, the Government has already committed itself to appointing ten more judges in the Small Causes Courts and ten in the City Civil Courts. Moreover, the implications of such an argument are that while the rich have the privilege of a relatively expeditious remedy, the not-so-rich can wait.

The unwritten argument is that District Court judges are incompetent whereas the chosen few of the High Court, chosen from the ranks of the lawyers, are not. Surely, the remedy lies in finding ways and means of elimi nating delays for all. Competence is not a negotiable issue dependent on the monetary value of the claim involved. Moreover, it needs emphasising that Judges of the City Civil Court are chosen entirely by a committee of High Court Juges, who, we trust, will ensure the appointment of the competent persons.

Hearing of Writ Petitions by Division Benches and the abolition of the intra-court appeals will ensure finality of High Court decisions and cut out on endless delays. Moneyed litigants will no longer be able to harras their less fortunate opponents by sheer money power taking advantage of the laws delays and the right of appeal. In fact the right of appeal has been so abused that litigation is like a gamble. No decision of a single Judge, however sound it may be is ever accepted as final.

But the question still remains if and when the new laws are challenged, who will decide upon their validity? In 1982, the Government consulted the High Court on the proposals which have now passed into law. The clear and categorical opinion of the Judges consulted was against the new laws. It was "impossible" they said to support the Governments move. The proposals they felt were "neither wise nor practicable" and "would be a disaster". They felt that there was "neither principle nor justice nor warrant in law" for denying this intra-court appeal and that social justice required that the rich and the poor receive the same access to justice! Are these very judges now going to sit in judgement on the validity of the new laws?

Indira Jaising

LETTERS

UOI Vs. UCC.

Mr. Micheal V. Criesi and his colleagues of Robins, Zelle Larson and Kaplan who have been representing the Government of India in the USA were in Bhopal on the 24th January to review the evidence to be presented before Judge Keenan in New York. In a meeting with us, Micheal Criesi said that the decision either to reach an out of court settlement or to continue with the trial would be solely that of the Government of India, depending on what they thought 'provident'. Mr. Criesi could not give any specific guarantee that the gas victims would have a voice in this crucial decision.

We pointed out to him that while it is important for the victims to get appropriate compensation, it was equally important that the cause of the disaster and the laibility of UCC be established to prevent recurrence of such disasters. So we suggested that interim compensation should be paid to the victims and the trial continued. Maximum punitive damages should be claimed. As Mr. Criesi refused to tell us the amount of compensation being claimed, we drew his attention to the case of *Karen Silkwood*, a worker who died due to radiation exposure in a plutonium processing plant. Her dependants were awarded US $ 500,000 as compensation and $ 10.5 million as punitive damages.

We pointed out that no systematic effort was being made to collect evidence of a medical nature to establish the nexus between the gas exposure and subsequent death or disability. No post-mortems were being conducted in cases of deaths taking place in gas affected areas.

The percentage of carbamylated haemoglobin in the blood of gas victims produced as result of interaction between MIC and haemoglobin, could have been measured and recorded during the first 120 days. This would have constituted invincible evidence, for correlating death and disease with exposure to MIC. Urinary thiosulphate levels, both before and after administration of sodium thiosulphate injections could have been estimated as valuable corroborative evidence.

Opthalmological measurements to assess damage to the eyes, measurements by electronic spirometer and pulmonary function machines to assess damage to the respiratory system, excercise tolerance test', estimates of urinary thiosulphates levels to quantify the levels of cyanide in the blood and neurological tests were all required to be done.

In the course of discussion with Mr. Micheal Criesi we pointed out to him the total lack of information available to the gas victims regarding "their case" in the US Courts. The absence of such a dialogue underlined an unequal and undemocratic relationship between the US attorneys and the Government on the one hand and the gas victims on the other. We urge the Government to encourage participation of the victims in the decision making process and allow them to influence the outcome of any trial.

Zahreeli Gas Kand Sangarsh Morcha

NOTICE BOARD

Maharashtra High Court (Hearing of Writ Petitions by Division Bench and Abolition of Letters Patent Appeals) Act, 1986

L.C. BILL No. I OF 1986

A BILL

to provide for hearing of Writ Petitions by Division Bench and for abolition of Letters Patent Appeals in the High Court of Judicature at Bombay.

(As passed by the Legislative Council on the 16th January 1986.)
(As passed by the Legislative Assembly on the 20th January 1986.)

WHEREAS it is expedient to provide for hearing of writ petitions by Division Bench and for abolition of Letters Patent Appeals in the High Court of Judicature at Bombay; It is hereby enacted in the Thirty-sixth Year of the Republic of India as follows:-

1. Short title and commencement. (1) This Act may be called the Maharashtra High Court (Hearing of Writ Petitions by Division Bench and Abolition of Letters Patent Appeals) Act, 1986.

(2) It shall come into force on such date as the State Government may, by notification in the *Official Gazette*, appoint.

2. Writ petitions, etc. in the High Court to be heard by Division Bench. Notwithstanding anything contained in any law, every application for the issue of any direction, order or writ under Article 226 of the Constitution of India and every application invoking the jurisdiction of the High Court under Article 227 or Article 228 of the Constitution of India, pending before the High Court of Judicature at Bombay, on the date of commencement of this Act, or filed on or after the said date, whether the matter in dispute is or has arisen in Greater Bombay or outside Greater Bombay, shall be heard and disposal of by a Division Bench to be appointed by the Chief Justice of the High Court:

Provided that, the High Court may, by rules made after previous publication and with the previous approval of the State Government prescribe that such of the applications referred to above, arising in Greater Bombay or outside Greater Bombay, as may be specified in the rules, may be heard and disposed of by a single Judge appointed by the Chief Justice.

3. Abolition of appeal from judgement or order of single judge of High Court made in exercise of original or appellate jurisdiction. (1) Notwithstanding anything contained in the Letters Patent for the High Court of Judicature at Bombay, dated the 28th December 1865 and in any other instrument having the force of law or in any other law for the time being in force, no appeal, arising from a suit or other proceeding (including the applications referred to in section (2) instituted or commenced, whether before or after the commencement of this Act, shall lie to the High Court from a judgement, decree or order of single Judge of the High Court made on or after the commencement of this Act, whether in the exercise of the original or appellate jurisdiction of the High Court.

(2) Notwithstanding anything contained in sub-section (1), all such appeals pending before the High Court, on the date immediately preceding the date of commencement of this Act, shall be continued and disposed of by that Court, as if this Act had not been passed.

Bombay City Civil Court and Bombay Court of Small Causes (Enhancement of Pecuniary Jurisdiction and Amendment) Act, 1986.

L.C. BILL No. 1 OF 1976

A BILL

to provide for the enhancement of pecuniary jurisdiction of the Bombay City Civil Court and the Court of Small Causes of Bombay, and certain other matters.

(As passed by the Legislative Council on the 16th January 1986.)
(As passed by the Legislative Assembly on the 20th January 1986.)

WHEREAS it is expedient to provide for the enhancement of pecuniary jurisdiction of the Bombay City Civil Court and the Court of Small Causes of Bombay and for certain other matters hereinafter appearing; It is hereby enacted in the Thirty-sixty Year of the Republic of India as follows:-

1. Short title and commencement. (1) This Act may be called the Bombay City Civil Court and Bombay Court of Small Causes (Enhancement of Pecuniary Jurisdication and Amendment) Act 1986.

(2) It shall come into force on such date as the State Government may, by notification in the *Official Gazette*, appoint.

2. Amendment of section 3 of the Bom. XL of 1948. In section 3 of the Bombay City Civil Court Act, 1948 (hereinafter referred to as "the City Civil Court Act"), the words "not exceeding fifty thousand rupees in value, and" shall be deleted.

3. Deletion of section 13 of Bom. XL of 1948. Section 13 of the City Civil Act shall be deleted.

4. Amendment of section 14 of Act XV of 1882. In section 14 of the presidency Small Cause Courts Act, 1882 in its application to the State of Maharashtra, (hereinafter referred to as "the Presidency Small Cause Courts Act"),—

(a) for the words "does not exceed one hundred rupees" the words "does not exceed five hundred rupees" shall be substituted;

(b) in the marginal note, for the words "not exceeding one hundred rupees" the words "not exceeding five hundred rupees" shall be substituted.

5. Amendment of section 18 of Act XV of 1882. In section 18 of the Presidency Small Cause Courts Act, for the words "ten thousand rupees", at both places where they occur, the words "twenty-five thousand rupees" shall be substituted.

6. Amendment of section 20 of Act XV of 1882. In Section 20 of the Presidency Small Cause Courts Act, for the words "ten thousand rupees", in both the places where they occur, the words "twenty-five thousand rupees" shall be substituted.

7. Amendment of section 22 of Act XV of 1882. In section 22 of the Presidency Small Cause Courts Act, in clause (c), for the words "ten thousand rupees" the words "twenty-five thousand rupees" shall be substituted.

NOTICE BOARD

8 Amendment of section 63 of Act XV of 1882. In section 63 of the Presidency Small Cause Courts Act, and in the marginal note thereto, for the words "five thousand rupees" the words "ten thousand rupees" shall be substituted.

9. Savings. The amendments made by this Act in the City Civil Court Act and the Presidency Small Cause Courts Act shall not have any effect in respect of and apply to any suits, appeals or other proceedings of a civil nature pending before any Court on the date immediately preceding the date of commencement of this Act, and such precedings shall be continued and disposed of by that Court, as if this Act had not been passed; and any appeal, revision application or other proceedings, of a civil nature in respect of any decree or order passed by any Court before the date of commencement of this Act shall be filed before and heard and disposed of by the Court competent to entertain such proceedings before such commencement, as if this Act had not been passed.

WEEKEND LAW SCHOOL

The Lawyers Collective's first Weekend National School will be held in

Delhi on 29-30 March 1986

The following topics will be discussed.

*** PERSONAL LAW**
*** HOMELESSNESS**
*** LEGAL SERVICE BILL**

Only limited seats for participants are available.

For further details contact:

Delhi: Kirti Singh, Chamber No. 406, High Court, Delhi Tel 389401.

Bombay: Deepti Gopinath 818, 8th Floor, Stock Exchange Towers, Dalal Street, Bombay-400 023.

NEWS

Chief Justices Conference

In the Conference of Chief Justices, Chief Ministers and Law Ministers from all States held in New Delhi, a number of resolutions were passed which were tabled in Parliament recently.

It was decided to increase the number of Courts and augment the strength of judges and expeditiously fill up vacancies. They also decided that a judge should be included, as an expert, in the selection committee for the subordinate judicial services and that the vacancies in the High Courts should be filled up without any delay.

An Institute or Academy for training of judicial officers should be set up by the Government of India with the Chief Justice of India as its Chairman.

Alternative Dispute Resolutions Forums should be set up throughout the country. A draft scheme for the setting up of these forums was to be circulated. The insitutions of Lok Adalat, on the lines of the Scheme of the Gujarat Legal Aid Board should be set up and given statutory powers.

State Governments were requested to appoint Special Magistrates under Section 13 and 18 Cr.P.C. to deal with offences under Motor Vehicles Act and other petty offences, not involving imprisonment.

Leading members of the Bar ought to be invited to act as Additional Judges in the High Courts and District Courts.

All District and High Courts should have telex facilities as well as modern electronic equipments, including word processors, the Conference resolved.

It was unanimously resolved that a National Legal Services Act ought to be passed. There was a consensus that conditions of High Court Judges as well as the Subordinate Judiciary ought to be substantially improved.

NEWS

Medico friends meet

On the 27th & 28th January 1986, the Medico-Friend's Circle (MRC) held their Annual General Body meeting at Khandala. The MRC is a group of medical and non-medical people who share the common conviction that the present system of health services and medical education is tilted in the interest of the privileged few and should be changed to serve the interests of the large majority of poor. Over the years the group has evolved to include members of many walks of life. This year's meeting included Lawyers, Engineers, Journalists, Trade Unionists, Scientists, Social Workers, Environmentalists, and Film Makers.

The subject under study this year was "Environment" and "Pesticides" was taken as a case study. Over the period of 2 days six workshops were held on 1) Environmental pollution 2) The effects of pesticides on its users. 3) Comparative study between research done by Govt. agencies and activist groups. 4) Effects of an Acute disaster. 5) Environmental pollution at the work place its effects on industrial workers. 6) Pesticide residues in food.

One very interesting case study was the struggle of the Trans National Centre against The Harihar Polyfibres Factory, at Karnataka. The case gave an opportunity to study comprehensively the various facets involved in tackling environmental problems. The workshop discussed in detail the roles of scientists, doctors, trade unionists, lawyers, the media and, most importantly, the effected victims.

TNC has filed a petition in the Karnataka High Court for restraining Harihar Polyfibres, a Birla owned company from polluting the river Tungabadra.

It was noted that there is inadequate legislation on environmental problems. The Air and Water pollution Acts were insufficient as it does not permit the individuals to approach the Court directly. There was a noticeable lack of representation at the meet from members of the bar. Participation of the bar is imperative to bring about change and introduction of new legislation on this issue of the times. *Interested people may please contact: MFC, 326, Main I Block Koramangalam, Bangalore 560 034.*

Private Corporations and Right to life

SC to decide

On the 4th December 1985, a highly corrosive chemical, oleum (concentrated sulphuric acid) leaked from the chemical plant of Delhi Cloth Mills, Shri Ram Food and Fertilisers. The support structure of the storage tank had crumbled and all safety systems failed to operate.

Three officials of Shri Ram, V.D. Sharma, General Manager, I.M. Kaul, Plant Manager, and Y.C. Jain, Plant Engineer were arrested and charged with criminal negligance under Section 336 and 337 of the Indian Penal Code.

The Delhi Administration ordered the closure of the unit and appointed a Committee to study the functioning of the unit and recommended that steps be taken so that such leaks do not reoccur. It has refused to allow the reopening of the unit as safety measures have been found to be inadequate.

The two petitions pending in the Supreme Court, one on behalf of the citizens and the other by the Company have to be viewed in the light of the inherently dangerous nature of the activity being carried on by the Company in a densely populated locality.

Chief Justice P.N. Bhagwati, Justice D.P. Madan and Justice G.N. Oza hearing the petitions have directed all claims on behalf of the victims of the leak to be lodged with the District Magistrate. On the last date of hearing, Raju Ramchandran, Advocate appointed to represent the claimants informed the Court that claims of the values of Rs. 5 crores have been lodged so far. The Company was directed to deposit the expenses towards medical examination of the claimants which has been done.

The Supreme Court notified the parties that in the context of the incident, it would decide certain important questions of law namely:-

* Whether the guarantee of right to life under Article 21 of the Constitution is available against private Corporations where large members of citizens are affected by their operations.
* Whether Corporations carrying on business which is inherently ultra-hazardous should be held strictly liable on the principle of no-fault liability for the damage caused by escape of the dangerous substance.
* Whether the size of the enterprise, it profits its capacity to do harm and its past breaches of safety should be taken into account in determining compensation.
* Whether punitive damages can be awarded against Corporations, if it can be shown that the factory had acted negligently.

The decision in the case is bound to be historic in more ways than one. The guarantee of fundamental rights is today not available against the private Corporations even if they are gigantic in their operations and perform functions which are almost public in nature.

Seervai on delays

Speaking at a meeting of the PUCL at Bombay on the Laws delays and its remedies, Mr. H.M. Seervai said that shortage of Judges, lack of preperation by lawyers, badly written briefs, and applications for adjournments were some of the main causes of delays.

Mr. Seervai had the following suggestions to make to decrease arrears:-

* Filing a statement of case setting out the facts, the statutory provisions relevant to the case and judgements relied upon.
* Time limit on arguments by lawyers to be strictly enforced.
* No adjournments at the request of advocates on the ground that they are busy in other courts.
* If the Government as a litigant fails to file an affidavit, the case should proceed without an affidavit.
* Court proceedings should be tape-recorded.
* Judges should not allow lawyers to argue points not referred to in written arguments.

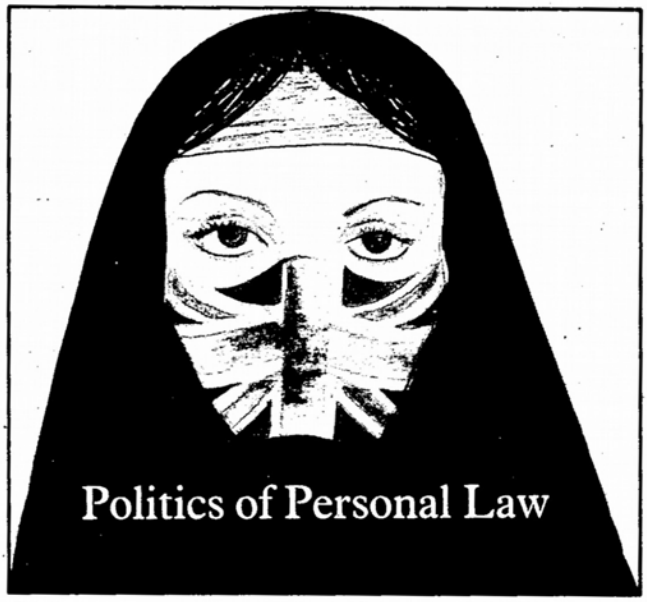
Concluding his speech, Mr. Seervai commented on the tendency of judges to attend lunch and dinner parties thrown by lawyers and condemned such practices.

COVER STORY

THE POLITICS OF PERSONAL LAW

The recent controversy over the Shah Bano case makes it necessary to examine the origins of personal laws and the reasons for their continued existence more than thirty five years after Independence. That personal laws of most communities discriminate against women cannot be denied. Hence the need for change also cannot be denied. In this article, Indira Jaising examines the controversy and traces its political origins.

Indira Jaising



When a person is governed by a particular law, not because he or she is a resident or a national of a particular country, but because he or she belongs to a particular religion, race, caste, sect or tribe, he or she is said to be governed by his or her personal law.

Origins of Personal Law

The problems of the continuation of the *legal regime* of the personal laws is essentially a political one. With the establishment of the Moghul Empire in India, Muslims came to be governed by Muslim law and Hindus by Hindu law. Relations between individuals who were Hindus were governed by the Hindu Law and relations between Muslims by Muslim law. We thus had a *legal regime* which one writer has described as an "intra-sovereign system of laws".

The British, through their political rule, reinforced and perpetuated this *legal regime* of the personality of laws. As a matter of colonial policy, it was politically expedient for the British not to interfere with existing personal laws - in so far as they related to family and inheritance rights alone. Given the predominant object of the East India Compay, namely trade, commerce and exploitation on the natural resources of the country, their primary concern was with laws relating to trade and commerce. Uniformity, certainty and universality of business transactions, was the necessity of British Rule. They did not, therefore, hesitate to legislate a common civil code and a criminal code applicable to all communities regardless of race, religion, tribe or caste. Thus, the Indian Penal Code 1860, Transfer of Property Act, 1882, Indian Evidence Act, 1872, Civil Procedure Code 1908, Indian Contract Act, 1972 all belong to this category of laws and time period. It requires to be stressed that all these laws applied throughout the territory of British India, to all persons regardless of race, religion and community. It is noteworthy that these laws did abrogate in many material respects the rule of personal law or custom. However, as mentioned earlier, family law and inheritance were matters left untouched to be governed by a legal regime of personal law.

The pattern of legislation indicated above would lead to the conclusion that legislation, substantive or procedural, civil or criminal, was dictated by the political needs of the British. **It was imperative to legislate in matters relating to trade and commerce and and equally imperative not to legislate in matters relating to family and inheritance in order to make political rule acceptable. The strengthening and entrenching of a regime of religious law facilitated a policy divide and rule as different communities would owe allegiance and loyalty to different religions, castes and sects.**

Christians and Parsis

With the notable exception of Christians, the British did not legislate for other religious communities on matters of family law and inheritance. For Christians, the British enacted the Indian Succession Act (ISA) 1865 (Replaced by the I.S.A. 1925), presumably as "Secular Law". It is, in effect, a wholesale borrowing of the English Law of Succession. The Indian Christian Marriages Act was enacted in 1872 and the Indian Divorce Act in 1869. Both these are applicable only to Indian Christians. The Indian Succession Act, 1865 defined Indian Christian as a 'Native Christian' namely, a native of India who is or claimed to be of unmixed Asiatic descent and who professed any form of Christian religion. The Act applied to any person who was not a Hindu, Muhammadan, Buddhist, Sikh or Jain. Thus, it became applicable to Christians, Jews and Europeans residing in India. Prior to the passing of the 1865 Act, English Law of Succession was applied by British Courts to Parsis. This led to the demand for *restoration* of Parsi Law which in turn lead to the passing of the Parsi Succession Act, 1865. The Indian Succession Act, 1925 now contains specific provisions applicable to Parsis.

Hindus and Muslims

Matters of family law and succession of Hindus remained largely uncodified and untouched by the British. Thus, prior to independence, Hindus were governed by uncodified Hindu Law. So far as Muslims were concerned, family and inheritance law was left untouched and uncodified. Howerver, there are a few important statutes which require to be noticed. Regulation

II of 1772 provided for the application of the "Law of the Koran" to all those cases among Muslims, which would be regulated among Hindus by their Dharmashstras. Thus in matters of family law and inheritance, British Courts applied "the laws of the Koran" to disputes between Muslims. During the period 1827 to 1887 several British Acts and Regulations empowered the Courts to recognise and apply local customs and usages. Often, these customs and usages applied uniformally in a given territory, regardless of race or religion. The statutory recognition of custom led to a demand from the Muslim community for a *restoration* of Islamic Law as they felt tht Muslims should be governed by Muslim law and not be any custom to the contrary.

Shariat Act, 1937

It is in this context that the Shariat Act of 1937 came to be passed. In the statement of objects and reasons, the following passage appears:

> "For several years past it has been the cherished desire of the Muslims of India that customary Law should in no case take the place of the Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jami-at-al-Ulama-Hind, the greatest Muslim religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called customary law is simply disgraceful. The Muslim womens' organizations have condemned customary law as it adversely affects their rights and have demanded that the Muslim Personal Law (Shariat) should be made applicable to them.
>
> The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this, the present Bill if enacted would have a salutory effect on society because it would ensure certainty and definiteness in mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit any doubt or entail any labour in the shape of research which is the chief feature of customary law."

By virtue of this Act, Muslims in India came to be governed in matters relating to marriage, divorce, guardianship, dowry maintenance, gifts, trusts, waqfs and intestate succession (excepting that concerning agricultural land) by Muslim personal law. This Act of 1939 is obviously the most significant piece of legislation for Muslims and "restores" personal law in preference to custom. *Pre-Indepedence legislation for Muslims in so far as it relates to family and inheritance law is not, by any stretch of the imagination, "reform" legislation but "restoration" of Islamic laws.* Custom, which was often recognised as the governing rule in several fields of family and inheritance law was thrown over in favour of Islam. Thus, whereas in a given locality or territory, people may have been governed by a common local custom regardless of religion, such custom was required to be disregarded and Islamic law applied. The Shariat Act, 1939 did not even have the merit of codifying Islamic Law or Muslim law, as in order to find out what is Muslim law, one has to go back to text book writers and commentators, who often differ in their understanding of what the law is. The recent controversy over the *Shah Bano* case among Muslims and non-Muslims alike, each trying to prove that their version of the law is the correct version, only proves the point.

The only other significant piece of pre-British legislation is the Dissolution of Muslim Marriages Act, 1939, an Act by which a Muslim woman can petition for divorce on certain stated grounds. The statement of objects and reasons mentions that there is no provision in the Hanafi Code for enabling Muslim women to obtain a divorce and the legislation was, therefore, felt necessary in order make available to Muslim women the right to divorce available under Maliki, Shafii or Hanabali law. The Act, therefore, merely extends to Muslim Women following the Hanafi Code, the law applicable to Maliki, Shafii or Hanabali sects of Muslims. In one very significant respect the Act actually makes the position worse for women. Prior to the enactment of this law, the apostacy (conversion) of a Muslim wife would automatically dissolve a Muslim marriage just as the apostacy of a Muslim male would automatically dissolve his marriage. However, the Dissolution of Muslim Marriages Act, 1939, in terms makes it clear that the apostacy of a Muslim woman will not dissolve the marriage, thus keeping Muslim women in bondage within the fold even after a change of religion, while leaving the Muslim man free to abandon his Muslim wife by changing his religion.

The pattern of British legislative intervention is thus clear: restoration of personal religious laws.

The position, therefore, prior to Independence was that in matters of family law and inheritance, Hindus were governed by uncodified Hindu law, Muslims by the Shariat i.e. Muslim personal law, Christians by the statutes mentioned above and Parsis by the personal codes mentioned above. There was no codified law for Jews at all; in matters of succession they were governed by the Indian Succession Act, 1865.

Post Independence Legislation

The Indian National Congress, prior to Independence was committed as a part of its political programme to "reform" Hindu law and to the enacting of a Hindu Code. Legislation on matters of Hindu law is a post-independence phenomenon. Between 1954-1956 the major areas of family and inheritance law for Hindus were codified. Thus, we had the Hindu Marriage Act, 1955, the Hindu Sucession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoption and Maintenance Act, 1956.

The British policy of maintaining a separate regime of Personal laws for different religious communities was continued by the Congress. This again can only be understood in the potitical context of the partition of the country.

We have so far talked about a dual system of laws-personal i.e. applicable to an individual of a particular religious community such as Hindu law, Muslim law, Christian law and territorial laws which apply to all persons within a particular political formation regardless of religion, race, tribe or section. In the former case the connecting factor between an individual and the law is religion, race or tribe, in the latter, it is domicle, residence or nationality.

It is now time to talk about the Constitutional law of the country which contains within it, the fundamental guarantees. Article 14 guarantees the right to equality and equal protection of laws throughout the territory of India. Article 15 forbids discri-

mination on grounds only of religion, race, caste, sex, place of birth or any of them. Article 25 guarantees freedom of religion and conscience, **subject to the other provisions of Part III.** Article 29 guarantees to minorities the right to conserve their culture.

Entry 5, List III, empowers the Union Government as well as the State to legislate on all matters of family law including marriage, divorce, inheritance and all other matters formally governed by personal law. Although Parliament is empowered to enact family and inheritance laws for all communities, there has been little or no post-Independence legislation for Muslims and Christians, much less has there been any move towards enacting a **common family law** for all communities. This failure to legislate despite the mandate of Directive Principle 44 which says that the State shall endeavour to enact a common civil code, can only be understood in a political context. **The ruling party i.e. the Congress for political reasons, does not wish to alienate the powerful male religious hierarchy of the Muslim and Christian communities and other minority communities, from which it gets electoral support. It has been politically inexpedient for the ruling party just as it was for the British to alienate the religious heirarchy of the minority community - the political patronage of the minority communities to the rule of Congress has been too substantial to risk alienating the religious leaders of the communities by enacting reform legislations.**

Personal Laws Discriminate against Women

We have come to the crux of the problem and the heart of the matter - why the need of a "Common Civil Code"? Is it desirable to continue the intra-sovereign system of laws whereby different personal laws apply to different communities? Is such a system consistent with a Sovereign, Democratic, Secular and a Socialist System?

The need for "reform" has been generally articulated with reference to Muslim Law. However, it must be evident to us, since the whole purpose of this discussion is to look at the provisions of personal laws which discriminate against women, that almost all personal laws require far reaching reforms if they are to be non-discriminatory.

Hindu, Muslim, Christian and Parsi law alike contain provisions highly discriminatory against women - it must, therefore, be recognised that the "reform" debate is not confined to minority communities, or in any event, ought not to be confined to minority communities.

The debate on the question, the need for reform, the arguments for and against a "Common Civil Code" have been confused to say the least.

Unfortunately, the demand has been mainly for reform of Muslim Personal law, leading to the criticism that 'minority rights' will be violated if Muslim personal law is reformed. Every time the demand for reform of Muslim personal law is made, it is resisted with the cry that 'religious freedom is in danger' or that 'minority rights are being eroded'. The demand for reform in Hindu law did not assume urgency in the context of the statutes of 1954-56, which to a large extent made a break with uncodified Hindu Law and enacted substantive rules of family and inheritance law which were far more egalitarian than uncodified Hindu law. This does not mean that codified Hindu law is free from sexual bias - it is not. The Hindu Succession Act, 1956 leaves untouched the Hindu coparcenary in which women do not have a proprietary interest. Christian law is particularly inequitious towards women seeking divorce in as much as the grounds for divorce are very limited - cruelty coupled with adultery, adultery coupled with desertion for 2 years or more and other more restrictive grounds. The limited grounds for divorce have caused great hardship to Christian women who are deserted or ill-treated by their husbands, as neither desertion nor cruelty by themselves are grounds for divorce.

Under Parsi law, daughters get only one half the share of a son in inheritance. (See Sec. 51, I.S.A. 1926). The Travancore Christian Succession Act, 1916 totally disinherits a daughter who has received streedhan and limits her share to Rs. 5,000/-.

The position of women under Muslim law is very unequal, to say the least, compared to men - a) a muslim male can marry four wives, b) a woman can be divorced by unilateral pronouncement of the triple talaq, c) a muslim daughter inherits only half the share of the son and d) a divorced Muslim wife is not entitled to maintenance.

The father is the natural guardian of a minor child in all different systems of Personal law and also under the secular Guardians and Wards Act, 1890. This so called natural right of the father of guardianship to the exclusion of the mother has had devastating consequences for women, particularly in cases where the marriage has broken down. It makes women constantly insecure about their right to take any meaningful decision relating to their own marriage and their children.

We have not referred to the position of tribal women so far. There is no codified family or inheritance law dealing with tribals at all. This leaves them governed by customary law which varies from region to region and tribe to tribe. The Hindu Succession Act specifically excludes tribals from its operation. The British policy in this regard again seems to have been non-interventionist. Post-Independence policy has also been non-interventionist, but at least theoretically has had a different justification. The desire to preserve the cultural identity of the tribe and the need to prevent non-tribals from grabbing tribal lands has led to the passing of laws which prohibit the alienation of tribal lands. The Constitution of India provides for protective discrimination in favour of tribals: reservations in jobs and reserved constituencies for Lok Sabha and Assembly elections etc. The same protectionist policy has left the tribals untouched by State made law.

The demand for reform, in this context, must be a demand for *sexual equality*. It would be better to reformulate the demand so as to focus on the sex discrimination which is written into all personal law. This will have the merit of not only emphasising the secular nature of the demand but also its rationale, namely, the urgent need to make equality for women a reality under a Constitution that guarantees equality between sexes.

Further Reading:

1) David Pearl: *Interpersonal Conflict of Laws*, N.M. Tripathi & Co, Bombay, 1981.
2) Akola M. Tier: *The Evolution of Personal Laws in India and Sudan*, in the Journal of the Indian Law Institute, Oct-Dec 1984.
3) A.M. Bhatttacharjee: *Muslim Law and the Constitution*, Eastern Law House, Calcutta, 1985
4) A.M. Bhattacharjee: *Hindu Law and the Constitution*, Eastern Law House, Calcutta 1983.
5) Tahir Mehmood: *An Indian Civil Code and Islamic Law*. N.M. Tripathi, Bombay 1976
6) *Mohmmad Ali Khan Vls Shah Bano* AIR 1985 SC 1945.

Legal Aid in Maharashtra

The following Article has been compiled on the basis of the Scheme and Rules providing for State legal aid and advice in Maharashtra. The Scheme is based on the model Scheme framed by the Committee for the Implementation of Legal Aid Schemes. A number of States have similar schemes.

Seema Sarnaik

Legal aid and advice is available to a limited extent in Civil cases through the Legal Aid and Advice Committees set up in the various Districts and Talukas in Maharashtra and in Criminal cases through Criminal Courts. Though the criteria for eligibility is the same,the procedure for application is different in civil and criminal cases.

Civil Cases

The Maharashtra State Legal Aid and Advice Board was constituted under Government Resolution dated 14th February 1977. The purpose of the Board is to set up and implement a legal aid programme for providing free legal services to the weaker sections of the community in Maharashtra in accordance with the Scheme formulated by it and approved by the State Government.

The Board formulated the Maharashtra State Legal Aid and Advice Scheme which, with certain modifications, was approved by the State Government. The Scheme together with the Maharashtra State Legal Aid and Advice Board Rules, 1981 form the basis of entitlement to legal aid and advice in civil cases.

The Scheme provides for setting up District Legal Aid and Advice Committees in Greater Bombay and Nagpur as well as other Districts and Talukas in Maharashtra. The Committees have to set up, administer and provide for legal aid and advice in their area. The Taluka Comittees are to be supervised by the District Committees which in turn are supervised by the Board. The Committees, headed by a Judge, consist of representatives of the Bar, the Legislature and representatives of weaker sections of Society, including Scheduled Castes and Scheduled Tribes and Women as well as social service organisations. All these persons are nominated by the Government.

The District Committees are charged with a duty to set up, administer and implement the legal services programme to provide services to the weaker sections of the community in their area in accordance with the Scheme. In particular the Committee is to:

* receive and investigate applications for legal aid and advice;
* provide for giving legal advice;
* maintain panels of legal practitioners and others for giving legal aid and advice;
* decide to grant or withdraw legal aid;
* to arrange payment of honorarium to legal practitioners for legal aid and advice as well as costs, charges and expenses of legal aid.

Each District Committee also has to have a

i) Conciliation Cell, comprising respectable members of the community in whom persons have confidence to bring about a settlement;
ii) Cell for Women consisting of persons who are social service minded, preferably women;
iii) Cell for SC, ST, Vimukta Jatis and Nomadic Tribes comprising persons engaged in social work amongst SCs, STs, etc., preferably members of SCs, STs, etc. themselves;
iv) Cell for Industrial and Agricultural Workers consisting of persons representing them.

The Cells for various categories are to be set up to ascertain the problems and grievances of the target groups and protect their interest through the legal process. For that purpose they may carry out socio-legal surveys and research. They are also to suggest and recommend changes in laws.

Eligibility

Legal aid and advice is available to all persons:

* who are *bonafide* **residents** of Maharashtra;
* whose annual income is **less than Rs. 5000/-;**
* **who are members of Scheduled Castes, Scheduled Tribes, Vimukta Jatis, Nav Buddhas, women or children, irrespective of income,** in cases of disputes of domestic matters.

Legal Aid is also available in

* cases of great **public importance,**
* **a test case,** the decision of which is likely to affect cases of numerous other persons belonging to the Weaker Sections of the Community;
* **a special case,** which is considered deserving of legal aid.

In all the above three cases, the means test need not be satisfied. It is for the District Committee to decide whether the case falls in any of the three cases above. However, if the District Committe grants legal aid in the above three cases, it has to record its reasons in writing for so doing. Legal aid is available in all Courts or Authorities.

Mode of Legal Aid

There is a distinction made between legal advice and legal aid.

Legal Advice means any oral or written advice as the nature of the case may require.

Legal Aid means and includes the following:

* payment of court fees, expenses of witnesses and all other charges payable or incurred in connection with any legal proceeding.
* representation by a legal practitioner in legal proceedings.
* supply of certified copies of judgments, orders, notes of evidence and other documents in legal proceedings.
* preparation of Appeal Paper Books including printing and translation of documents in legal proceedings; and
* drafting of legal documents.

However, **no legal aid** is available in proceedings:

* relating to defamation;
* relating to malicious prosecution;
* for offences punishable only with a fine;
* for offences against social laws (such as Suppression of Immoral Traffic in Women and Girls Act, Protection of Civil Rights Act etc.)

Moreover, legal aid is not available where the applicant is:

* concerned with the proceeding in a representative or official capacity;
* concerned with proceedings jointly with other person or persons with identical interests who is or are adequately represented;
* is a formal party, not materially concerned in the outcome of the proceedings and whose interests are not likely to be prejudiced in the absence of proper representation.

Application

A person desiring legal aid or advice has to make an application in duplicate either in the prescribed form (Form 'A', which is available in the Office of the Committee) or in any other form but containing all the essential particulars required by the prescribed form. It has to be signed by the Applicant, unless it is made on behalf of a person who is incapacitated or unable to make an application for any reason himself. It can be presented either in the Applicant himself or any other person authorised by him. The application may be made either for legal advice or legal aid or for both.

The Application must be supported by an affidavit of the Applicant giving details of annual income (both in cash and in kind) of the Applicant.

In case an Applicant is a poor illiterate person or not in a position to fill in the particulars, the Member-Secretary of the Committee or the person receiving the Application is obliged to gather the relevant particulars from the Applicant and fill in the form on his behalf. After reading it out and explaining it to the Applicant he is required to obtain the signature or the thumb impression of the Applicant.

An Application for legal aid or advice should be addressed to the Taluka Committee in case of matters arising in the Taluka Area, to the District Committtee in matters arising in District Head Quarters. However, it can be received by any member of the Committee of the area, who has to forward it to the Member Secretary of the Committee. A member of the Board can receive applications from anywhere in Maharashtra. He has to forward it to the appropriate Committee.

On receipt of the Application, the person receiving it has to make an endorsement on the Application of the date of the receipt, name and address of the person presenting the Application and the place where the Application is received. In case the Application is received by the Office of the Committee or the Member Secretary, written acknowledgement of the receipt has to be given. In other cases the Member Secretary has to arrange to send the written acknowledgement of the receipt of the Application to the applicant and intimate him the time and date and place where he must present himself for further enquiry.

The person receiving the Application has to scrutinise it and ascertain further facts and information necessary for the form. The statement relating to annual income has to be verified at this stage. If further facts are required, but not immediately available, an endorsement is to be made to that effect on the Aplication and the Applicant informed accordingly. If sufficient information is available to satisfy the recepient about the eligibility, on the basis of annual income, the Applicant may be asked to present himself before an Advocate on the panel on the date and time and place to be intimated later on.

As soon as the Application is received in the Office of the Member Secretary, it has to be given a serial number which is endorsed on the Application and entered in the Register of Applications. A separate endorsement about informing the Applicant about the time date and place to meet the Advocate also has to be made on the Application. The information given in the Application has also to be recorded briefly in the Register of Applications.

Disposal of the Application

On receipt of the application the Member Secretary or the lawyer to whom the application is referred has to scrutinise the application to decide whether the Applicant deserves legal aid. For this purpose the Advocate may discuss the matter with the Applicant personally. Consideration also has to be given to the fact that the Applicant belonging to the weaker section requires the assistance in obtaining legal aid.

In case he decides that legal aid should be given, the decision has to be confirmed by the Committee. On the other hand, if he decides that the Applicant does not deserve legal aid, the matter has to be placed before the Committee for decision. He must give his reasons for so doing. If the Committee also decides not to give legal aid, it has to record

its reasons. These have to be communicated to the Applicant as well as entered in the Register of Applications.

Conciliation

Before actually giving legal aid the matter has to be referred to the Conciliation Cell to bring about a settlement between the parties.

The Conciliation Cell consists of persons who enjoy the confidence of the community in bringing about a settlement. The Cell is to be divided into panels of two persons each and any dispute which is referred to conciliatiion may be entrusted to any such panel taking into consideration the nature of the dispute. Thus if the disputants include a woman, a member of the Schedule Caste or Scheduled Tribe, then the Conciliation Cell must include one person from such groups.

Certificate

Once legal aid or advice is decided to be granted, the Member Secretary has to issue a Certificate of Eligibility to the Applicant. This Certificate entitles the Applicant to aid or advice as the case may be. The Certificate continues to be valid until the legal aid is withdrawn or is cancelled.

The Applicant seeking legal aid or advice has to comply with the requisition or direction of the Committee or any of its members from the beginning of grant of legal aid or advice till its cessation. The Applicant is also required to execute an Agreement to the effect that if a Court awards costs or other monetary benefits, he will reimburse to the Committee all the costs charges and expenses incurred by the Committee. For that purpose he is also required to execute an Irrevocable Power of Attorney to do all acts necessary for the recovery of the said amount.

Cancellation of Certificate

Certificate of Eligibility is cancelled in the following circumstances:

* If the certificate is obtained by misrepresentation or fraud;
* If there is a material change in the circumstances of the Applicant;
* If there is misconduct, misdemeanour or negligence on the part of the Applicant;
* If the Applicant does not co-operate with the Committee or the lawyers;
* If the Applicant engages another lawyer;
* If the Applicant dies, unless the right or liability survives his death;
* If the Applicant is externed from the place of residence or business.

Panel

For the purpose of providing legal aid and advice a panel of lawyers divided into the categories of Senior Advisers, Legal Practitioners and Assistants have to be maintained by the Committee. Each panel is constituted for one year.

Advocates are empanelled on the basis of applications. Service on the panel is to be entirely on a voluntary basis. Ordinarily a lawyer volunteering for the panel must have at least five years practice as an advocate. However, competent lawyers with less experience may also be included in the panel. Senior lawyers, retired judicial officers, retired judges and retired public servants are to comprise the panel of Senior Legal Advisers. The panel of Assistants is to consist of young lawyers or even third year law students, who are to be encouraged. A separate Register is to be maintained for the three categories of lawyers. The Advocates on the panel can take advice of Senior Advisers and assistance of Assistants.

Honorarium

The lawyer to whom the case is referred cannot receive any fee or remuneration whatsoever. The Committee has to pay the honorarium to Advocates as follows:

Court	Fees
1) High Court at Bombay, Nagpur, Goa and Aurangabad, and City Civil and Sessions Court, Bombay.	Rs. 75/- per effective hearing upto a maximum of Rs. 450/- in a case.
2) All Courts in District Head Quarters, except in (1) above, Small Causes Courts in Bombay, Pune, Nagpur and Magistrates' Courts in Greater Bombay.	Rs. 50/- per effective hearing upto a maximum of Rs.300/- in any case.
3) In all Courts in Taluka other than Talukas in Greater Bombay and in District Head Quaters.	Rs. 25/- per effective hearing upto a maximum of Rs.200/- in any one case.
4) Legal advice.	Rs. 25/-.

After the case is over, the lawyer is required to submit a statement to the Committee indicating the honorarium due to him. The Member Secretary scrutinises it and a places it before the Committee for sanction, after which it is paid to the Advocate.

Criminal cases.

Section 304 of the Code of Criminal Procedure confers power on the High Court to frame rules for legal aid in criminal cases. They have to be approved by the State Government. Such rules have been framed by the Bombay High Court for legal aid in the Court of Sessions and other Magistrates' Courts. Though different Rules have been framed for legal aid to unrepresented accused before the Court of Sessions and other Magistrates' Courts, they are substantially similar.

The mode of legal aid available in the Court of Sessions and other Magistrates' Court is the same as in civil cases.

Legal aid is available in all criminal cases where the accused

* whose annual income is less than Rs. 5,000/-, and is unrespresented, or
* is kept in an incommunicado condition (i.e. in custody), or
* is entitled to maintenance allowance under Section 125 of the Code of Criminal Procedure,
* is a poor person who wants to defend himself in a criminal case.

However, no legal aid is available in criminal cases involving economic offences against social laws such as Suppression of Immoral Traffic in Women and Girls Act and Protection of Civil Rights Act or cases involving child abuse.

As the need for giving legal aid arises at the time when the accused is produced before the Court, the duty has been cast on the Judge of the Court to explain the entitlement to legal aid to the unrepresented accused. The Judge is supposed to explain to the accused his right to legal aid and to record the fact of having done so in the case papers. If after explanation the accused states that his income is less than Rs. 5,000/- per annum, he has to be asked whether he wants to submit an application for legal aid and avail of free legal assistance. However, nobody can be compelled to avail of free legal aid. This procedure has also to be followed by the Judge at the time of awarding sentence and the convict has to be explained his right to legal aid for an appeal.

The application for legal aid has to be made to the Judge before whom the case is to go on. It has to be in the prescribed form. It is the job of the Judge to certify that the Applicant cannot engage a lawyer at his own cost. On being granted legal aid the accused would be represented by a lawyer on the panel. This is constituted in consultation with Principal Judge and the Senior members of Bar of the Court concerned. The lawyer on the panel must have practiced for at least five years. However, in cases involving an offence punishable by death or imprisonment of seven years or more, a Senior advocate assisted by a junior advocate has to be appointed.

Defects

Though we have dealt with the Scheme in Maharashtra similar Schemes are in existence in other States.

The Scheme has not been able to take off the ground. There are fundamental weaknesses in the Scheme which need to be corrected. Few of them can be noted:

a) It covers only persons whose annual income is less than Rs. 5000/-.
b) It relies on a panel of lawyers working on a purely voluntary basis. As a result the services of the bar are not utilized. Moreover, it **ghettoises** the legal aid Scheme. For legal aid to succeed, the applicant must have a choice of his own laywer.
c) There is too much power given to lawyers to decide whether the applicant is deserving of legal aid.
d) There is overemphasis on conciliation in the Scheme.

A National Legal Services Bill is in the offing. Hopefully, it will remedy the defects.

The Family Courts Act, 1984

This Act sets up Family Courts with exclusive jurisdiction to deal with disputes such as divorce, maintenance, guardianship and custody, commonly described as family disputes. Though it is a Central Act, the power to set up Family Courts is with the State Governments. The result has been that although it was passed in 1984, at the time of writing, only the State of Rajasthan has established Family Courts. Mihir Desai examines the Act and its implications.

Mihir Desai

At present matrimonial disputes are dealt with by various Civil and Criminal Courts. These disputes form only a part of the total workload of these Courts. For instance, any petition under the Hindu Marriage Act, 1955, Special Marriage Act, 1954 and Guardians and Wards Act, 1890 has to be filed in the District Court. Under the Guardians and Wards Act, the High Court is also considered to be a District Court. A petition under the Indian Divorce Act, 1869, which is applicable to Christians, can be filed either in the District Court or in the High Court. A compalint under Chapter IX of the Criminal Procedure Code for maintenance of the wife, children or parents has to be filed in the Criminal Court.

Family Courts

The Family Courts Act, 1984 does away with separate Courts dealing with different aspects of family disputes. All the petitions and complaints will now have to be filed in the Family Court, which will have the jurisdiction and powers of the District Court and of the 1st Class Magistrates under Chapter IX of the Criminal Procedure Code. Criminal actions necessitated by family disputes (which do not fall within Chapter IX of the Criminal Procedure Code) will still have to filed in Courts having criminal jurisdiction. For instance, cases relating to bigamy will, even after the enactment of the Family Courts Act, have be tried by the Criminal Courts. Offences covered under Section 18 of the Hindu Marriage Act, 1955, pertaining to punishment for contravention of certain conditions of a Hindu marriage will also have to be heard by the regular Criminal Courts. With a few exceptions, what the Act does is to bring within the jurisdiction of Family Courts the vast majority of family disputes.

The Family Courts Act, 1984 does not change substantive Family Law. It only brings about changes in procedure. The parties will continue to be governed by their own Personal Law.

It extends to the whole of India, except Jammu and Kashmir. Family Courts are to be set up by the State Government after consultation with the High Court. For every city having a population of over one million, a Family Court has to be established and such Additional Family Courts can be established as the State Government may deem necessary. Any person who has for at least seven years held a judicial office or has been an advocate of the High Court for seven years is eligible for appointment as a Judge. *Preference in appointment of judges shall be given to women.* The Act requires the Government to attempt to select as judges, **"persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling".**

Section 5 provides for the associating social welfare organisations and persons involved in social work with Family Courts as may be decided by the State Government in consultation with the High Court. The State Government is also to determine, in consultation with the High Court, the number of counsellors attached to the Family Courts and their functions.

Jurisdiction

Cases to be dealt with by Family Courts

* a suit or proceeding between the parties to a marriage for decree of nullity of marriage (declaring the marriage to be null and void, or as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage.
* a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person.
* a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.
* a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship.
* a suit or proceeding for maintenance.
* a suit or proceeding in relation to the guardianship of a person or the custody of or access to any minor.

All cases which are pending in District or Criminal Courts and which are required to be heard by Family Courts will be transferred to the Family Courts.

Procedure

Family Courts will in all cases endeavour to bring about a conciliation and settle the dispute. The provisions of the Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1973 will apply to the Family Courts. However, this will not prevent the Family Courts from laying down its own procedure for conducting cases. If any party or the Family Court so desires, the proceedings may be held *in camera.* In order to assist the Family Courts in discharging their functions, it shall be open for it to obtain the services of a *medical expert* or such person (preferably a woman) professionally engaged in promoting family welfare to assist the Court. The parties do not have a right to be represented by a lawyer but the Family Court may allow such respresentation. **The Court can receive as evidence any report, document or information for effectively dealing with a dispute whether or not it would be admissible under the Indian Evidence Act.**

The decree or judgement of the Family Court can be appealed within 30 days and such appeal has to be filed before a two—Judge Bench of the High Court. No appeal lies from an interlocutory (interim) order of the Family Court. The State Government is empowered to make Rules in order to govern the procedure of the Family Courts.

Expanded Jurisdiction

Under the existing Personal Laws, the District Courts while dealing with property rights have a very limited jurisdiction. For instance, under Section 27 of the Hindu Marriage Act, 1954 the Court is empowered to make provisions in the decree as it deems just and proper with respect to any property presented at or about the time of marriage which may belong jointly to both the husband and wife. **The Family Court is now empowered to deal with a suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them and it is no more necessary that the property in question belongs jointly to them or that it is given at the time of the marriage.** The expanded jurisdiction to deal with property disputes will prevent multiplicity of proceedings and prevent delays. When a marriage breaks down, redistribution of property, whether, joint or separate, is integral to the settlement or resolution of the matrimonial dispute and it is, therefore, rational for the same Court to deal with it.

Domestic Violence and Ouster Injunctions

The break-down of a matrimonial relationship is often accompanied with violence against women. Often, the only remedy open to a woman in such a situation is to approach the Courts for what have come to be known as an 'ouster injunction' against her husband. Such injunction could be granted under the general law to protect the right of a wife to live in the matrimonial home. Courts have been reluctant to grant such injunctions. Moreover, such injunctions are mainly asked for in the context of a pending proceeding for divorce or separation, rather than in a suit specifically filed for that purpose without claiming any matrimonial relief. The Family Court has been given the power to entertain a "suit or porceeding for an order or injunction in circumstances arising out of marital relationship". This power is extremely important for the woman. **She can now seek an injunction against the husband restraining him from assaulting her or preventing him from entering the matrimonial home. Such injunctions can be sought even without claiming any other relief such as divorce or separation.** A husband who is physically violent can be prevented from entering into the matrimonial home, regardless of who owns the matrimonial home. Though the development in these type of injunctions is in its embryonic form in this country, with the Family Courts Act it is likely to develop into a very effective means of defence for the wife who is the victim of domesitc violence.

English Law

Ouster injunctions have been granted by Courts in exercise of inherent powers to protect the welfare of the children and the wife, in cases where the husband has been guilty of physical cruelty. So acute was the problem of violence against women, that in 1976 the Domestic Violence Act was passed in England empowering the Court to grant an injunction restraining any par-

ty to the marriage from molesting the other or the children, restraining entry into the house or any part of it or preventing the applicant from entering the matrimonial home. The power of arrest can be attached to such injunctions, authorising arrest without warrant in case of a breach. Such an injunction can be asked for even by a woman who is living with a man in the same household as his wife.

In England, the law had developed around six major cases. In *Montgomery Vs Montgomery* (1) the Court held that in a proper case, a person can be asked to leave the matrimonial premises notwithstanding his or her proprietory rights till the matrimonial proceedings are finally disposed off. It further held that once the proceedings are over, a wife who has no legal right over a house cannot get an ouster injunction. If, however, the proceedings are pending, then the wife has a right to an ouster injunction because she has a right not to be pressurised by a 'superior force' during the proceedings. "At such a stage, the Court cannot have too nice a regard for proprietary rights". If the welfare of the children is at stake, such injunctions are normally granted. A similar view was taken in *Gurasz Vls Gurasz* (2) where the Court held that the right to prevent a husband from entering the matrimonial home is a personal right of the wife and does not depend on who owns the house. Similar views were expressed in *Bassett Vs. Bassett* (3), *B Vs. B* (4), *Walker Vs. Walker*(5), *Bendal Vs. McWhiter* (6). In *White Vs. White* (7) the Court held that ouster injunction can be granted even if the parties are not actually married but only living together. The general trend of decisions was to grant ouster injunctions to the applicant wife in cases where there was violence, actual or apprehended, and in cases where the welfare of the children demanded that such orders be granted. This trend was disturbed in a recent judgement, *Richards Vls Richards* (8),where the House of Lords held that the Court would not only have to consdier the behaviour of the husband but also whether it was "reasonable" for the wife to refuse to live with her husband. The majority Judgment was written by Lord Brandon. Lord Scarman dissented and held that the interest of the children must get priority over all other factors when such injunctions are sought. He also held that the inherent powers of the Court are not taken away by the Matrimonial Homes Act, 1967 or the Domestic Violence and Matrimonial Proceedings Act, 1976. The majority judgment has been criticised as creating more problems than it resolves.

Indian Law

In *Banoo Vs Jal Darunwalla,* (9) decided in 1962, the Court recognised in principle the right of the wife to obtain ouster injunctions. Though refusing to grant such an injunction on facts, Justice K.K. Desai of the Bombay High Court cited with approval Lord Denning's judgement in *Bendal Vs McWhirter* and stated that the Court had the widest discretion in granting such injunctions if the behaviour of the husband is cruel and oppressive. In another case, *A Vs. B* (10), the Bombay High Court held that ouster injunctions could be granted in extraordinary cases. Similarly, in a judgment (11) delivered by Mrs. Justice Baam of the Bombay City Civil Court, it was held that a husband can be evicted from the matrimonial home if he is cruel and otherwise underserving.

Judges who are required by the policy of the law to be committed to protect and preserve the institution of marriage are likely to order restitution of conjugal rights as a matter of course while granting judicial separation and divorce only as an exception. Such a commitment will normally prove very harmful to women who will be compelled to stay with their husbands, even at the cost of suffering mental and physical cruelty. The husband, on the other hand, even if compelled to cohabit with an unwanted wife will not suffer the same injury that a wife does and may even resort to coercive means in order to get his way. Forcing women into the framework of a broken marriage rather than helping them to find ways and means of breaking out of a bad marriage can do more harm than good. Women live in an inherently unequal situation within marriage as the vast majority are housewives and depend on their husband's income. Law makers have recognised the unequal position of women and endevoured to correct the imbalance by making protective laws. Judged in this light, the Act makes no provisions for women but rather sets up a neutral framework within which women will have to work out their rights. **In an Act of this kind one would have expected to see support structures such as shelters and temporary homes being set up for women during the transitional period when they are trying to rebuild their lives after a broken marriage.**

The provision in the Act regarding assistance of Counsellors can also be harmful. Experience has shown that whenever the Courts have associated Counsellors with their work, they tend to insist that women push themselves back into the marriage as a solution to the dispute. The reports to the Court based on interviews with the husband and wife are secret and not disclosed to the parties. Under the Family Courts Act the parties do not even have an absolute right to cross-examine the persons who furnish such reports. Thus rights are affected on respresentations by 'experts' without proper opportunity given to the parties to rebut them.

No Lawyers No Solution

Not allowing an absolute right to the parties to be represented by lawyers can cut both ways. On the one hand, eliminating a lawyer may help facilitate settlements, as often, lawyers consciously prevent clients from settling disputes. On the other hand, so long as judges decide strictly on the basis of firmly established legal categories, women will not be able to do without the aid of lawyers, who can inform them of their rights. The law, as it obtains today, in its content, form and language remains very technical and esoteric and merely eliminating the lawyer without changing the law will do more harm than good. Women may not be confident or articulate enough to present their case personally. The social conditions of India are such that women are extremely reluctant to even go to Court, let alone present factual accounts about their personal traumas. Questions of maintenance and custody at times require detailed evidence about the total income of the husband, his investment and expenditure. Such evidence is of technical nature demanding legal knowledge and experience in order to do full justice. There seems to be no rationale for excluding lawyers from Tribunals and Family Courts, while allowing them in other Courts.

Another drawback of the Act is the provision that no appeal can be filed from interim orders of the Court. Such orders in a number of cases are crucial to the litigant. Custody, maintenance and injunctions preventing the husband from entering the place of residence or from disposing of property etc. are all matters of extreme urgency for women and making them wait for a couple of years until final disposal is bound to be counter-productive.

Reference:
1) (1964) 2 All ER 22. 2) (1969) 3 All ER 82. 3) (1975) 1 All ER 513. 4) (1978) 1 All ER 821. 5) (1978) 3 All ER 140. 6) (1952) 2 QB 466. 7) (1983) 2 All ER 51. 8) (1983) The Times 1 July, 42. 9) (1962) LXV BLR 750 10) (85) BLC 120 11) Judgment on 7.8.85 in M.J. Petition No. 627/85 in *P. Ganeshan v/s Ganeshan*

LAW AND PRACTICE

Employees State Insurance

The Employees State Insurance Act and the Scheme under it cover a large number of workers across the country. In this article, RI & SR trace the history of and explain the provisions of the Act and the Scheme.

RI & SR

Introduction

Every 3 minutes somewhere in the world a worker dies of an occupational injury or illness. Every second that passes at least four workers are hurt. The world of industrial work is a dangerous place and inspite of progress made the odds in the battle against the hidden and all too apparent hazards are still heavily against the workers.

In the early stages of industrialisation, workers sought protection against the contingencies to which they were exposed through small savings, protective liability or private insurance. Later protective legislation became common on the theory that the employer who set up a factory created an environment which was likely to cause injury to his workmen and the loss sustained for the victim should be charged on the employer. The Workmen's Compensation Act, 1923, was the first such enactment which fixed liability for payment of compensation by employers to workmen and their dependents in case of personal injury caused by accidents arising out of and in the course of employment and for death or disablement as a result of contracting certain occupational diseases. The Act however made no provision for medical care and treatment which was greatest need of the worker when he met with an accident.

Royal Commission

The Royal Commission on Labour (1929-31) took note of the provisions of the Workmen's Compensation Act, 1923. It discussed the problem of old age provision and the medical and financial aspects of sickness insurance.

It recommended -

* that the aid during sickness should be split into two parts (a) medical and (b) financial benefits;
* that the medical benefit should be the responsibility of the State on a non-contributory basis;
* that the financial benefits should be effected through the employers on a contributory basis by the employers and workers; and
* that the Government should encourage private employers to introduce old age pension and provident fund.

The then Government, however, did not take any effective action on these recommendations. Then came World War II which made the introduction of certain benefits for labour necessary. The Bombay Textile Labour Enquiry Committee (1940) recommended the introduction of sickness insurance. The matter was considered by the State Labour Minsiters' Conference between 1940-42. They decided to appoint an expert to frame a scheme to provide health insurance to workers. The scheme drawn up in 1944 by Prof. B.P. Adarkar in pursuance of the decision, was later examined by two I.L.O. experts and this joint effort became the basis of health insurance in our country.

Due to the vastness of our country and the considerable preparatory work involved such as provision of buildings, equipment and personnel, the scheme was not implemented throughout the country simultaneously. A plan for the phased extension to different places was drawn up. The scheme came into operation in the industrial towns of Kanpur and Delhi on February 24, 1952. Thereafter, from time to time, it has been extended to numerous centres. As on 31st December 1984, the scheme covered 513 centres all over the country with 61.34 lakh employees, 69.90 lakh insured persons andd 271.20 lakh beneficiaries.

In November 1946, immediately after the formation of the first interim government, the Government of India presented in the Central Legislature the Workmen's Insurance Bill, which was passed 18 months later as the Employees State Insurance Act, 1948. It received the assent of the Governor General on 19th April 1948. The paragraphs that follow briefly deal with the Act, and the scheme framed thereunder.

Administration of the Act and the Scheme.

At the National level, the scheme is administered by the Employees State Insurance Corporation consisting of representatives of employees, employers, the Central Government, State Governments, medical profession and the Parliament. A Standing Committee constituted from amongst members of the Corporation acts as the executive body. There is also a Medical Benefit Council to advise the Corporation on the medical aspects of the scheme. At the regional level, regional boards have been constituted in each State and at the local level, local committess have been formed which function as advisory bodies. There is a regional office in each State for attending the day to day administration work and for disbursement of cash benefits which is the direct responsibility of the Corporation. There is a network of local offices all over the country. The administration of the medical care is the statutory responsibility of the State Government. In Union territory of Delhi, the Corporation has also taken over the responsibility of administration of medical care. The inpatient treatment is afforded through the number of ESI hospitals and annexes and through the reservation of beds in hospitals. Out-door medical care is rendered through a network of full time ESI dispensaries, part time, mobile and employers' utilisation dispensaries and through clinics of insurance medical practitioners in certain States.

Applicability

The scheme applies in the first instance to all factories using power and employing 20 or more persons for wages. In these factories, persons whose remuneration, (excluding remuneration for overtime) does not exceed Rs. 1,600/- a month are covered under the ESI Scheme. The Act however does not apply to a mine, railway running shed and to seasonal factories.

The provisiions of the Act have also been extended or are being gradually extended to the following classes of establishments.

(i) Smaller power using manufacturing establishments employing 10 to 19 persons,

(ii) Non-power using manufacturing establishments employing 20 or more persons, and
(iii) The following establishments employing 20 or more persons:
(a) Hotels and restaurants,
(b) Road motor transport undertakings,
(c) Cinemas including preview theatres,
(d) Newspaper establishments and
(e) Shops

Counting of 20 or 10 persons

In addition to the persons employed directly by the principal employer, the following categories of persons are also counted:

* Employees on the roll of a factory who are on leave with or without wages;
* A substitute/badli employee employed for wages;
* Persons drawing over Rs. 1,600/- per month;
* Persons employed by or through a contractor (but not the contractor himself).

The following categories are **not** counted:

* Apprentices/trainees undergoing training for the purpose of learning the trade under an approved schems;
* Part-time workers who are employed on contractor for service.

Benefits

The Act is designed to provide for the following benefits:

* medical treatment for and attendance on insured person and his family;
* periodical payments to an insured person in case of his sickness;
* periodical payments, in case of confinement, to an insured woman;
* periodical payment to an insured person suffering from disablement as a result of employment injury sustained by an employee;
* periodical payments to such dependents of an insured perons who dies as a result of employment injury sustained by him and is entitled to compensation;
* payments towards the expenditure on the funeral of the deceased insured person; and
* Rehabilitation and other benefits.

Employee

The term **"employee"** as defined under the Act means **any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies.** The term 'employee' has a wide connotation and includes within its scope every type of clerical, manual labourer etc. The Act does not make any distinction between casual or temporary employees or between technical, and non-technical employees. There is also no distinction between those employed on time rate or piece-rate basis. Employees according to the definition fall into the following categories:

(i) Those **directely employed** by the principal employer,
(ii) Those employed by or **through a contractor,** on the premises of the factory and those employed outside the factory premises under the supervision of principal employer,
(iii) Employees whose services are **temporarily lent or let on hire to the principal employer** by the person with whom the person whose services are lent or let on hire has entered into a contract of service,
(iv) Those employed for wages on **any work connected with the administration** of the factory/establishment or any part of department or branch thereof with the purchase of raw material, or for distribution or sale of the products of the factory/establishment,
(v) **Part-time employees** on contract of service.

In addition to the above, the following categories of employees working in various offices of the factory/establishment have been covered under the Act:

(i) Persons employed in Sales Office/Depot, Head Office, administrative office/branch office or any other other office dealing with purchase of raw materials, or the distribution or sale of products of the manufacturing unit whether situated inside or outside the factory premises,
(ii) Persons employed in Guest House of factory/establishment,
(iii) Persons employed on building/extension to factory building, repair/white washing, machinery repair, loading, unloading and movement of raw material and finished products.

In all the above cases, the employee should be in receipt of wages (excluding overtime) not exceeding Rs. 1,600/- a month. If an employee's wages (excluding remuneration for overtime work) exceed Rs. 1,600/- in a month at any time after the commencement of the contribution period, he shall continue to be an employee until the end of that contribution period.

Contributions, Contribution Period and Corresponding Benefit Period

The scheme framed under the Act is contributory. The contribution is the sum of money payable to the Corporation by the Employer in respect of an employee and comprises the amount payable by the employee and the employer (employee's contribution is 2.25% of the wages, while the employer's contribution is 5% of the wages paid/payable in respect of every wage period). The State Government gives 1/8th share towards the cost of medical care. Employee's contribution is not recovered from the person whose average daily wages are below Rs. 6/-.

Wage Period is a period in respect of which wages are ordinarily payable whether in terms of the contract of service or otherwise. In other words, a wage period can be a month, a fortnight, a week or even a day according to the period for which wages are ordinarily payable to the insured person. A wage period is the unit in respect of which all contributions are payable under the Act.

Wages means all remuneration paid or payable in cash to any employee if the terms of his contract of employment express or implied were fulfilled and includes any payment to an employee in respect of any period of authorised leave, strike which is not illegal, lock-out or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months.

The employer's share as well as the employee's share is to be paid in an authorised bank branch through a challan on or before the 21st of the month following the calendar month in which wages fall due.

To be continued

ADAALAT ANTICS

Raid Aid

We have heard of legal aid lawyers, first aid lawyers and bare-foot lawyers. Thanks to the activation of the Central Excise Department, we now have the emergence of a new brand on the scene, the **Raid Aid Lawyers.** *Both Godfrey Philips India and Golden Tobacco Company have been in trouble over their dual pricing policies and are reportedly getting together to share expertise - can lawyers be far behind? According to a report in the 'Afternoon' dated 6th February, 1986 GTC lawyer Umesh Khaitan was in Bombay to meet D.M. Harish, Adviser to Godfrey Philips India. No doubt they must have shared their Raid Aid experiences for better consumer services.*

Male-Chauvinist Judge

Justice Ranganath Misra of the Supreme Court was inaugurating a conference on "Legal Aid for Women" organised by the National Institute for Public Cooperation and Child Development. To members of the audience, which consisted mainly of women activists drawn from different fields, he said that the role of a woman was to bring up children and make a happy home. Why go out and work, to compete with the men, he asked. Some people really know how to choose the right speaker for the right occasion. But Seminars apart, with such reactionary views on women, how can working women expect justice from Ranganath Mishra's Court? And every time he sees a woman in his Court, he must be shedding unseen tears for the husband and children she has left behind at home to pursue her profession.

Gentlemen Squatters

N.A. Palkhiwala, while condemning pavement dwellers for "tresspassing" warned that if today they are allowed to squat on pavements, tomorrow they may occupy railway stations, schools and other public places. He forgot to mention the High Court. We have here, the gentlemen squatters - not to forget the 'gentle women' - in the Chambers in the Annexe building to the High Court. These gentle people have perfected the art of squatting on public premises and our pavement dwellers could learn a lesson or two from them. The State Goverrnment is in a fix. With pavement dwellers, you can threaten, beat, burn, evict and demolish - but what do you do with gentlemen squatters, who incidentally include such distinguished personalities like N.A. Palkhiwala, F.S. Nariman, Soli Sorabjee - all absentee Squatters and other local stars of the legal world? The Rule of Law, due process of Law and what have you, must take their own course. The High Court has been requesting the State Government to make more space available for High Court work. Ironically, the High Court building is under the administrative control of

the Chief Justice himself. The State Government has reportedly asked successive Chief Justices since 1974 to get the gentlemen squatters out so that about 4500 sq. ft. of space will become immediately available for High Court work. Chief Justices have come and gone but the tenacious squatters form part of the integrated landscape of the High Court. Indeed Palkhiwala was right - the law treats both the rich and the poor equally. No one has the right to sleep below bridges and on pavements. But business is a different matter.

Stay Home Sen

In January this year, the Carbide case was due for hearing in New York. It was time for Law Minister A. K. Sen to pack his travel bags and fly off to the U.S.A. Yet again, no doubt to help negotiate a settlement. He must have been disappointed indeed when Prime Minister, Rajiv Gandhi, told him to stay home and look after the affairs of his Ministry. Attorney General K. Parasaran went instead.

Instant Justice

Justice Pendse of the Bombay High Court was hearing a 'complicated' petition challenging the inclusion of newspapers in the Monopolies & Restrictive Trade Practices Act, on the ground that it violated freedom of speech and expression and tampered with basic structure of the Constitution. After the arguments were over, there was a brief pause in the Court-room and everyone was overheard saying in whispers "He will reserve judgement". Their predictions were belied and prompt came the order from Justice Pendse "Call the Steno". Within hours, he gave his judgement and in his characteristic matter-of-fact style, proceeded to hear the next case. So much for arrears - this judge does not know what it means to have "arrears". Contrast with Justice R.S. Pathak, A.P. Sen and D.P. Madan, who have heard the take-over of Management of the Textile Mills case in December, 1984 but not come up with a judgement as yet. And Chief Justice P.N. Bhagwati and R.S. Pathak who heard a petition challenging the Christian Succession Act in October, 1985, with no judgement yet. Obviously increasing the number of judges is no solution to the so called problem of "arrears". It can even work the other way round - more the judges, more the arrears.

Fees spin off

Last month's practice direction that there will be no keeping back of cases on the ground that the senior lawyer is busy in another court, has led to spin-off benefits for them. The fees for admissions of Special Leave Petitions in the Supreme Court have gone up to Rs. 5500/- — as officially known. Let's hope consumer services have improved in direct proportion to the jacked-up rates. It's too soon to assess the impact of this revolutionary change — though it is a pleasant surprise to see a senior lawyer sitting in court patiently waiting his turn to be heard.

Devil's Advocate

WARRANTS ATTENTION

Consumer Rip-off!

In September, 1985 the goverrnment changed the excise structure for Cigarette Companies in the hope of preventing deceptively similar brands from being priced differently, and to prevent excise evasion. Far from achieving its object, industry sources believe that it has led to raids against raids Godfrey Phillips India and Golden Tobacco.

While the Government and the Companies and the manufacturers are locked in the battle over excise, the consumer rip-off has escaped the notice of the public. In this Article, Anand Grover explains the implications of the case of **ITC Vs. M.S. Chipkar**

Anand Grover

Did you realize that money could be made out of nothing. Not illegally, but perfectly legally. Well, that's exactly what you, as a consumer, are helping other persons to do.

How does it happen? As a consumer you buy a variety of goods. In some cases duty or taxes are not charged as a separate item but included in the prices as an integrated whole (known as the integrated price) as in the case of excise duty. In other cases, taxes are charged as a separate item, as in the case of sales tax, but included in the overall price.

In case of cigarattes a large portion of the price includes excise duty. After purchasing the goods nobody is bothered about the taxes paid.

Refunds

The taxes or duties are leived under various Acts such as the Excise Act, Customs Act, Sales Tax Act and Municipal Acts. The Central and State Acts authorize the Government to levy taxes or duties on goods, imported, exported, sold or brought while the local bodies are authorised to levy and collect octroi, cesses, etc., if goods are brought within the local limits of a Municipality. Under all these Acts there is provision for refund of the tax, **if the tax levied and paid in excess or it was not required to be paid at all.**

Every year thousands of applications are made by manufacturers, traders or importers for refund of the taxes or duties, paid either in excess of what is required to be paid or not required to be paid at all. The manufacturers, importers or traders get the refunds as a matter of course from the Governmental authorities. In most cases, the claim is negotiated and settled and refunds made. In some cases matters go to Court and Courts grant the refunds if they are due.

It has been estimated that refunds every year run into thousands of crores. The magnitude of the problem can guaged from the fact that claims pending in the Supreme Court under the Excise Act alone for a particular period which constitute only 2 to 3% of the total claims under that Act run into **two thousand crore rupees!**

No right

The manufacturers, traders or importers do not have either the legal, equitable or moral right to claim refunds at all. They have already recovered the taxes, wrongly or excessively paid by them to Government, from the customers. Obviously no manufacturer, trader or importer is going to pay tax from his own pocket. It is recovered either directly as sales tax or indirectly as a component of the price charged to the customer. It is indeed a truly legal consumer rip-off.

Legal 'argument'

The argument of the manufacturers, traders and importers is based on the interpretation of Section 72 of the Contract Act. It says that, "a person to whom money has been paid by mistake must repay or return it". Money paid by mistake by the manufacturers, traders and importers has already been recovered from the consumers. Logically, therefore, the money has been paid by mistake by the consumer. One would imagine that it is the consumer who are entitled to the recovery and refund under Section 72 and not the manufacturers. The manufacturers, importers or traders in their applications for refund, never make any provision for handing over the money to the consumers. Despite that, refunds are being granted to them either by the Government or by the Courts. It is nothing but **illegal bounty.**

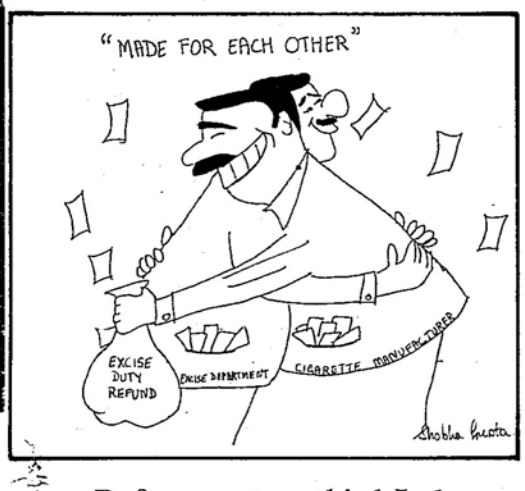
The Case of ITC

The Indian Tobacco Company, in similar circumstances, made an ap-

WARRANTS ATTENTION

plication for refund of duty excessively paid. The application was not granted and ITC went to Court demanding a refund. The two judges hearing the case, Justice Lentin and Justice Sawant differed with each other on the question. Justice Sawant held that the, **"Petitioners (ITC) having recovered the excess excise duty from their distributors, any indulgence in granting relief to them would ony amount allowing them to appropriate monies not beloning to them. This will be nothing short of allowing them to misappropriate the said amounts. The excess excise duty has already been passed on to the consumers and it is the consumers who have in fact paid the said amounts and not the Petitioners or any intermediary in between them and the consumers. To allow the petitioners to recover the said amount from the Government is indirectly to permit the petitioners and private bodies like the petitioners to tax the consumers and to collect and appropriate the tax to themselves. This will be against the law of the land and an unconscionable act on the part of any Court of law. The grant of relief to the petitioners will thus be against all canons off law as well equity".** *Indian Tobacco Company Ltd. versus M.S. Chipkar and others.*

Justice Lentin held that the Government could not resist paying up the refunds on the ground that the ITC was **unjustly enriching** itself. In effect this meant that, even if the Company was unjustly enriching itself, the Court was powerless to do anything about it.



Reference to a third Judge.

As there was a difference of opinion between the two judges, the matter was referred to Justice Shah. He went a step further and decided that it could not be said that there was any unjust enrichment.

In his opinion, the excise duty was not paid as a specific separate amount by the consumer but was integrated into the price of the final product which included excise duty payable in law. He felt that it could not, therefore, be said that a specific amount of excise duty had been collected.

A distinction was drawn between the duty paid on an integrated price basis and duty paid separately. This is a distinction without a difference and of no relevance in deciding whether the duty paid by the manufacturer is recovered from the customer or not. In both cases, either when duty is paid on the integrated price or as a specific amount, it is recovered from the customer. However, the Judge held that there was no question of unjust enrichment as the duty was included in the integrated price!

The judgement proved a windfall for ITC, which pocketed a refund of over Rs. 35 lakhs for excise duty paid in a period of 2 years! Others are also reaping a rich harvest from the decision.

As large number of manufacturers, traders or importers conduct business in Bombay, the result of the decision of the Bombay High Court is extremely crucial. **The most unfortunate thing is that the Government has not filed an appeal in the Supreme Court, though by any criteria, it is a fit case to file an appeal.**

Other Courts

Fortunately, however, other High Courts in the country have not accepted the arguments of manufacturers, traders and importers. The Madras High Court in the *Madras Aluminium* case directed that excess collection should retained by the State as a deposit for the benefit of the actual consumers. The Andhra Pradesh High Court in the *Curram Sreeramulu, Garlapati Anjaneyulu* case also held that the Companies should not be allowed to retain Sales tax collected from the public. Similarly the Allahabad High Court in the *Jaswant Sugar Mills* case held that refund should not be payable to the Company as that would amount unjust enrichment as it had collected the excise duty already from the customers. Similarly, the Gujarat High Court in the *New India Industries,* case held that duty collected illegally must be refunded to the consumers and not to the manufacturers or the State. It further directed that the State Government should open a Bank Account and a Trust for the benefit of the consumers.

It is now reported that the appeals pending in the Supreme Court have directed to be heard by a seven-Judge bence. **While the Supreme Court takes its own time in constituting the bench, hear the case and render a judgement, the grand consumer rip-off continues!**

Government Inaction

All that is required to set things right is a simple amendment to all the relevant laws prohibiting refunds of taxes, duties, cesses, octroi, etc. which have already been recovered from customers and consumers. The money could instead be kept in separate fund to be used fro the benefit of the public to improve consumer services. This would save crores of rupees now being drained away by private persons from public coffers. In fact, the Punjab Government amended the Punjab Agricultural Produce Market Fee Act so that the State can retain the excess fee paid by the licencee. The amendment was challenged but was upheld both by the Punjab and Haryana High Court and by the Supreme Court. This is a solitary instance of a Government taking action to put its house in order so that the loot of public money by business houses can be stopped.

When is the Government of India going to wake up and act? Only when consumers become conscious of the rip off? It is about time that consumers started organising themselves to put a stop to this.

REVIEW

Constitutional Rights of Working People - II

Colin Gonsalves continues his review of H. M. Seervai's Constitutional Law of India in so far as it reflects his views on the rights of the working people.

Colin Gonsalves

Directive Principles

Seervai finds the expression "social justice" not easy to define. (p-1600) This is impossible to understand since the Directive Principles of State Policy in Part IV of the Constitution are very clear on the point.

Article 37 states that Directive Principles are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Article 39 lays down that the State shall direct its policy towards securing that men and women equally have the right to an adequate means of livelihood; that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; that there be equal pay for equal work for both men and women; that the health and strength of workers and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; that children are given opportunities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment and that there be equal justice and free legal aid. Article 41 deals with the right to work, to education and public assistance for the unemployed, the aged, the sick and the disabled.

Seervai instead of understanding the importance of the Directive Principles in the making of laws and in the interpretation of the Constitution, appears to feel threatened by their existence in the Constitution. According to him, they ought to be deleted altogether from the Constitution.

In *Chandra Bhava's* case, Hedge J. had said:

> "While rights conferred under Part III are fundamental the Directives given under Part IV are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complimentary and supplementary to each other... the mandate of the Constitution is to build a welfare society in which justice, social, economic and political shall inform all institutions of our political life. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met."

Seervai vehemently disagreed:

> "It is necessary not to be carried away by the graphic language that the Fundamental Rights and the Directive Principles are the soul of the Indian Constitution." (p1612)

> "What would have happened to the governance of our country if the Directive Principles had not been enacted in our Constitution? The answer is: nothing would have happened; if anything the governance of our country would have been easier." (p1614)

> (Bhagwati's view that)..."the core of the commitment to the social revolution lies... in the fundamental rights and the directive principles of state policy...(is a) current fashionable view...(and is) untenable." (p1621)

Fears

His fears and prejudice reveal themselves quite openly.

> "The directive which provides that the State shall endeavour to secure a living wage may be used by a communist government to destroy private business by fixing a living wage at a level which, while not subjecting such business to loss, leaves it with inadequate profits thus removing the incentive to continued business." (p1672)

Merit

Seervai's book is nevertheless not without merit. It ranks as one of the few serious and somewhat systematic attempts to logically organise the matrix of Constitutional cases. The work has been painstakingly put together and will obviously be of much use to the student of Constitutional law. His style is simple, perhaps to a fault, for he tends to oversimplify complex constitutional issues. But the advantage of such a style is that he opens up the abstruse and semantical theoretical world to the serious beginner.

Detracting somewhat from his books merit, however, is his personal venom directed at Justice Krishna Iyer and Chief Justice P N Bhagwati. The criticism against them is unconvincing as a whole. Besides, Krishna Iyer and Bhagwati have been more tuned to the plight of the poor than Seervai himself.

Finally, he is at his best when defending one propertied section against another or one political party against another. It is in this context that his human rights and civil liberties rhetoric arises. His treatment of the Emergency and related issues is the strong point in his book. But it also shows, by contrast, that in Seervai's jurisprudential world, the working people have no rights.

Concluded.

All page numbers are from H.M. Seervai: *Constitutional Law of India,* 1984, Bombay.

INTERNATIONAL

British Immigration Rules

In May 1985, the European Court held that the British Immigration Rules relating to entry of spouses were discriminatory on grounds of sex. The British Government was forced to change the Rules. Rather than ameliorating the position for women, after the change in the Rules, it has become worse. Satish Kumar evaluates the changes brought about by the Immigration Rules.

Satish Kumar

The British Government changed the Immigration Rules once again with effect from 26th August 1985. The most substantial changes affect the entry of spouses and fiance's and fiance'es to the U.K.

These changes come in the wake of a defeat for the British Government before the European Court of Human Rights on the 'Marriage Rules'. This is the seventh occasion when the British Government has been embarassed into recognition of being in breach of the European Convention on Human Rights. It has now been found to have the poorest record on Human Rights - at least so far as the European Court is concerned.

The changes in the Immigration Rules are the bitter fruits of, and an ironic response to, the sustained campaigning by Civil Rights Groups, organisations of immigrants and blacks - Asian and Afro-Caribbean communities in Britain. The legal strategy of the campaigners was to challenge the Immigration Rules for entry of husbands and fiance's to the U.K. by taking the cases to the European Court of Human Rights, which provides remedies to individuals against infringement of Civil Liberties by the State. Three test cases were chosen from hundreds of cases of women who had complained to the European Court that the British Government was in breach of Article 14 of the European Convention on Human Rights by discriminating on grounds of race and sex and interfering with the right to family life. The cases, known as the *A B A* cases, named after the names of the three petitioners viz. *Abdul Aziz, Balkandali and Abales,* took nearly four years to decide. In May 1985, the Court ruled that the British Government was guilty of discriminating on grounds of sex.

The British Government was forced to change the Immigration Rules. Hoewever, the Tory Government has turned on its head the embarrasing defeat before the European Court and has used it as an opportunity to attempt to turn the screw tighter to curtail immigration, particularly from the Indian Sub-Continent.

The New Rules

The main marriage rules are as follows:

* The Sponsor (the partner in U.K. supporting the applicant's entry) must be **settled in the U.K.**
* That it is **not the primary purpose** of the intended marriage to obtain admission to the U.K. (known as the 'primary purpose' test).
* That there is an intention that the parties to the marriage should **live together** as husband and wife.
* That the parties **must have met** (the intention behind this rule is to **rule out arranged marriages** in which case the parties would have never met,
* The sponsor must satisfy the Immigration Officers (IOs) that she or he has **sufficient funds** of his or her own to support the applicant without relying on 'public funds'. 'Public funds' are defined by the New Rules to mean Supplementary Benefits, Family Income supplement and housing under the Housing (Homeless Persons) Act, 1977.
* The sponsor must be able to **accommodate** the applicant in adequate accommodation, which the person concerned either owns or occupies.
* Wives/husbands/fiance's/fiance'es seeking entry must have been granted an **entry clearance** from the British High Commission based in the country they are departing from.

Let us compare the New Rules with the Old Rules. In the main they were as follows:-

* Wives and fiance'es seeking entry did not have to satisfy the 'primary purpose' test.
* Fiance'es were not required to obtain an entry clearance to join their partner for settlement.
* The stipulation about public funds did not apply to wives and fiance'es in the U.K. sponsoring their partner's entry into the country.

In all the above matters, there has been a deterioration in the position of immigrants. However, it should be added that the Civil Rights campaigners were able to pressurise the British Government to remove the previous condition requiring women, seeking to bring their husband's/fiance's to the U.K., to be U.K. citizens. Now women, like men, have to be settled in the U.K., that is, free of immigration restriction on their stay. But the requirement that the couple must support and accommodate themselves without recourse to public funds means that for many unemployed or low-paid women, this is a pyrrhic victory. And, of course, the proportion of black and Asian women in these categories is substantial.

The 'Primary Purpose' Controversy

The other crucial battle-ground has been the question concerning the intepretation of the 'primary purpose' test.

The Immigration Rules provide that an applicant seeking entry into the U.K. on the basis of a marriage must show that the primary purpose of that marriage is not immigration. Both in theory and practice this is almost an impossible hurdle to overcome. How does one prove, negatively, one's intentions? How does one prove, among all the different factors which come into play in the decision to get married, which is primary? If one wants a reasonable prospect of happiness, and

having a steady job is a part of that, does it mean that one gets married to immigrate to secure a job in the U.K.? Since it has been held that **genuine** marriage may still have as its primary purpose immigration, Entry Clearance Officers, (ECOs), have had no difficulty in finding that a majority of the applicants in the Indian Sub-Continent fall foul of the 'primary purpose' test. Therefore, they do not qualify for entry. Trick questions are used to establish this. For example, a male applicant is asked "Do you hope to get a job in the U.K. after you marry" or "Would you have married even if your wife had not lived in the U.K." If the answer is 'Yes' to the former question and 'No' to the latter, this would suffice to disqualify someone from entry. In no other field of English law is one, effectively, 'guilty until proved innocent'.

The Procedure

The Entry Clearance application is made to the British High Commission in the country of spouse or intended spouse. Specific application forms are issued to Applicants for this purpose. Once it is received, the Applicant is placed on a waiting list for an interview with the Entry Clearance Officer. The British High Commissions in the Indian Sub-Continent are notorious for lengthy delays. Newly married couples are given 'priority' treatment. Ordinarily, this implies waiting for about four months onwards.

If the sponsor happens to be visiting the Applicant in the U.K. at the time of the interview, then both parties will be interviewed at that time, though separately. Otherwise, after the Applicant has been interviewed in the country of the spouse by the British High Commission, it is common for the sponsor to be interviewed, often after many months of delay, in the U.K. The refusal rate for husbands from the Indian Sub-Continent was approximately 73% for the year of 1984. The refusal rate for fiance's is higher. The vast majority of the refusals are on the grounds of 'primary purpose'.

Vinod Bhatia's Case

On 31st August, 1984 a special Tribunal was convened to consider this particular issue in the case of *Vinod Bhatia*. Two out of the three Tribunal members agreed that although, "Vijay Kumari's sponsor's primary purpose and that of her parents' is to arrange a suitable match without providing a large dowry, on a balance of probabilities, the primary purpose of the appellant is to obtain admission to this country". The third member, dissented on the grounds that "the evidence comes nowhere near displacing the intention to live together permanently as the primary purpose of this intended marriages".

The decision in *Vinod Bhatia's* case has rubber-stamped the Entry Clearance Officers (ECO's) restrictive interpretation of the 'primary purpose' test.

Secret instructions issued to Immigration Officers, recently revealed, show the kind of interrogation men face to prove the motive for the marriage. Answering other questions, a man is asked about the nature of his relationship with his wife or fiance's, his reasons for getting married and circumstances under which he made his decision. Couples have also complained that intimate questions concerning sexual relations have been asked.

Experience shows that the ECOs cross-examine in such a way that the applicant is made to make admissions to the effect that the main reason for the marriage is to improve his standard of living or to better himself in the U.K. Once an applicant admits that **one reason** for seeking entry into the U.K. is to improve his standard of living, the ECO's next step is to gain an admission that this is in fact the primary or the main reason.

Advisers should note that the ECO's take detailed notes which are then prepared into the 'Explanatory Statement' which forms the basis of the Government case before the Adjudicator, in the event the Applicant appeals against the refusal of an entry clearance.

Clients never take notes of these interview, and by the time the hearing is listed, which may will be a year or more after the interview took place, their memory has usually faded so that specific questions and answers at the interview cannot be remembered.

The Explanatory Statement thus becomes the only available record of the interview.

The Appeal System

Applicants refused an entry clerance must exercise their right of appeal within three months of the date of decision of the ECO. The Appeal is heard before an Adjudicator in the U.K.

Over 80% of appeals are dismissed before the Adjudicator. One crucial factor is the inherent imbalance against the Applicant in Immigration Appeals. The Applicant, who is the primary witness, is not present to attend the hearing since she or he is abroad and the case is heard in the U.K. The second point to be noted, of course, is that the burden of proof in a 'marriage rule' case, in terms of the 'primary purpose' test, is upon the Applicant. It is the Applicant who must prove that marriage is genuine and that too *in absentia*.

If the Adjudicator dismisses the Appeal, then leave to Appeal to the Immigration Appeal Tribunal may be granted. However, if the matter raises a point of law, then leave to appeal must be granted. Less than 1% of the case filed with the Adjudicator reach this stage and the vast majority of the cases are unsuccessful.

Conclusion

Advocates in the Indian Sub-Continent have neglected to play a role to assist Applicants to enter the U.K. Clearly, the first hurdle, viz., that of applying for an entry clearance is the most crucial. It is at this stage that many genuine cases are being turned down. It is at this preparatory stage that Indian Advocates can intervene. However, the difficulty, and this is perhaps insurmountable, is that the cases before the Adjudicator are heard in the U.K. For logistic reasons these cannot be handled by the Indian Advocates. Liaison between immigration experts in the U.K. and interested Advocates in India is absolutely crucial to enable a proper service to applicants. Indian Advocates could, among other things, think of remaining present at the interview, take notes, demand a written record for verification.

Satish Kumar is a Law Centre Worker in the Southhall Law Centre in England.

HAAZIR HAI

Justice D.A. Desai

Justice D.A. Desai was recently appointed Chairman of the Law Commission after his retirement as a distingushed Judge of the Supreme Court. Many of his judgements have made history and broken new jurisprudential ground. He will perhaps be most widely known and remembered for his judgement in **D.S. Nakara's** *case, commonly known as the pensioners case, a judgemnt which will probably enter the Guineas Book of Records as being one by which the largest number of persons benefited - about 40 lakhs pensioners got the Constitutional right to receive pension.*

In any dispute between unequally matched litigants, his sympathies would always be with the weaker of the two, and within the limits of his judicial powers, he did much to correct the social imbalance which he saw reflected in disputes before him. Naturally, therefore, when he takes over as Chairman of the Law Commission, there are great expectations that he will propose far—reaching reforms in the judicial system to make it accessible and affordable. He has recently proposed Alternative Formums for Dispute Resolution with Participatory Justice. We interviewed him on his proposal. Here are the excerpts:

Q Can you tell us something about the functions of the Law Commission?

A The Law Commission was set up in 1955 by Pandit Nehru. Since then it has been reconstituted every three years. It was set up primarily to keep under review the system of Judicial Administration to ensure that it is responsive to the reasonable demands of the times. It came to be thought of as a watchdog. It was a sort of courier between Courts and Government. But that was a minor part of its work. It was mainly looking at new and the uncovered areas of law. With the 14th Report you can see a certain consciousness in the Law Commission that the justice system requires to be reformed.

Q How do you perceive the present functioning of the judicial system and the way forward for reform?

A Litigation today has become over professionalised, too expensive and over formal. **There is a need for a deprofessionalised model of justice, a need to develop the indigenous juristic potential of the people including their own sense of justice. This is sought to be done by peoples' participation in justice.**

Q At what level will you propose reforms?

A Any pyramidic structure to survive must have strong foundations. The restructuring must start from the bottom and move upwards. The litigant comes into contact with the grass roots Court which today is the Munsiff's Court or

Court of the Civil Judge, Junior Division. Petty disputes arising in rural area start at these Courts. We will have to find a new method and mode of dealing with these disputes. This will take care of 75% of the litigation and will be dealt with in a speedy, effective and less expensive manner. Disputes brought to the grass roots Courts must be settled on the spot with peoples' participation. The feed stock for appeals can thus be substantially reduced.

Q How would you devise such a forum?

A Care must be taken not to disturb the susceptibilities of the people and their confidence in the Court system. While deprofessionalising the model of justice, an attempt must be made to combine the best from all sources. Alternative Forums will have to be set up with participatory justice as an important element.

Q What category of disputes will the Alternative Forums deal with?

A A cursory examination of the kind of cases that arise at the Taluka level reveals tht disputes fall into certain categories, civil, that is those relting to implementation for land reforms, protected tenancies, boundry disputes, disputes relating to entries in revenue records; matrimonial disputes relating to divorce, custody, maintenance and succession; and property disputes relating to division or possesion of farm houses, use of passage and water ways. The Alternative Forums will deal with all such disputes.

Q What jurisdiction would these Courts have?

A I am in favour of conferring unlimited jurisdiction in respect of the categories of subjects mentioned. I am also in favour of conferring Criminal Jurisdiction upto the level of First Class Magistrate.

Q What about the composition of the Alternative Forum in your proposal?

A The village landscape is heavily politicised along party lines. A purely elective system may hamper the administration of justice. Only the powerful will get elected. It is often said that we are better ruled by laws than by men. The wholly elective method will not allow a legally trained mind to get into the Court. Basic knowledge of law to render justice according to laws is necessary. We, therefore, propose that persons recruited to the civil judicial service of a state as Munsif, District Munsif or

Civil Judge, Junior Division, should preside over the Alternative Forums. They should be subject to the jurisdiction of the High Courts under Article 235 of the Constitution. They would be eligible for promotion as Sub-Judge and District Judge as at present.

Q How will you provide for peoples' participation?

A The District Magistrate and the District Sessions Judge for each District will draw up a panel of lay people with an educational attainment of a University Degree or at least HSC. The list will be approved by the High Court. When a dispute is brought to the Panchayat Judge, whose headquarters wll be at the Taluka or Tehsil level, he will select 2 persons from the panel of lay people. The Panchayat Judge and the two lay people will constitute the Court for the dispute. **This method could avoid caste, communal and political contamination.** If the two panel members are working people they will be treated as on duty and paid.

Q Your method of selecting will completely leave out those who do not have any formal education. Will it not bring in the more powerful elements and defeat the purpose of peoples participation?

A The District Judge can have the discretion to empanel those who have no formal education also, but those who have a degree or at least a Higher Secondary School Level education must be prefered.

Q Is there any point in getting the list of lay people approved by the High Court - how would a High Court Judge be in any position to decide about the credentials of people in remote Districts?

A It is necessary to have some inbuilt checks over the apointment of panel members. Therefore, the selection by the District Magistrate must be approved by the High Court to ensure that selection is not based on caste, communal or political lines.

Q What will be the respective roles of the Judge and lay people?

A They will evaluate and assess the evidence and the Panchayat Judge will assist with regard to simple formulations of law. They will share decision-making powers. Their attempt should be to arrive at a unanimous decision. If a decision is not unanimous, the majority decision will prevail. Some have suggested that there should be no appeals. I think it will be necessary to provide one revision to the District Judge in the initial stages for correcting errors of law.

Q What you are proposing is something akin to the jury system. Will the disputant have the right to ask for disqualification of lay members?

A If we allow this, the process may never end. Instead, the Panchayat Judge himself can ask them if they have an interest in either party and if so, disqualify them and select others.

Q Don't you think such a purely nominative system will not ennsure genuine, peoples participation? Invariably the more vociferous and better - off people will be on the panels.

A We can consider a system where, if an adivasi or a woman is party to the dspute, at least one of the lay judges will be an adivasi or a woman, as the case may be. We did consider whether either party should have the right to nominate one panel member. This system also has its problems as the nominated member will invariably decide in favour of the person appointing him or her. We hope that the method suggested by us will work but we invite views from the public for improvement of the proposed model.

"To kill a fly, a nuclear missile known as the high priced Lawyer is brought in. The public sector, which is supposed to be a model employer, is no exception"

Q You have been a judge of several courts, District Court, High Court and Supreme Court. Can you tell us something about attitudes of litigants to litigation?

A A certain kind of very unhealthy litigous cuulture has developed. Nobody wants to concede anything in Court even though they hope that what they are arguing is unsustainable. They take advantage of the laws delays and allow cases to drag on in the hope that the other side will get tired. I have seen powerful employers litigating petty claims of Rs.500/-up to the Supreme Court. To kill a fly, a nuclear missile, known as the high priced Lawyer is brought in. The public sector, which is supposed to be a model employer, is no better. Appeals are filed where no principle of law is involved. A time has come to take a reasonable approach to the beneficiary of welfare legislation, such as Provident Fund, Gratuity and ESIS.

Q Can you suggest ways and means of stopping this kind of pointless litigation?

A One of the worst things that the Income Tax Act has done is to make all expenditure on legal costs totally deductible as business expense. The result is that Corporations don't care about the heavy cost of litigation - it all comes out of the shareholders money. This must be changed. The company's money is going into unproductive channels.

Q What is your experience with public sector employers?

A They are no exception. **Litigation has become almost an egocentric virtue.** Public sector employers must accept the judgement of the first court and not go in apppeal. They must learn to have confidence in the judiciary and the trial court. When I was at the Bar, I loved criminal practice. I remember in the Bombay High Court, out of a list of 30 or 50 appeals, there used to be hardly one acquital. I recall Justice M.C. Chagla who used to say "Has the Government lost all confidence in my Sessions Judge?" A private litigant may say that he has no confidence in a judgement and wishes to go in appeal. The State cannot say that— it has appointed the Judges. **Public Sector litigation today is also governed by egocentric activity with only one aim in view-to tire out the poor opponent. If a Public Sector employer wants a question of law to be decided, it must first agree that the person concerned in the case will not be affected.**

Q Why are Judges so reluctannt to grant heavy and punitive costs against an unsuccessful employer?

A The consciousness is slowly growing. In *Devikinandan's* case we granted Rs 25,000/- in a case where pension was not paid. Recently Justice Chinnapa Reddy granted Rs. 50,000/- in *Bhimsingh's Case.*

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