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FROM

THE LAWYERS

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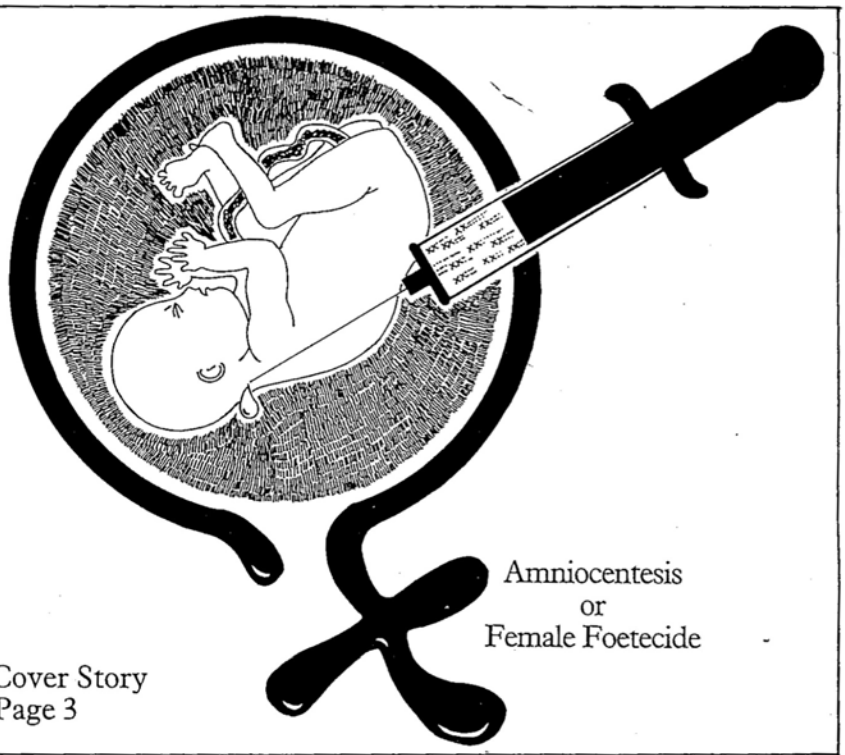

Amniocentesis
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The Law of Religious Politics

The Muslim Women (Protection of Rights on Divorce) Bill 1986 denies to Muslim Women equality before law, equal protection of laws and discriminates against them on grounds only of religion and sex.

Divide and Rule is the policy of the new Bill which is why it has been called a "legislative contribution to destablization." Never before in the history of the Congress party has such a blatanly comunalist posture been adopted. On the contrary, the party has always taken a stand, publicly at least, which is anti-communalist. Today, the Congres (I) is openly accomodating the Muslim League and cultivating the cancer of communalism

All this in the name of freedom of religion guaranteed by Article 25. Nothing could be further from the truth. We quote the full text of Article 25(1): "Subject to public Order, morality and health, **and the other provisions of this part,** all persons are equally entitled to freedom of conscience and the right freely to profess practice and propagate religion".

To put it in plain English, this means that the right freely to profess and propagate religion is subject to the right to equality before law, equal protection of laws and the right not to be discriminated against on grounds only of religion, race, caste and sex.

It is not the other way round as Rajiv Gandhi seems to think, that the right to equality is subject to the right to freedom to propagate religion. Any religious practice which has the effect of denying equality before law does not have the protection of the Constitution.

We come back to the basic question. Is there any warrant or authority in law for keeping different communities divided against each other in matters relating to marriage, divorce, child custody, maintenance, alimony and succession to property? These are all matters essentially secular in nature and will remain with us so long as the institution of private property and marriage continue to exist. Succession to property is about material wealth and nothing could be more worldly than wealth. The other

EDITORIAL

areas of family law have so far revolved around the institution of marriage. Alimony and maintenance are issues which arise on the breakdown of a marriage, whether that be the marriage of a Hindu, Muslim or a Christian. In a Secular Democratic State, one would expect a rational method to be found for dealing with these issues which are a matter of everyday occurence. Marriges and divorces, births and deaths go on regardless of religion.

Why then must Muslim women, Hindu women, Christian women or any other women be governed by different laws? **The issue is essentially a womens' issue - the demand for equality within the framework of a marriage, the demand for equal rights in succession to property.**

All personal laws of all religions have denied this equality to women within the framework of marriage. Concrete shape to the right to equality can only be given by conferring equal rights to all matrimonial property acquired after the marriage, the matrimonial home, savings, bank balances, and other income and assets to be equally divided.

Only then will a woman's labour, time and energy invested in the building of the home during the subsistence of the marriage, a contribution which is imperceptible and not capable of being evaluated in terms of money, be recognised. It is this contribution which entitles her to claim, as a rightful owner, equal share in matrimonial property from her hushand. The new Bill far from guaranteeing equality reduces Muslim women to a position of dependence, and recepients of charity, first on their fathers and brothers and then on the Wakf Boards.

It is time for the womens' movement to demand with a single voice here and now a single law which unambiguously gurantees equal rights to all matrimonial property to women. Only such a law will assure the dignity of a woman as a person in her own right and not a person as a plaything in the hands of fathers, brothers, husbands, religious bigots, judges or politicians.

The role of the Law Minister

What requires condemnation is the role of the Law Minister in drafting and piloting the Bill. The Statement of Objects and Reasons bears his signature and the Bill was introduced in Parliament by him. According to reports in the Times of India dated 3rd and 4th March 1986, in May 1985 the opinion of the Ministry of Law was sought on the Judgement of the Supreme Court in the *Shah Bano* case. The note dated 25th May 1985 states "the decision of the Court cannot be regarded as an encroachment on the Muslim Personal Law... in view of the foregoing, the Bill to amend section 125 and 127 Cr.P.C. must be opposed". According to the Times of India report, this note is stated to have been endorsed by Mr. A. K. Sen on 2nd June, 1985.

It states that, "the decision *(Shah Bano)* has led to some controversy as to the obligation of the Muslim husband's liability to pay maintenance to the divorced wife. Opportunity has therefore been taken to specify the rights which a Muslim Divorced woman is entitled to at the time of divorce and to protect her interest".

The Bill does not "specify" the rights of Muslim women as understood by Mr. A.K. Sen in June, 1985, but to his knowledge alters them to their prejudice. He failed in his constitutional duty, went back on his own opinion and became a willing party to the Politics of Religious Laws.

In February, 1986, Mr. A.K. Sen is reported to have told Mr. Arif Khan, Minister of State, Ministry of Home Affairs that the Government had come to "an understanding with the religious heads". On the 24th February, 1986, Mr. A.K. Sen personally introduced the Bill, which in effect, excludes Muslim women from the purview of Sections 125 and 127 of the Cr.P.C.

According to the same news report, which remains undenied till date, the Bill was not put to the Council of Ministers before its introduction in Parliament but presented to the Council after its introduction. Is this the Learned Law Minister's understanding of collective Cabinet responsibility? Why did he do it?

The Statement of Objects and Reasons of the Bill is expected to give reasons for the introduction of a proposed new law. On the basis of the Reasons, the Bill is expected to be debated in the Parliament and in the nation. The Reasons offered in the Bill are, to say the least dishonest and misguiding.

Mr. A.K. Sen having violated all norms of collective Cabinet responsibility must now take individual responsibility for his "legislative contribution" to communalism. Why are all our Bar Associations, National and International, who never tire of felicitating him as an "eminent jurist and Hon'ble Minister" silent?

Indira Jaising

COVER STORY

Amniocentesis or Female Foetecide

What is the legality of aborting female foetus with full knowledge that it is a female and for the reason only that it is female? Is such an abortion prected by the Medical Termination of Pregnancy Act, 1971? Sex-determination tests, followed by abortions can only lead to the conclusion that the child is aborted as it is not of the sex desired by the parent - invariably a female child. This practice calls into question the role of Doctors and Scientists in encouraging blatantly sexist practices and misusing amniocentesis, a test essentially designed to detect genetic abnormalities in the foetus. It also exposes the manipulation of the MTP Act to abort the famale foetus. In this article we analyse the law and suggest reforms.

Anand Grover

In 1870, female infanticide was banned. Today female foetecide has come to replace female infanticide demonstrating that social attitude to the birth of a female child has not changed. Over the last century science has only quickened the pace of the death of the female child from the born to the unborn stage, calling into question the role of doctors and of science and technology. This is reflected in the popularity of Amniocentesis.

Amniocentesis in India has become synonymous with the sex-determination test. It is being used to first determine whether the unborn child is a female and if so, the female child is aborted.

The practice of sex-determination by Amniocentesis followed by abortion in case of a female child is not only illegal but constitutes a criminal offence and is Constitutionally impermissible.

Amniocentesis Widespread

Amniocentesis for sex determination has reached every nook and corner of the country. In Dhule, where there were hardly any pre-natal clinics 3 years ago, today there are 5 clinics functioning only for sex determination. In Bhandup, a suburb of Bombay, where there were hardly any pre-natal clinics some years ago, there are today over four clinics carrying out sex determination tests of the unborn child. A well-known clinic in Dadar, Bombay, carried out 15, 914 abortions in the year 1984-85. Considering that there are hundreds of doctors in Bombay alone who carry out sex determination tests and abortions, the magnitude of the problem can be well imagined. It is not that large numbers of daughters in the family drive women to have the sex of the child determined. Even women who have no daughters want to ensure that they have only sons. This is clear from the survey carried out by a group in Bombay and Dhule (See Box).

The use of Amniocentesis for sex determination has permeated all classes of society. People in a **slum in Vile Parle,** a suburb of Bombay, were found to **borrow money from money-lenders to pay for Amniocentesis and abortions.** Doctors carrying out the test charge anything ranging from Rs.500 to Rs.5000/- for the test followed by an abortion.

With increasing demand and the large number of doctors performing the test, the competition is intense. Advertising is increasingly used and is becoming bolder day by day. Facilities for sex derermination and abortions are advertised in the suburban trains in Bombay though not always together and thus have official sanction.

Technique for genetic diseases

Amniocentesis is a technique to determine genetic abnormalities at the pre-natal stage (i.e. when the child is in the womb of the mother). Although other methods are available to determine genetic diseases or abnormalities, Amniocentesis is today the most widely used technique all over the world.

There are approximately 1500 known genetic diseases. Most of these, such as haemophilia are due to genetic mutations. Others, like the Down's Syndrome, where there are three No. 21 Chromosomes, instead of the normal pair, and which occurs in one out of 200 births, results from genetic defects.

Sex Determination is essential only in cases of genetic diseases which are sex-linked such as haemophilia, which cannot be diagnosed by other means. In such cases, it is arguable whether after detecting chromosomal abnormality, abortion of the foetus should be carried out or not.

However, today sex-determination is only being used to determine the sex of the child and if it is a female the child is invariable aborted.

Abortion - an offence

Until 1971, the law relating to abortions was exclusively governed by the Indian Penal Code (IPC). Enacted in 1860, it reflects the prevailing morality and makes **abortion an offence, except if performed to save the life of the woman.** Under the IPC any one causing miscarriage is, unless it is done

in good faith to save the life of the pregnant woman, liable to imprisonment for three years. If the woman is quick with the child (i.e. the child has assumed foetal form, normally after 5 months) the punishment can be imprisonment of upto seven years (Section 312). If the miscarriage is caused without the consent of the woman, the person concerned is liable for imprisonment for life or ten years. (Section 313) If the woman dies by an act intended to cause miscarriage the person causing the death is liable for imprisonment for ten years if it is done with the consent of the woman and with imprisonment for life; if it is done without the consent of the woman (Section 314)

Any act done with the intention of preventing a child from being born alive or causing it to die after birth, **unless it is done to save the life of the mother** is punishable with imprisonment of upto life (Section 315). An act done with a knowledge that it might cause the death of the pregnant woman, but which causes death of the quick unborn child instead, will make the person liable to imprisonment of upto ten years (Section 316).

Thus under the IPC, abortions are illegal and constitute an offence unless it is done to save the life of the pregnant woman. Despite this, women both married and unmarried resorted to abortions. Moreover, no consideration is given for the health (mental or physical) of the woman or pregnancy caused by rape or possibilities of children being born of genetic deformities.

Medical Termination of Pregnancy

The Medical Termination of Pregnancy (MTP) Act enacted in 1971 modified this position radically. Its effect is to legalise abortions provided they are carried out under conditions specified in the MTP Act. As Sections 312, 315 and 316 IPC have not been repealed, an abortion not covered by the MTP Act would still amount to an offence under the IPC. The Act recognised that a number of illegal abortions were being carried out, even by married women. It also noted that there was avoidable wastage of the mother's health and strength and some times life.

Pregnancy under the MTP Act is allowed to be medically terminated:

(a) if it is **less than twelve weeks** on a certificate of one registered gynaecologist and obstetrician;
(b) **between twelve and twenty weeks on a** certificate of two registered gynaecologists and obstetricians;

If

(i) **Pregnancy would involve a risk to the life of the pregnant woman;** or cause **grave injury to her physical or mental health;** or
(ii) there was a substantial risk that the child if born would suffer from **physical or mental abormalities** so as to be seriously handicapped;
(c) **at any time** on a certificate of two registered doctors, **if it is immediately necessary to save the life of the pregnant women.**

Anguish, either caused by pregnancy because of rape of a woman or caused by a failure of contraception by a married woman is presumed to constitute grave injury to the mental health of a pregnant woman. Pregnancy can be medically terminated only at a Government hospital or at a hospital

What is Amniocentesis *Dr. P. Phatnani*

The living body is composed of cells, the basic units. The nucleus of the cell contains the genetic information passed from the parents to the child. In the cells of all humans there are 23 pairs of chromosomes, numbered 1 to 23. The 22nd pair is the pair of sex chromosomes either XX or XY. All the cells of a woman carry the XX chromosomes, while all the male cells carry the XY chromosomes. The sperm can either have the X or the Y chromosome, while the ovum carries only the X chromosome. The fusion of the sperm with the ovum (fertilisation) results either in a male child, carrying an XY chromosomes or a female child carrying the XX chromosomes.

The human foetus lies in the uterus contained in the amniotic sac and surrounded by the amniotic fluid. Cells from the foetus are passed into the amniotic fluid. These are collected by a simple method of passing a needle through the abdominal wall of the mother after the fourth month of pregnancy. Earlier, the test used to be carried out in the third trimester (the nine months of pregnancy are divided into three trimester of three months equally). However, it is now carried out in the second trimester, most often after 16 weeks of pregnancy.

On detecting whether the foetus is a boy or a girl, the uncultured or cultured cells from the amniotic fluid are studied under the microscope. If it is a girl, the X chromosome shows up as a dark spot against the nuclear membrane of a cell. If it is a boy the Y chromosome shows up as a white spot using fluorescent techniques.

Cells obtained from the amniotic fluid are normally cultured (allowed to develop) for about three weeks for chromosomal analyses and four to six weeks for bio-chemical studies. However, for sex determination, even the uncultured amniotic fluid can give a highly accurate prediction of the sex of the child within 24 hours.

Other Techniques

Chorion Villi Biopsy is a method where the cells of the chorion are removed and studied for chromosomal abnormalities. The advantage in this method is that it can be carried out in the first trimester (around 8 weeks) i.e. within 12 weeks, and hence the abortion is easier. These would give an impetus to large-scale sex determination and female foetecide.

Sex Pre-selection

Current research in the area is focusing on **sex pre-selection** rather than sex-determination. Among the methods that are being pursued include separation of sperms, carrying X or Y chromosomes, followed by artificial insemination, timing of insemination in relation to ovulation, immunization of females against X or Y bearing and altering the conditions of the femals reproductive tract.

Dr. Phatnani is a well known medico-legal expert.

approved for the purpose.

All abortions carried out require the consent of the woman. The certificate by the doctor or doctors must state the reasons why the abortion has been carried out. The concerned doctor or the head of the institution is required to send the statement of cases of the medical termination of pregnancies to the State Government. This statement must also include the reasons for the abortions as permitted under the MTP Act.

Under the MTP Act, all abortions after twenty weeks are illegal. Let us view the legality of sex determination tests in the context of these laws.

Amniocentesis is normally carried out in the sixteenth week of pregnancy. For accurate determination of the sex, culturing of the amniotic cells for 3 weeks must be carried out. On occasions, the test has to be carried out again. Chromosomal analyses without culturing the cells are subject to an error in nearly 10-20% of the cases.

Sex Determination Illegal

Abortion, following a proper sex determination test, would fall foul of the MTP Act as it would be outside the 20 weeks period. In order to avoid this, a lot of doctors simply do not culture the cells for three weeks. There have also been reports of sex-determination tests not being carried out at all, yet the patient is told that it was carried out and that she is carrying a female child. Written reports are hardly ever given to the patients. No records are kept of the test or the name of the patient or the reasons for carrying out a sex determination test. Thus either inaccurate reports or absolutely bogus reports are made and used as the basis of the abortions. Once the sex of the child is certified to be female, given the dominant psychology prevailing in society, and the family in particular, the pressure is to abort the female foetus.

Medically, the only category of cases where sex determination is necessary is where there are sex-linked genetic diseases. In order to avoid children having such abnormalities, the MTP Act allows the termination of the pregnancy under Section 3(2)(ii) (where there is substantial risk that the child would suffer from physical and mental abnormalities).

'99% Come only for Sex-determination' Dr. Pai

Dr. Pai, President, Health Promotion Society, runs the famous Pearl Center at Dadar, which offers to perform abortions at a "nominal cost" of Rs. 70/-. In 1983-84 15,914 abortions were performed at Pearl Center. How many of these were of female foetus? How many were genuinely for reasons permitted by the MTP? Dr. Pai says that though he performs amniocentesis he makes it clear to his clients that "parliament has denounced discrimination against female foetus". No record is kept of the sex of the aborted foetus, ***Nina Murdeshwar*** *interviewed Dr. Pai on some of these questions. Here are excerpts:*

Q *Would you agree that amniocentesis is done more for sex determination than to find out the genetic defects?*

A It depends upon the people. In our country amniocentesis is essentially done, I can say upto 99%, purely for the sex determination of the foetus. In the West, like say in the United States, discovering the genetic diseases through amniocentesis is important. In India, we have not yet reached that stage medically, to go into such details regarding genetic diseases.

Q *What is the percentage of women coming to your clinic for sex determination?*

A Usually, young married females having one or more female children come for this test. The percentage is quite high. There are quite a few who keep trying and trying to have a male child and then come here for the test after having had 4 to 5 female children.

Q *In your experience have you had patients coming for amniocentesis for any other reason than sex determination?*

A I will be very honest. Mostly people come for sex detection only. We also tell them of the other advantages of the test but they are not so interested in that. I have yet to come across a person who has come here for the test purely for detection of genetic diseases.

Q *Do all women who have found through this test that the foetus they carry is a female, undergo abortion?*

A I don't know. I think so. We have no follow up on that. Therefore, I would not make a statement on this; but I would say that large majority must be getting rid of female foetuses. I do not have any statistics. I only know that almost 50% of women who find that their foetus is a male go back happy and even later write to us once the baby is born.

Q *Is a sex determination test followed by abortion legal?*

A It is. As per Medical Termination of Pregnancy Act, 1971, any pregnancy, which causes injuries to physical or mental health of a woman, can be terminated upto 20 weeks. And if a woman feels that the pregnancy can be harmful then it is perfectly legal for her to have an abortion. She does not say that she wants an abortion because the foetus is female. She will give the reason as a socio-economic environment in the immediate or forseeable future.

Q *Is there no way of ensuring 100% accuracy of the results?*

A That would mean lengthy laboratory work and it will mean more cost - at least Rs. 600/-. 98% is good enough. In any case nothing is 100% accurate.

Q *Does not aborting female foetus amount to female infanticide?*

A Definitely not. MTP can be carried out only upto 20 weeks of pregnancy. After that aborting is in any case illegal and punishable. In the period of 20 weeks the foetus is just a conglomeration of cells. It has life, yes, but so has a tumor, which is also a conglomeration of cells and has life. But that does not stop us from removing the tumors growth which will prove injurious to health. So also, if the pregnancy is believed to be injurious to physical or mental health of the mother, it should be removed. And within 20 weeks the foetus is not viable. By itself it cannot live. It is only after 28 weeks if a delivery occurs that the baby may live. Till then, I will not call the foetus an infant and therefore, aborting it does not amount to infanticide legally.

There is no other ground for sex determination.'

Abortion on grounds of Sex an offence

However, practically all abortions are inevitably preceded by sex determination of the child and in almost all cases where sex of the foetus is determined to be female, the child is aborted. There is no doubt that sex determination tests are carried out only with a view to abort the female foetuses. There is also no doubt that doctors are willing parties to this practice. In fact, many have built empires doing business in sex determination coupled with abortions.

Abortion preceded by sex determination is totally illegal and a criminal act on the part of the doctor. In order to overcome this, the doctors specify any of the other grounds available under the MTP Act for carrying out abortions.

The ground commonly specified is the 'failure of contraception'. Women who go for sex determination do so after planned conception wanting a male child. Obviously the ground of failure of contraception is not sustainable in these cases.

There is no method to check that the reasons specified in the certificate are the true reasons for the abortion. All that is required to be forwarded to the Governement is the statements of cases along with the reasons. The Government, concerned only with its family planning programme, could not care less and is a willing party to this legalised female foetecide.

To remedy the situation the Government must take note of the situation and immediately take the following steps viz.

* **Ban all sex determination tests** by private practitioners.
* Allow **sex determination by public hospitals** only as an exception to the general rule, if there is a known history of sex linked genetic abnormality in the family.
* Ensure that **amniocentesis is carried out only by persons specifically licenced** for the purpose, the condition of the licence being that the test will be carried out only to detect sex-linked genetic abnormality.
* ***Prosecute all doctors*** carrying out sex-determination tests without licences.
* **Amend** the Rules and Regulations under the **MTP Act** to ensure that: **the doctor records in the report the following:**
* Whether aborted **child is a male or female**

** **precise number of weeks** at which the MTP was performed

** If the MTP is being performed on the ground of physical or mental abnormality of the child, **the exact nature of abnormality** with documented reports to prove the abnormality.

** If the MTP is being performed on the ground that the continuation of pregnancy would cause risk to the life of the mother or grave injury to her physical or mental health, **the precise nature of risk to life or apprehended grave physical or mental injury** documented by medical evidence

** if the MTP is carried out on the ground that there was a failure of contraceptive, the **method of contraception used and its reasons for failure.**

** Take a **declaration** from the mother and father (if the woman is married) **that no sex determination test was carried out** prior to the MTP.

Constitutional Validity

The constitutional validity of the sex determination followed by abortions is very much in doubt. In law, an unborn child can be considered "a person" within the meaning of Articles 14, 15 and 21. The unborn child has several statutory rights, the right to inherit, to bring an action when born for wrongful dimunition of life or damage caused to the child in the womb. In fact, the right to be born. This right is being denied without due process of law. That abortions are being selectively resorted to in the case of female children only would make them violative of Article 14 and 15 also.

It is not our intention in this article to argue against abortions; but rather to prevent selective abortions of the female foetus. The right to an abortion is essential to a woman to ensure her control over her reproductive process - to decide whether or not she wants a child - a decision which is taken regardless of the sex of the unborn child.

COVER STORY

'False test led to abortion of male child'

Mrs Sarla Sugand had undergone Amniocentesis with the intention of determining the sex of her unborn child. She was not familiar with the word 'Amniocentesis' but called it the 'male-female test'. She had had two daughters already and when she conceived the third time she decided to undergo this test. She was told that she was carrying a female child and, therefore, decided to have an abortion. But the child she aborted happened to be a male child. "I was cheated", she said. The abortion itself proved hazardous to her life as she was well into her fifth month of pregnancy. Today she advises her friends and relatives to "never undergo the test". When she got pregnant after her 'experience' she did not repeat her previous mistake.

We met her and questioned her on her experience, her reasons for undergoing the test and the way it affected the course of her life. Today, at the age of 34, she is the mother of four lively daughters aged 14, 12, 6 and 4.

Q. *What made you go for the test?*

A. It was about 7 years ago. I had two daughters then aged 7 and 5. I was quite satisfied with two children and did not want any more children but there was pressure from the elders that I must have a third child since we did not have a son. My husband has two brothers both of whom had sons. So my mother-in-law was keen that my husband, who is her youngest son, should also have a son. After the birth of my second daughter I had been using contraceptives for several years. Finally I succumbed to family pressures and decided to have another baby to keep peace in the home. When I knew I had conceived, we decided to have a sex determination test done.

Q. *How did you go about it?*

A. We went to J J Hospital. I told the doctor on duty that I wanted the 'male-female test' done. She readily agreed. She neither asked me any questions nor did she explain its implications. She just examined me and asked me to come again for another examination.

Q. *How advanced was your pregnancy then?*

A. 4 months. She told me the test cannot be done before 4 months.

Q. *What was the nature of the test?*

A. My case papers were prepared and I was given an appointment for a particular day. When I reached the hospital on the appointed day I was sent to the Gynaecological ward and a doctor injected a needle in my stomach to extract some fluid. There were several women undergoing the test and the doctor repeated the same procedure with them. I was then asked to return after about a week or so.

Q. *When were you informed of the results?*

A. When I went there again after a week I was told to check with the department about the results of the test. I had been given a number which was supposed to by my case number. I gave it to a person on duty. She looked into the records and informed me : "It's a female".

Q. *Did they give you any report?*

A. No. No written record or report is given to anybody.

Q. *What did you do then?*

A. The doctor then asked me if I wanted an abortion. I said 'yes'. She asked me to get admitted immediately which I did. By then I was into my fifth month of pregnancy. A lady doctor gave me an injection. I did not abort the child but became very ill. The doctor was visibly disturbed by this. She said it was unusual and she would have to try again. She said this happened as the child was healthy.

Q. *Did she try any medication again?*

A. The next day she gave me another injection to make me abort. My condition had become very serious. I was in great pain and was bleeding heavily. I was put on a saline drip. My husband and family told the doctor they would take me elsewhere if she could not handle my case. She told them that it could prove dangerous and that she could handle the situation. Finally I had the abortion but with great difficulty. I thought I was going to die. After the abortion the sister who was attending on me held the foetus in a tube and said, "it's a male". I heard her loud and clear and asked her if I had been carrying a male child. She said 'yes'. She then went out of my room and I distinctly heard the doctor reprimanding her for informing me about the male child I had aborted. They thought I did not understand English. When the doctor came in to see me I confronted her but she refused to accept that I had been carrying a male child and insisted that her report had been correct.

Mrs. Sugand with her two daughters

ADAALAT ANTICS

Judges United Protest

Looks like Justice Chandurkar, Chief Justice, High Court, Madras, has missed the bus to the Supreme Court this time round. Justice Sivasankar Natrajan of the Madras High Court has been appointed instead.

Justice Tulzapurkar retired from the Supreme Court on March, 1986. Four new appointments have been made in March, bringing the number to 17 out of a sanctioned strength of 18. Who is going to be the lucky one to make it? According to a news report in the Indian Express (12/3/86) four Senior Judges of the Bombay High Court have protested to Zail Singh about the likely appointment of Justice Sawant. Who are these four senior judges? After the retirement of Justice Tulzapurkar, they probably feel they have a rightful claim to represent Maharashtra — or is it themselves they represent? Or is it the "principle" of seniority? But haven't they all, or at least some of them, already been superseded by Justice S. Natarajan, Madras (confirmed on 27.2.74) who was junior to Justice Chandurkar (confirmed on 7.8.68) who was obviously senior to the four seniors of the Bombay High Court. Likely to be in the list of protesting judges are:

M.H. Kania	*confirmed on 2.11.71*
S.K. Desai	*confirmed on 8.2.72*
B.A. Masodkar	*confirmed on 24.11.72*
C.S. Dharmadhikari	*confirmed on 24.11.72*
P.S. Shah	*confirmed on 1.11.73*
R.L. Aggarwal	*confirmed on 29.1.75*
B. Lentin	*confirmed on 27.3.75*

Justice S. Natarajan at least supersedes the first 5 in this list. So what is the fight all about?

Influence

In an article published in "Loksatta" dated 7th February, 1986, the Editor criticised Judges attending parties hosted by lawyers where drinks are served. The article refers to an incident where a Judge of the Bombay High Court, who is now said to have been transferred as the Chief Justice of another High Court, attended along with his family members, the marriage of two daughters of two advocates who were his friends. All the expenses of the trip were paid by the hosts. Now everybody knows that only one judge of this High Court has been transferred as Chief Justice of another High Court, Justice Chandurkar. Why didn't Madhav Gadkari name him? Perhaps he thought he would be guilty of contempt if he did. Well, he was wrong. By an order dated 17th February, 1986, R. A. Jahagirdar and Tated JJ held that it was not contempt. "That the Judges of Superior Courts and especially the High Court should not attend, at least frequently, parties hosted by lawyers, is a thought which is shared by many people. It is not the suggestion that by attending such parties the Judges tip the scales of justice in favour of their erstwhile host. But in the mind of the general public an impression that they do should not be created." Strange that H. M. Seervai who is quoted in the same judgement with great approval, does not seem to think so, but seems to be of the opinion that such parties do tend to tip the scales of justice. Says Seervai "A number of Judges are present, high officers in the Secretariat are present, businessmen are present. For what does a man spend Rs.40,000 to Rs.50,000 in honour of a newly appointed Chief Justice, if not to put him under obligation and expect a return?"

More about Gentlemen Squatters

In 1974, Chief Justice Kotwal assured the Law Minister that if the Government wanted the Chambers back, the Chief Justice would implement the decision.

In 1981, individual notices were issued to the Gentlemen to quit and vacate. They wrote back stating that they should be allowed to continue. They were informed that their representation to continue was not acceptable. Yet, the tenacious Gentlemen not only hang on but multiply as time goes by.

Chief Justice Madhav Reddy constituted a Committee of Judges consisting of himself, Justice S. K. Desai, Justice C. Dharmadhikari and Justice Kania. This Committee decided that a notice should be sent to the squatters to quit. Has the notice been sent ? If not, why not ? If yes, with what results ?

In the meantime, Atul Setalvad and 7 mysterious others have taken offence at a report appearing in the Times of India (February 19) that the space was required for High Court work. Obvious, is n't it ? In a letter to the Editor (3.3.86) he says that the space is occupied by 83, of whom "only 16 are seniors".

He is one of them. One wonders whether his name appears anywhere in the list of original allottees — but perhaps his late lamented father's name may do ! Or could it be that the chambers are heritable tenaments ? The law is in a constant state of flux — who knows the legal position anyway. Information is secret, may be privileged and difficult to come by — so we will have to wait and see till the promised notices are issued. One wonders for example how much rent or compensation, by whatever name called, they pay.

Incidentally, squatting is not a phenomenon confined to Bombay. It is reported that several chambers in the Supreme Court are occupied in violation of rules.

Maharaja's brief

The International Bar Association, Law Asia, and the Bar Association of India, sponsored a seminar which was recently held at the Oberoi Towers. Delegates and participants received their reading material in bags supplied by the ever obliging Maharaja of Air India — 'the official carriers' — whatever that means. Incidentally Air India has so much litigation all over the country that it would be a good idea for their enterprising official advertisers to design some special publicity material for lawyers, litigants and judges, instead of designing the same old boring Maharaja. How about putting the Maharaja in a Judge's band and gown for a change shouting "Silence" in good old Hindi filmi style.

Devil's Advocate

Employees State Insurance

RI & SR continue their article on Employees State Insurance

RI & SR

ESI Benefits at a glance

Benefit	Contributory conditions	Duration	Rate
1.(a) Sickness Benefits	Payment of contribution for not less than half the number of days in the relevant contribution period.	91 days in any two consecutive benefit periods.	As per standard benefit rate.
(b) Extended Sickness Benefits for 22 specified long term diseases like TB leprosy etc.	Continuous employment for a period of two years.	124 days which may be extended upto 309 days in specified chronic cases during a period of three years.	25% above the standard benefit rate.
(c) Enhanced Sickness Benefit (for undergoing sterilisation operation for Family Welfare Planning)	Same as for Sickness Benefit at (a) above.	7 days for vasectomy and 14 days for tubectomy extendable in cases of post-operative complication etc.	Twice the standard benefit rate.
2. Disablement Benefit (Employment Injury)	No condition	In case of temporary disablement, as long as incapacity lasts and in case of permanent disablement, for life.	Temporary Disablement benefit 40% more than the standard benefit rate. Permanent disablement benefits: percetage of above rate as determined by Medical Board.
3. Dependents' Benefit (Employment Injury)	No condition	To widow/widows for life or until re-marriage; to legitimate or adopted sons and to legitimate or adopted unmarried daughters till age of 18 years; to legitimate adopted infirm son or adopted unmarried infirm daughter till infirmity lasts.	As in the case of Temporary disablement benefit rate.
4. Maternity Benefit.	Same as in Sickness Benefit.	12 weeks of which not more than six weeks can precede the expected date of confinement. 6 weeks for miscarriage. Additional one month for sicknes arising out of pregnancy, confinement, premature birth of child or miscarriage.	Twice the Standard Benefit rate.
5. Medical Benefit (for Injured Person and his family)	No condition	From the date of entry of insured person into insurable employment so long as he remains in insurable employment and thereafter for certain additional period.	Full medical care (all facilities including hospitalisation for insured persons. Families are provided either full, or expanded or restricted medical care depending on the facilities available).
6. Funeral benefit	No condition (i.e. merely by virtue of being an insured person)	----	Actual lumpsum expenses on the funeral not exceeding Rs. 100
7. Rehabilitation Allowance	No condition	For each day on which insured person remains admitted in Artificial Limb Centre for fixation, repair, or replacement of artificial limb.	At Sickness Benefit rate as at 1(a) above.

Legal Provisions

Section 72 of the Act imposes a ban upon the powers of an employer with regard to reduction of wages of an employee by reason of his liability to pay contribution.

Under Section 73, an employer cannot dismiss or discharge or reduce or otherwise punish an employee during the period of his certified sickness.

Section 85 provides for **punishment for failure to pay con-**

tributions or to fulfil other obligations enjoined on any person under the provisions of the Act. Different punishments have been prescribed for different types of offences.

Wages under the Act.

To be deemed as Wages	Not to be deemed as wages.
* Basic wages, dearness allowance, house rent allowance, city compensatory allowance	* Contribution paid by the employer to any pension/ provident fund or under this Act.
* Overtime wages	* Any travelling allowance or the value of any travelling concession.
* Payment for day of rest	* Sum paid to defray special expenses entailed by the nature of employment
* Production/Incentive bonus	* Gratuity payable on discharge.
	* Pay in lieu of notice or retrenchment compensation.
	* Benefits paid under the ESI Scheme
	* Encashment of leave.
	* Payment of Inam which does not form part of the terms of employment.
	* Washing allowance for uniforms.

Besides these provisions, action can also be taken under Section 406/409 of the Indian Penal Code 1860, in cases where the employer deducts contributions from the wages of his employees but does not pay to the Corporation.

Any contribution due under the Act and not paid can be **recovered as arrears of land revenue** through the District Collector. The employer can raise any dispute or question for adjudication in the Employees' Insurance Court of the area, set up under the Act.

The employer is liable to **pay interest at the rate of 6% per annum** in respect of each day of default or delay in payment of contributions. The Corporation is also empowered to recover damages from the employer who fails to pay contributions or delays payment of any other amount. The amount of damages, however, cannot exceed the amount of arrears. The damages can also be recovered as arrears of land revenue.

There are two **contribution periods** of six months each in a year in respect of an employee, with corresponding benefit period of six months each as under :

Contribution Period	Corresponding Benefit Period
1st April to 30th September	1st January to 30th June of the year following
1st October to 31st March of the year following.	1st July to 31st December

Other Benefits

Insured persons and members of their families are provided artificial limbs, hearing aid, artificial dentures, spectacles (for Insured Perons only) and artificial appliances like spinal supports, cervical collars, walking callipers, crutches, wheel chairs and cardiac pace makers, dialysis/dialysis with kidney transplant etc. as part of medical care under the ESI Scheme.

The extension of medical benefits under the Employees State Insurance Scheme to retired workers, who were earlier covered under the scheme has recently been approved by the Employees State Insurance Corporation. It is estimated that it will cost the Corporation around Rs. 6 crores a year.

The present rates of benefits are as follows:

Group of employees whose average daily wages are	Corresponding daily Standard Benefit Rate
1 Below Rs. 6	Rs. 2.50
2 Rs. 6 & above but below Rs. 8	Rs. 3.50
3 Rs. 8 & above but below Rs. 12	Rs. 5.00
4 Rs. 12 & above but below Rs. 16	Rs. 7.00
5 Rs. 16 & above but below Rs. 24	Rs. 10.00
6 Rs. 24 & above but below Rs. 36	Rs. 15.00
7 Rs. 36 and above.	Rs. 20.00

The Rights of Prisoners

What is the object of incarceration? What is the role of the judiciary beyond sentencing? Does a prisoner behind bars lose all his fundamental rights by the mere fact of incarceration or only those that are inconsistent with his right to move freely, his right to physical liberty? The answers to these questions determine the rights of prisoners in any given society. In this article Mihir Desai examines changing trends in thinking over the last century and discusses the rights of prisoners.

Mihir Desai

Historically, social perceptions of the object of incarceration have varied from retributive and deterrent to rehabilitation and reform.

The earlier view is best exemplified by the 1871 decision in *Ruffian Vls Commonwealth* (1)

> "He as a consequence of his crime not only forfeited his liberty, but also his personal rights except those which the law in its humanity accords to him. **He is for the time being the slave of the State".**

By contrast, the modern day approach sees the prisoner as a

person who retains his fundamental rights and needs to be helped to rehabilitate himself in society. The rights of prisoners are determined mainly by the legislature, the executive and the judiciary. It is necessary, therfore, to examine whether laws and judicial attitudes have kept pace with changing attitudes.

The management and administration of prisons in India is governed by the following Acts:

(i) Prisons Act, 1894.
(ii) Prisoners Act, 1900
(iii) Transfer of Prisoners Act, 1950.
(iv) Prisoners (Attendance in Courts) Act, 1955
(v) Indian Lunacy Act, 1912
(vi) Borstal Schools Acts
(vii) Habitual Offenders Acts
(viii) Civil Jails Act, 1874.

The day to day functioning of jails is governed by Prison Rules found in the Prison Manuals of different States.

History

In 1835, Lord Macaulay remarked about Indian Prisoners that, "it is of greatest importance to establish such regulations as shall make **imprisonment a terror** to wrongdoers".(2)

In 1836, a Prison Discipline Committee, headed by Lord Macaulay, was appointed to enquire into prison conditions. In its Report submitted in 1838, the Committee jettisoned any ideas about improving the conditions of prisons or reforming prisoners. It prescribed increased rigourous labour and also recommended dull, monotonous and wearisome work for the prisoners.

In 1864, the Government, compelled by the high and increasing rates of prison deaths, appointed a second Committee. However, even this Committee was interested more in the management and disciplining of prisons and prisoners rather than improving their conditions.

In 1888-89/92 a Jail Committee headed by Lord Dufferin was appointed. As a result of its proposals, the Prisons Act 1894 came to be passed.

The Prisons Act, 1894.

The purpose of the Prisons Act was not the ameliorating of conditions of the prisoners but to bring about a uniform system of prison management in India. Being a 19th Century Act, it obviously reflected the retributive theory of punishment.

Under the Act, a **prison is defined to mean any jail** or place used temporarily or permanently under orders of State Government **for the detention of prisoners, but does not include police lock ups** and also does not include such places declared by the State Government to be subsidiary jails.

A **criminal prisoner** is a person committed to custody under writ, warrant or order of the court or authority exercising criminal jurisdiction or under Court Martial. A **convicted criminal prisoner** is any criminal prisoner under sentence of a Court or Court Martial. A **civil prisoner** is any prisoner who is not a criminal prisoner.

The highest officer for prisons in a State is the **Inspector General** who is appointed by the State Government, while each prison is managed by a Superintendent in matters relating to discipline, labour, expenditure, punishment and control.

The jailor is to reside in the prison and is responsible for safe custody of these records, for commital of warrants, other documents, money and articles taken from the prisoners. The **Medical Officer** is in charge of sanitary administration within the prison.

The **Gate Keeper,** of the prison has the right to examine anything carried in or out of the prison, and may stop and search any person suspected of bringing any prohibited article into or out of the prison.

Documents to be maintained

The **Superintendent** is in overall charge of the jail and is required to keep the following five books:

* A register of admitted prisoners;
* A book showing the release dates of each prisoner;
* A punishment book for entry of the punishment inflicted;
* A visitor's book containing observations made by them relating to administration of prisons;
* A book containing record of money and other articles taken from the prisoners.

Admission and Stay.

When a prisoner is admitted to prison he is to be searched and all weapons and prohibited items taken away from him. A criminal prisoner has to be examined by the Medical Officer as soon as possible after admission, and a record of his state of health, wounds or marks on his person and type of labour he is fit to undertake are to be recorded. In case of female prisoners, the search and examination have to be carried out by the Matron.

Female and male prisoners are required to be kept in separate buildings, or in separate isolated parts of the same building. Prisoners who are above and below the age of 21 are also to be separated. Unconvicted criminal prisoners are to be kept apart from convicted criminal prisoners and civil prisoners are to be kept apart from criminal prisoners. A prisoner under sentence of death is to be confined in a cell apart from other prisoners, and is to be placed under the charge of a guard day and night.

A civil prisoner or an unconvicted criminal prisoner is permitted to maintain himself and to purchase or receive from private sources at proper hours, food, clothing, bedding or other necessities. Every such prisoner who is unable to provide himself with sufficient clothing and bedding is to be so supplied by the Superintendent.

As regards employment, civil prisoners are allowed to work and follow such trade or profession with the Superintendent's permission. A criminal prisoner cannot be made to labour for more than 9 hours on any day.

The Medical Officer shall, at least once a fortnight, record the weight of the prisoner on the history ticket and he may also direct the prisoner to do work of a light nature.

In every prison, a hospital or proper place for receiving sick prisoners is to be provided. If a prisoner is not well or does not appear to be well, this has to be immediately brought to the notice of the jailor who in turn will ensure a check up and treatment by the Medical Officer.

LAW AND PRACTICE

Prison Offences

Prison offences are divided into 16 different categories ranging from attempted escape to feigning illness, wilful idleness and disorderly behaviour. 12 different types of punishment are provided for these offences. Punishments can be meted out only by the Superintendent. They range from formal warning to penal diet, separate confinement, bar fetters and even whipping. Certain States like Gujarat, Maharashtra and West Bengal have abolished the punishment of penal diet and whipping, but in many other States these punishments are still operative. Apart from this, the Act provides that whenever the Superintendent considers it necessary for the safe custody of any prisoner, he may be confined in irons.

Mulla Committee Report.

In 1980 an All India Committee on Jail Reforms, chaired by Ex-Judge A.N. Mulla, was constituted to go into prison conditions and make its recommendations. The members of the Committee visited prisons in most of the States of India and also relied on information from various countries all around the world. It submitted a comprehensive three volume report in 1983. It stressed for prison reforms and a better life for prison inmates. **The Committee came to the conclusion that harshness of punishment does not have such deterrent effect. In fact, in many countries lighter sentences with slightly liberal burden of proof had led to reduction in the crime rate.**

It categorically called for giving up of the "brutal approach"

Rights of Prisoners

Employment.

* **Undertrial** Prisoners are **not required to work**
* **Except in case of an emergency, and by the order in writing of the Superintendentt, no person** shall be employed in **labour for more than 9 hours** on any day.
* **No Prisoner** is to be employed by officers and staff **for private work** at their residence and attached gardens.

Diet

* **Pure and wholesome water** is to be provided for the prisoners;
* **Properly Cooked articles of food** have to be provided.
* **Change in diet on medical grounds,** is to be allowed if prescribed by the Medical Officer.
* The jailor present is required to **weigh the food** in the presence of the Prisoners if they complain about shortage of food.
* The exact quantity of food,is required to be in accordance with the Appendix to the Maharashtra Prison (Diet for prisoners) Rules 1970.

Interviews.

* Interviews are to be granted **only with near relatives, friends and legal advisers** of the prisoners.
* **Unconvicted criminal** prisoners will be granted such interviews **as the Superintendent may prescribe.**
* **A convicted criminal prisoner** will be granted **one interview every fortnight.**
* Except in cases of unconvicted criminal prisoners seeking legal advice, interviews will be **within hearing distance** of the jailor.
* An interview shall normally **not exceed 20 minutes.**
* The Superintendent can, however, refuse any interview if in his opinion, it is against public interest.

Letters

* Every prisoner is allowed **to write 4 letters a month** — two at his own cost and two at the cost of the Government.
* All the letters will be subject to **censorship.**

Sale of property

* The Superintendent **may allow** a prisoner to effect sale, transfer or disposal of his property outside the prison.

Newspapers and books

* Daily newspapers from the list approved by the State Government will be **supplied free of charge to convicted criminal prisoners** so that there is one copy for every 20 convicted prisoners. Unconvicted criminal prisoners and civil prisoners will have to pay for the newspapers. At their own costs, the prisoners shall additionally be supplied with newspapers or periodicals which are on the list approved by the State Government.
* At one time the prisoner will be allowed to keep 2 **religious and 10 non-religious books.**
* A convicted criminal prisoner desirous of doing **higher studies may possess any number of text books,** with the permission of the Superintendant.

Wages

A convicted criminal prisoner under sentence of more than 3 months, who has completed a sentence of 3 months, and all civil and unconvicted criminal prisoners who desire to do work, shall be paid wages as determined by the State Government.

Maharashtra Prison Manual

The Maharashtra Prison Manual, modelled on the Model Prison Manual, contains a compilation of Rules and Regulations & administrative directions. The rules provide for employment, diet and other facilities to prisoners, punishment for prison offences, furlough, parole and remission of sentences. Although some of these rules have been framed as recently as in the seventies, they still reflect the brutalising aspect of prisons.

and strongly recommended reform as the goal. It also suggested that greater latitude be shown to the prisoner for being released on parole, liberal permission for interviews and writing of letters be given to them. The prisoner should be employed in some useful work which would benefit both the State and the prisoner and which could secure him employment when he goes out of jail. It is a pity that till date there seems to be no attempt to implement any of these recommendations.

LAW AND PRACTICE

Judicial Responses

The Courts have traditionally adopted the 'hands off' doctrine in relation to the prisoner's rights. The Courts refused to interfere in the basic rights of the prisoners on the ground that incarceration deprives prisoners of all rights unless specifically granted. A.K. Gopalan (3) As stated in *Ruffian Vls Commonwealth* the prisoner is the slave of the State.

A break with the doctrine came for the first time in 1966, in *P.P. Sanzgiri's* case (4). In this case the detenue imprisoned under the Defence of India Rules was prevented from publishing a book "Inside the Atom" written inside the prison. The book dealt with a purely scientific subject but the State refused permission to the detenue for its publication. The Supreme Court held that the mere fact of confinement in prison cannot prevent the detenue from exercising his fundamental right to freedom of speech expression. It observed that if the detention order does not prohibit the writing of a book, such restriction would amount to violation of the prisoner's personal liberty. Sanzgiri was allowed to publish the book.

New Criminal Procedure Code

In 1973, the old Criminal Procedure Code was substituted by a New Code. Through the incorporation of the new sections, sections 248(2) and 235(2) judges were for the first time empowered to hear the accused on the aspect of sentence. Thus sentencing was no more to follow mechanically on conviction but had to be independently dealt with taking into account the background, the age of the convict, the prospects of rehabilitation etc. In the cases of *Jagmohansigh (5) Tejank, (6) Sarta Singh (7), and Hoskot (8),* this aspect was considered and **stress was laid on rehabilitation at the time of sentencing**

D.B.N. Patnaik's Case

A major breakthrough in the right of prisoners came in 1974 when the Supreme Court, delivered its judgement in the case of *D.B. Patnaik Vls State of M.P. (9)* The Petitioners were convicts said to be involved in the Naxalite movement. They had also attempted escape in the past. Armed guards were placed around the jail and live wire electrical mechanism was installed on the jail boundary wall. The Petitioners asked for removal of guards and dismantling of the eletrical mechanism. On facts, the Petitioner's case was dismissed. However, though the demand was turned down, the Court laid down the basic principle in this case which still holds good. In the Court's own words **"Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison house entails by its own force the deprivation of fundamental freedoms like the rights to move freely throughout the territory of India or the right to "practise" a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose off property for the exercise of which incarceration can be no impediment. Likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law".**

In 1977 in *Hiralal's (10) and Moh. Gisauddin's (11) cases* the Supreme Court stressed, for the first time, the need for rehabilitation of prisoners. Pointing out the rehabilitative aspects both at the time of sentencing and also inside the prison, Justice Krishna Iyer, in the case, *Mohd. Gisauddin* stated:-

"A proper sentence is a composite of many factors, including the nature of the offence, the circumstances, extenuating or aggravating, of the offence, the prior criminal records, if any, of the offender, the age of the offender, the professional and social record of the offender the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilition of the offender, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community's need, if any, for such a deterrent in respect to the particular type of offence involved."

Again in 1978, the Supreme Court stressed the need for reforms within the prison and granted many important rights to the prisoners. In *Charles Sobhraj's* (12) case the Supreme Court reiterated the principle that "imprisonment does not spell farewell to fundamental rights". In *Hoskot's* case the Supreme Court held that the prisoners had the **right to receive immediately the copy of the judgement passed against them.** The Supreme Court also held that such prisoners who had sparse means had a **right to receive free legal services,** and such a right was an important ingredient of the fundamental right to life and personal liberty contained in Article 21 of the Constitution of India.

However, the most important case regarding prison reforms is *Sunil Batra (13),* decided by the Supreme Court in 1978. Making out a strong case against the "hands off" doctrine, the Supreme Court cited with approval the American decision *Coffin Vls Reichard (14)* which stated;

"When a man possesses a substantial right, the Court will be diligent, in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of *Habeas Corpus* to protect his other inherent rights".

Finally giving the directions, the Supreme Court in ***Sunil Batra's*** held that:

* Undertrials will be given more relaxed facilities than convicts;
* Barfetters and handcuffing shall be shunned as violative of human dignity;
* Iron restraint is permissible only if the undertrial has a credible tendency of violence and no other alternative is workable;
* The discretion to impose irons is subject to quasi-judicial review;
* Previous hearing shall be afforded to the victims before any punishment;
* The grounds for fetters must be communicated to the prisoners;
* When the prisoners cannot afford it, legal aid shall be provided;
* No fetters shall continue beyond daytime;
* Prolonged continuance of fetters is subject to previous approval by an external examiner like a Chief Judicial Magistrate or a Sessions Judge who shall hear the victim and record reasons;
* The Prison Act does not empower the prison administrations to put anyone under solitary confinement as it is substantive punishment under the Indian Penal Code and can be imposed only by the Courts.

Discussing the procedure for punishment, the Supreme Court cited with approval the dissent of Douglas J. in the *Eve Pall* (15) case where he stated that "conviction of crime does not render one a non-person whose rights are subject to the whim of the prison administration and, therefore, the imposition of any serious punishment within the prison system requires procedural safeguards".

The Supreme Court observed that imprisonment itself is a punishment and it is a crime of punishment to further torture a person undergoing imprisonment, as the remedy aggravates the malady and thus ceases to be a reasonable justification for confiscation of personal freedom and is arbitrary because it is blind action not geared to the goal of social defence, which is one of the primary ends of imprisonment. It reverses the process by manufacturing worse animals when they are released into the mainstream of society". The Court even went to the extent of stating that the Court retains a continuous jurisdiction over the prisoner. It stated that "Courts which sign citizens into prisons have an onerous duty to ensure that during dentention and subject to the Constitution, freedom from torture belongs to the detenue".

In 1980 the second *Sunil Batra* (16) case was decided by the Supreme Court. Sunil Batra addressed a letter to the Supreme Court complaining of torture of a co-prisoner by the Prison Authorities. The Supreme Court treated the letter as a Writ Petition, and observed that **"whenever the rights of a prisoner either under the Constitution or under any other law are violated the writ power of the Court can and should run to his rescue".**

The directions made by the Supreme Court in second *Sunit Batra* were:

* Lawyers nominated by the District Magistrate, Sessions Judge, High Court and Supreme Court will be given all facilities for interviews, visits and confidential communication with prisoners, subject to discipline and security considerations.
* Grievance Deposit Boxes should be maintained under the orders of the District Magistrates and Sessions Judges, to be opened as frequently as possible and suitable action taken on complaints made.
* District Magistrates and Sessions Judges, personally or through surrogates, must visit the prisons under their jurisdiction, afford effective opportunities to prisoners to ventilate their grievances, make expeditious enquiries and take suitable action;
* No punishment like solitary confinement or confinement in a punitive cell, hard labour or dietary change and no denial of privileges and amenities, no transfer to other prisons with penal consequences shall be imposed without the sanction of the Sessions Judge.

In *Kishore S. Dev's* (17) case, decided in 1981 by the Supreme Court it was held that if special restrictions of a punitive or harsh character like solitary confinement or putting fetters have to be imposed for convincing security reasons, it is necessary to comply with natural justice and an appeal has to be provided from a Prison Authority's order to a judicial organ.

In *Francis Mullin's* (18) case sections of the COFEPOSA Act pertaining to regulation of detenue's rights to interview were challenged. The sections provided for a very strict control over the detenue's right to meet her legal advisor as also permitted only one interview to the detenue with her family members. The Supreme Court, while striking this down, held that "thus as part of the right to live with human dignity and therefore, as a necessary component of the right to life, the **Prisoner or detenue will be entitled to have interview with the members of his family and friends,** and no prison regulation or procedure relating to the right to have interviews with the members of the family and friends, can be upheld as Constitutionally valid under Articles 14 and 21, **unless it is reasonable, fair and just".**

In the case *PRE of wages of prisoners* (19) decided by a Division Bench of the Kerala High Court, it was held **that prisoners have to be paid reasonable remuneration.** The Court held "that prisoners are entitled to payment of reasonable wages for the work taken from them". It held that prisoners must be paid minimum wages for labour performed in prison.

In *Madhukar Jhamble* (20), the Division Bench of the Bombay High Court, struck down Rules (17)(ix) and 20 of the Maharashtra Prisons (Facilities to Prisoner Rules 1962) as being violative of Artilces 19(1) and 21 of the Constitution. Rule 17(ix) of the Maharashtra Prisons (Facilities of Prisoners Rules 1962) provided that the prisoners shall not be allowed to correspond with inmates of prisons. Rule 20 provided that a prisoner who writes a letter shall not include in it any matter likely to become the subject matter of political propaganda or any strictures on the administration of the prison. Both these Rules were held to be violative of the prisoner's fundamental rights of freedom of expression and speech guaranteed under Article 19(1) as also the fundamental right to personal liberty guaranteed under Article 21 of the Consitution.

In conclusion, one may say that at the higher level, judicial opinion is definitely turning towards rehabilitative jurisprudence. Similarly, the various Committees appointed by the Government have also pointed out the urgent need for using the prisons as reformatries. However, the legislature is still extremely lacadaisical in bringing out required changes and the prison administration continues to be more brutal as days pass by. Even in the judiciary, majority of the judges remain retributive in their actions as is reflected in the recent Rajasthan High Court Judgement, sentencing the accused to public hanging and remind one of the words of Jawaharlal Nehru in his *Prison Land.* So the question of prison reform leads us inevitably to a reform of our criminal procedure, and even more so a reform in the mentalities of our judges, who still think in terms of a hundred years ago and are blissfully ignorant of modern ideas of punishment and reforms".

References:
1. (1871) 6US (21 Cratt) 790; 2 Government of India; National Archives of India; Documents connected with Prisons Act 1894; Legislative Dept. Proceedings No. 164 to 271; 3. AIR 1950 SC 27; 4. AIR 1966 SC 424; 5. AIR 1973 SC 947; 6. AIR 1974 SC 228; 7. AIR 1976 SC 2386; 8. AIR 1978 SC 1548; 9. AIR 1974 SC 2092; 10. AIR 1977 SC 2237; 11. AIR 1977 SC 1926; 12. AIR 1975 SC 1514; 13. AIR 1978 SC 1675; 14. Substantive Criminal Law, P. 14; 15. (1974) 417 vs. 817; 16. AIR 1980 SC 1579; 17. AIR 1981 SC 625; 18. AIR 1981 SC 747; 19. AIR 1983 Ker 261; 20. Decided by Shah and Mohta JJ in Cri. W.P. 414/83 on 7.7.84

These Grey Pages have different running numbers allowing compilation as a ready referencer.

Law Relating to Bail

One of the cardinal principles of criminal jurisprudence in India is the **presumption of innocence of the Accused.** *In other words a person who alleges that anybody has committed an offence must prove his case beyond reasonable doubt to establish the guilt of that person.* **It is for the prosecution, and the prosecution alone, to prove its case against the Accused beyond reasonable doubt.** *It is for this reason the pre-trial release i.e. "Bail" assumes such importance.*

Neelam Raheja

The procedure for criminal action is controlled by the Code of Criminal Procedure (Cr.P.C.). The Code does not define "bail". However, **bail may be understood as setting a person, arrested or imprisoned at liberty on security taken, which secures his appearance at a subsequent trial.**

Nowadays the right to be enlarged on bail is considered to be a right under **Article 21** of the Constitution , which lays down that **no person shall be deprived of his personal liberty except by procedure established by law.**

Bailable and Non-bailable Offences

Section 2 of the Code of Criminal Procedure defines a **bailable offence** as an offence **which is shown as bailable in the First Schedule** or which is bailable by any other law for time being in force. The First Schedule contains offences under the Indian Penal Code. The other laws are special laws like Customs Act or local Acts such as the Bombay Police Act which specify an offence to be either bailable or non-bailable. **All other offences are non-bailable.** Offences such as murder are non-bailable whereas offences such as causing hurt are bailable. **Generally bailable offences are less serious than non-bailable ones.**

Section 437 of the Code of Criminal Procedure provides for granting of bail in bailable and non-bailable cases. These provisions broadly lay down the following principles.

* **In bailable offences,** the Accused has to be released on bail as a matter of right.
* **In non-bailable offences, release on bail by the Court is a matter of discretion.** The discretion is to be exercised judicially.
* If the offence is **punishable with death or imprisonment for life, the Accused shall not be released on bail unless the Accused is a woman or a minor under the age of 16 years or a sick or infirm person.** In these cases the Court has the discretion to grant bail.
* **The Courts of Sessions and the High Courts have a wider discretion in granting bail,** even in respect of offences punishable with death or life imprisonment than the Magistrates' Courts.

In *G. Narasimhalu's* case (1) the Supreme Court has laid down the following criteria which has to be considered when exercising discretion to release an Accused on bail:

"When the crime charged of which a conviction has been sustained is of the **highest magnitude and the punishment** for it **is of extreme severity,** the Court may reasonably presume, some evidence warranting, that **no amount of bail** would secure the presence of the convict at the stage of judgement.

The **nature of the charge** is the vital factor and the **nature of evidence also is pertinent.** The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

Another relevant factor is whether the **course of justice would be thwarted** by his seeking the benignant jurisdiction of the Court to be freed for the time being.

The legal principle and practice validate the Court considering the **likelihood of the Applicant interferring with witnesses for the Prosecution** or otherwise polluting the process of justice. It is not only traditional but rational, in this context, **to enquire into the antecedent of a man who is applying for bail,** to find whether he has a **bad record,** particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of the society. Bail discretion on the basis of evidence about the criminal record of a defendant is, therefore, not an exercise in irrelevance."

Considerations for granting bail.

The **considerations that** should be taken into account by the Court on application **for release on bail can be summarised as follows:**

* The **magnitude of the charge** against the Accused.
* The **severity of punishment** if the Accused is convicted.
* **Nature of evidence** against the Accused and the likelihood of conviction.
* The **likelihood of the Accused absconding** if he is released.
* The danger of the **prosecution witnesses being interferred with and the evidence tampered** with.
* **Health, age and sex** of the Accused.
* **Previous history** of the Accused and the likelihood of repetition of the crime.
* The **period** for which the Accused has **already been in detention.**
* **Whether any bona fide purpose will be served** by the continued detention of the Accused, such as further investigation, recovery of property etc.
* **Opportunity** for the Accused **to prepare his case.**

LAW AND PRACTICE

Apart from automatic right to bail in bailable offences, the Accused has the right to be released on bail in the following cases:

* **Within ninety days of arrest if investigation into offence punishable with death, life imprisonment or imprisonment for not less than ten years, is incomplete.** (Section 167 (2), Cr.P.C.)
* **Within sixty days** of arrest if investigation into **other offences** is incomplete. (Section 167(2), Cr.P.C.)
* If the order of **remand is illegal** or otherwise improper.
* If the Accused has been **detained beyond a reasonable period.**
* In **non-cognizable cases,** if the **trial is not completed within sixty days** from the day when evidence is first recorded.

Imposition of conditions

At the time of releasing a person on bail, the Police Officer or Court may impose conditions that may be appropriate. The usual conditions on bail include furnishing of surety for a particular sum of money, executing a personal bond, reporting to the police station at regular intervals, not leaving the jurisdiction of the Court etc., all to ensure that investigation process is not impeded with.

The Police or the Court is required to verify the sureties. This is normally done on the basis of affidavits filed by the surety or by holding an enquiry into the capacity of the person to stand as a surety for the Accused. Financial status of the prospective surety is very important.

At times, the Court may allow the Accused to deposit cash in lieu of furnishing a surety. As a result it is **easier for rich persons to avail of bail than the poor Accused.**

However, no condition can be imposed which effectively denies the Accused to avail of an order to be released on bail as that would be tantamount to infringement of the Constitutional right to liberty under Article 21. The bail amount cannot be excessive. Therefore, Section 440(2) of Code of Criminal Procedure provides that the bail amount may be reduced by the Magistrate.

However, the Magistrate is also entitled to increase the bail amount under Section 443 Cr.P.C. if he considers that insufficient sureties have been accepted.

Authorities to grant bail

In case of bailable offences, it is the duty of the Police under Section 50 Cr.P.C. to inform the person of his entitlement to bail and that he may arrange sureties for himself. In such cases the police itself can take bail.

Enlargement on bail is also granted by **Magistrate** on an Application for it when an Accused is first produced before him, within 24 hours of arrest. The Magistrate can also grant bail in case a matter is committed to another Court at the commital stage; after conviction, provided the Accused satisfies the Magistrate that he is going to file an appeal and the offence in one of the categories specified in Section 389 Cr.P.C.; while making a reference under Section 395 Cr.P.C. to the High Court on the validity or otherwise of a statute.

The **Court of Session and the High Court** can also grant bail in their capacity as trial Courts or as Courts of superior jurisdiction. If they are acting as trial Courts, the powers of granting bail in non-bailable offences are controlled by Section 437 Cr.P.C.

Section 439 Cr.P.C. confers on the **High Court** and **Court of Session** special powers to release the Accused on bail as an original Court as also to set aside and modify any condition imposed by the Magistrate while admitting the Accused on bail.

Cancellation of Bail

The High Court and Court of Session have the powers to rearrest an Accused person who has been released on bail and cancel the bail. This discretionary power of cancellation is not hedged by any conditions. The discretion must be exercised judicially and not arbitrarily. **The Courts have held that bail can be cancelled in one of the following circumstances:**

* The person on bail, during the period of bail **commits the very same offence for which he is being tried** or has been convicted and thereby proves his utter unfitness to be on bail.
* **If he hampers the investigations** as will be the case if he, when on bail, forcibly prevents the search of places under his control for the **corpus deliciti** or other incriminating things.
* **If he tampers with the evidence,** as by intimidating the prosecution witnesses, interferring with the scene of offence in order to remove traces or proof of the crime, etc.
* **If he absconds** or goes underground or beyond the control of his sureties.
* **If he commits acts of violence,** in revenge, against the police or the prosecution witnesses or those who have booked him or are trying to book him.
* When subsequent developments in the **condition of the injured makes the offence a more serious non-bailable offence.**
* When the **original charge is amended** to a more serious charge.
* If the **reasons for bail no longer exist.**
* If **insufficient sureties have been** accepted.
* When **sureties apply for discharge.**

However, the power of the cancellation of bail has to be exercised sparingly. The Supreme Court has held in *Delhi Administration Vls Sanjay Gandhi (Kissa Kursi Ka,* case) that "the power though of an extra-ordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities it is clear that the Accused is interferring with the course of justice. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the Courts to be silent spectator to the subversion of judicial process. We might as well wind up the Courts and bolt their doors against all, than permit a few to ensure that justice shall not be done."

Though some High Courts have held that only the State has the right to move for cancellalation of bail in a police case, it is now well established that the **Complainant has a locus standi to apply for cancellation of bail.**

To be continued.

NOTICE BOARD

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) BILL, 1986

A
BILL

to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands and to provide for matters connected therewith or incidental thereto.

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

1. Short title and extent. (1) This Act may be called the Muslim Women (Protection of Rights on Divorce) Act, 1986.

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

2. Definitions. In this Act, unless the context otherwise requires —

(a) "divorced woman" means a Muslim woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law;

(b) "iddat period" means in the case of a divorced woman —

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enciente at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;

(c) "Magistrate" means a Magistrate of the First class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where the divorced woman resides.

3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.—

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to —

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth and such birth and such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce , she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that—

(a) her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life, enjoyed by her during her marriage and the means of her former husband or, as the case may be for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman.

Provided that if the Magistrate finds it impracticable to dispose off the application within the said period, he may, for reasons to be recorded by him, dispose off the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973, and may sentence such a person for the whole or part of any amount remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4 *Order for payment of maintenance:* (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force; where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order.

Provided that if any such relative is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to sub-section (1), the

NOTICE BOARD

Magistrate may, by order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954, or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

5.*Power to make rules:* (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

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

STATEMENT OF OBJECTS AND REASONS

The Supreme Court in *Mohd. Ahmed Khan vs Shah Bano Begum and others* (AIR 85 SC 945), has held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to section 125 of the Code of Criminal Procedure.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following, among other things: namely:-

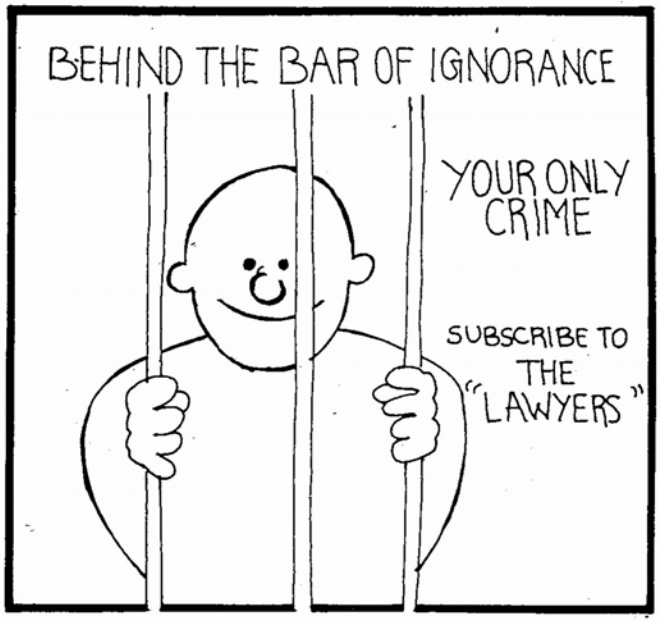
(a) a Muslim divorced woman shall be entitled to a reasonable and fair provisions and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the delivery of the properties:

(b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property. If anyone of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a divorced woman has no relatives to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives, the Magistrate would order the State Wakf Board to pay the maintanenace ordered by him or the shares of the relatives who are unable to pay.

3. The Bill seeks to achieve the above objects.

New Delhi

The 19th February, 1986. A.K. SEN



WARRANTS ATTENTION

Deaths in Police Custody

Attorney General K. Parasaran addresing the United Nations Human Rights Commission stated that India was honouring its international commitments to human rights by guaranteeing to all its citizens the right to life and personal liberty. While the availability of an international forum in which to ventilate grievances of violations of human rights is welcome, the state of civil liberties in India does not bear out the Attorney General's claim. Amnesty International's reports, on its investigation in 1985, clearly bear this out.

Amnesty International is an independent worldwide movement, focusing its activities strictly on prisoners and undertrials. Apart from the regular monthly reports, it publishes an Annual Report detailing separately its concern about the happenings in about 150 countries.

Objects of AI

* To seek the release of men and women detained anywhere for their beliefs, colour, sex, ethnic origin, language or religion. In other words, "Prisoners of Conscience", provided they have not used or advocated violence.
* Advocating fair and early trial for all political prisoners.
* Opposing the death penalty and torture or other cruel,inhuman or degrading treatment or punishment of all prisoners without reservation.

The January 1986 report of Amnesty International on India deals with several cases of deaths in police custody. Based on reports, personal visits, as well as cases filed in the Supreme Court, Amnesty International has expressed its concern about the use of third degree torture in India, especially in Andhra Pradesh, Punjab and New Delhi.

No Fair Inquests

The Report on India notes that though the holding of magisterial enquiries (inquests) in all cases of deaths in custody is mandatory under section 176 of the Code of Criminal Procedure, such enquiries are not always held. Though both Executive and Judicial Magistrates are empowered to conduct these inquests, lawyers pointed out to Amnesty International that in the majority of the cases of deaths in police custody, the inquests are conducted by an Executive Magistrate and, therefore, are subject to the control of the State Government. Moreover, in the State of Andhra Pradesh it has been reported that Executive Magistrates responsible for conducting enquiries into deaths of persons alleged to have died at the hands of police, are known to have complained of intimidation by the police. **The lawyers also complained to Amnesty International that in such inquests, the relatives and friends of deceased were scared to come as witnesses due to police intimidation. The inquest reports are not made public and the lawyers and relatives also complained to Amnesty International that it was extremely difficult to obtain copies of either the post-mortem or the inquest reports.**

Amnesty International was forced to observe as follows:
"When held, magisterial enquiries into deaths of detenues, are often not conclusive because since the person died in police custody, independent evidence is hard to obtain. In nearly all cases, the Magistrate must depend on the police to investigate allegations affecting members of their own forces. In those cases in which magisterial enquiries found that deaths in custody were the result of police brutality, responsible officers were usually suspended from duty or transferred. They were almost never subjected to criminal proceedings and convicted."

Six Deaths in 1985

Amnesty International's report dated 29th January, 1986 makes horrific reading about police brutality in 1985, in "Democratic" India.Inspite of successive pronouncements by Courts hailing fundamental rights of detenues and decrying the use of third degree methods by the "law-enforcers" there has been an increasing trend, at least in some of the States in India, towards the use of torture in police custody and faked "encounter deaths". In its report, Amnesty International has highlighted six cases of deaths in custody reported during 1985.

Anthony Murmu and Madan Murmu - Bihar

Anthony Murmu, a former member of Parliament of the Janata Party, and a leader of Santhal Tribals in the State of Bihar, died in his village on 19th April, 1985. The Santhal Tribals were very frequently attacked by the landlords in connivance with the police. Upon these attacks becoming unbearable,5 persons, including Anthony and Madan, approached the Police Station. The Police, instead of acting on their

WARRANTS ATTENTION

complaint, locked up Anthony and Madan and asked the other three persons to go away. By this time, a group of tribals had gathered, demanding justice from the police. The police fired at this non-violent crowd killing 15 tribals. Anthony and Madan were inside the lock-up and could not have been killed during this firing. They were, it appears, taken to a nearby godown, beaten and killed. The police, however, claimed that these two persons had been "killed in the firing".

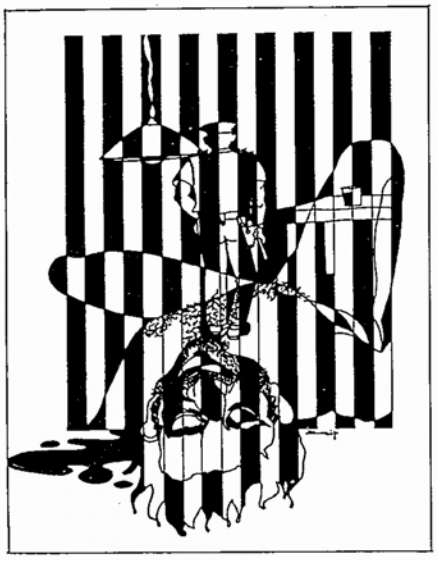
Dr. A. Ramnathan - Andhra Pradesh

Dr. A. Ramnathan was a practising paediatrician in Warangal, Andhra Pradesh and former Vice President of the Andhra Pradesh Civil Liberties Committee. On 3rd September, 1985, he was shot dead by the police during the funeral of a Sub-Inspector of Police. Some Police Officers entered his dispensary, beat up the patients, chased Dr.Ramnathan and shot him in his back. Amnesty International's respresenstatives were personally informed, while in Andhra Pradesh, that Police did enter the dispensary and chase Dr. Ramnathan.

On 15th September, 1985, the State Home Minister, Mr. V. Nageshwar Rao, however, denied before the Assembly that police were involved in the murder and refused to hold a judicial enquiry into Dr. Ramnathan's death. The Medical Officer, who had examined the body, had observed that the fatal injuries were caused by a service revolver fired at point-blank range. Amnesty International suggested that the Government should order a comprehensive enquiry by an independent authority, like a High Court Judge and the findings should be published.

Mohinder Singh alias Khalsa - New Delhi.

Mohinder Singh, a Sikh, aged 32 years, was arrested on 12th May 1985, after a series of bomb explosions in Delhi. According to a report in the Indian Express, he received minor injuries at the time of arrest. According to various reports, Mohinder Singh alias Khalsa died in police custody on 13th May 1985, as a result of torture. According to a report in the Statesman on 14th May, 1985, "most doctors in Lohia



Hospital were convinced that Mohinder Singh had died due to police torture". Police officials denied the allegations and claimed that Mohinder had refused food and water, and repeatedly "hurled himself head first against the wall of the police station". The post-mortem report, however, stated that the detenue had died as a result of the cumulative effect of injuries, 18 in number - most of them in the upper and lower limbs. Amnesty International sent a cable on 16th May 1985 to the Home Minister, expressing deep concern at the death of Mohinder Singh alias Khalsa.

Mohinder Pal Singh New Delhi

Twenty six year old Mohinder Pal Singh was a Medical Practitioner at Ludhiana and a member of the Akali Dal. According to the police, he was involved with others in a plan to plant bombs. Again according to the police, he was arrested in Delhi on 24th May 1985 and committed suicide by hanging himself with his turban on the same day. He is supposed to have bolted the toilet from inside and hanged himself. However, according to many other reports, he was arrested two days ealier in Punjab and was taken to New Delhi for interrogation, where he died after torture. Amnesty International has received a witness account stating that his arrest took place on 22nd May 1985, at 2 p.m. at his Surgery. He was not produced before the Magistrate as required by law. Although the police have denied reports of torture, the press reports have pointed out that detenues in police custody are not permitted to walk around with their hands free and the suspects are not permitted to bolt the toilet door from the inside.

Gurinder Singh Punjab

According to press reports, Gurinder Singh was considered to be a "suspected terrorist in Punjab."

He was reportedly arrested in Punjab on 4th May 1985. He died while in PGI Hospital 6 days later on 10th May. Immediately after the arrest, he was admitted to Hospital with bullet injuries, dislocation of both arms and a Knee,and a fracture on the thigh besides crushed muscles of the legs and arms. According to reports, at the time of arrest he was beaten up with lathis, taken to an unknown place and tortured. Gurinder Singh himself mentioned this to the doctors attending to him. Journalists present at the time of arrest also mentioned that at that time there were no major injuries on his body.

Remedies

Indian law, however, does not permit torture. The police officers are not above the law. A police officer who causes injury - whether inside the lock-up or outside, is as much liable for prosecution for hurt, grievous hurt or even murder as any other person.

Apart from this, the Supreme Court has in a number of cases held that torture by police is violative of the detenue's fundamental right to life and personal liberty under Article 21.

First, the constitutional remedy. As torture is violative of the fundamental rights under Article 21 of the Constitution, the detenue or anyone on his behalf has the right to directly move the High Court or Supreme Court for pro-

continued on page 14

Section 26 IPC

"No confession made by any person whilst he is in the custody of a police officer, unless it is made in the presence of a Magistrate, shall be proved as against such a person".

A Legitimate Expectation Denied

Superseding Municipal Corporations is not an entirely Indian phenomenon. In the UK, Mrs Thatcher's Conservative Government abolished the Greater London Council (GLC)controlled by a left-wing Labour majority which had initiated a number of radical measures, among them, the reduction in transport fares in Greater London itself.
While the Court struck down that decision, it provided public interest lawyers an impetus to develop the law on judicial review of Administrative Actions.

Robin Allen

Whilst in India cases of public interest litigation have been, increasing apace, in England there has been a similar development in the number of cases of judicial review of administrative decisions.

This development has been particularly pronounced as a way of challenging a radical right-wing government, at a time when Parliamentary Opposition has been weak and diffused. With no Constitutional or Statutory code of public rights, the public have been repeatedly trying to stop Government's decisions by judicial review. In no other area of the law has its recent development been more ironical.

For a start, the first really important case of judicial review in this series, was a case which the Government actively encouraged the litigant to bring.

In May 1979 London elected a radical left-wing city authority on the progressive manifesto which included a promise to cut public transport fares and to keep cars out of the city. This promise was duly implemented by a resolution of the Greater London Council ("GLC"), which involved a substantial increase in the property taxes that had to be raised.

Conservative controlled Borough of Bromley, an outer London borough, which would not benefit much from this proposal, complained to the Courts on behalf of its residents that the decision of the GLC was unlawful as they had felt bound to implement a manifesto commitment.

The Central Government was delighted with this argument seeing it as the way to persuade the GLC to tear up its manifesto commitments which clashed so profoundly with its own.

Probably without realising what was to follow the Courts allowed this argument and quashed the GLC's decision issuing an appropriate order of certiorari *Bromley L.B.C. Vls Greater London Council* (1983) 1 AC 768.

GLC Strikes Back

It was not long before the GLC struck back, thinking that if the Courts were prepared to enter the political arena they might be persuaded to act against Central Government's wishes. The GLC retook its decision to cut fares and submitted its proposals to the Court for approval.

It got it. It then began a series of actions against the Government and won notable victories, with orders of mandamus and certiorari, over the Government's refusal to negotiate over the GLC's socialist development plan for London and to implement a night-time truck-ban for inner London.

Against this background the scene now shifts. On 22nd December, 1983, Central Government decided to exclude the rights of workers at major communications centre (the Government Communications Headquarters "GCHQ") to join trade unions. This decision was taken without a word of warning or consultation with the unions at GCHQ. It was a devastating attack on the right to belong to a trade union. Workers were asked to trade this right for $1000 or be moved to other jobs.

The GCHQ Unions inevitably went to Court for judicial review of this decision. The line of attack was novel. It was said that because other changes in workers' terms and conditions had always been the subject of consultation, the Government had acted unlawfully, in not consulting before deciding.

At first instance, amid much surprise, they won. There was no statutory right to be consulted and the only basis upon which such right could be claimed was that because of past practice the Government had denied the unions a "legitimate expectation". This was a dramatic new turn in the law. Inevitably the case went in appeal to the House of Lords. At these later stages the Government filed further evidence alleging that even the unions had such a legitimate expectation to be consulted generally. This decision was taken on grounds of national security and there could be no expectation to be consulted on such matters.

Legitimate Expectation

In the House of Lords they won. But only on the ground of the national security. The House of Lords confirmed unequivocally that the Courts would review and if necessary quash a decision of an administrative body, which was taken in denial of a 'legitimate expectation of consultation'. In the words of Lord Diplock, the Court held that, "To qualify as a subject for judicial review the decision must have consequences which affect some person than the decision makers, although it may affect him too. It must affect such other person either by depriving him of some benefit or advantage which either he has in the past been permitted by the decision-maker to enjoy and which he can legitimately ex-

INTERNATIONAL

pect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment." (*Council of Civil Service Union v/s Minister for the Civil Service (1984) 3 All E.R. 935)*

The scene now shifts again. A large proportion of barristers do solely or mainly criminal work. Of these many rely entirely on Legal Aid or their Defence clients to pay their fees, and the State for their Prosecution work. Most of the rest of the criminal barristers are paid in a similar way, i.e. ultimately by the State.

The Bar Council has been arguing for some time that the rates of payment for both Legal Aid and Prosecution barristers were insufficient. They employed a leading firm of International Accountants to do a comparison. This appeared to show that barristers with a criminal practice were paid about half as much as those actually in the Civil Service.

Bar Council V/s Lord Chancellor

The Bar Council sent this report to the Government last Autumn and asked to be consulted about it before deciding how and when to charge the rates for payment for criminal work, whether as a prosecutor or for a Legally Aided defendant.

The relevant department of the Government is run by the Lord Chancellor, who holds the highest judicial office. He also is the man who picks the High Court Judges.

The man presenting the case for the Bar holds the post of Chairman of the Bar Council. Very frequently this post leads to a post as a High Court Judge.

On 7th February, 1986, with incredible timing, on the day before an extraordinary general meeting of the Bar Council, the Lord Chancellor wrote to the Chairman of the Bar Council, to say that the fees for criminal work would be increased by 5% and there would be no consultation on the accountant's reports.

The next day the Bar Council decided to take all necessary steps to challenge this decision. It has now applied to the High Court for judicial review of the Lord Chancellor's decision for an order quashing the 5% increase.

So the House of Lords opened a real "Pandora's Box" with their decision in the GCHQ case. Cases alleging breach of "Legitimate Expectation" by an administrative body are bound to multiply, certainly in cases by the Left as well as the Bar Council.

Perhaps the final irony is this : The Chairman of the Bar Council, Robert Alexander Q.C., was the barrister who acted against the Government's interests for the GLC in the Bromley case, and for the Government in CGHQ case. Will the Lord Chancellor forgive him this lese-majeste and make him a judge? His only mitigation is that in acting for the Bar Council he has acted against his own interests.

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ducing the detenue before the Court as also to ensure that he is not tortured anymore.

Secondly, under the law of torts, a suit can be filed in the Civil Court by or on behalf of the tortured person for damages. This remedy has been very rarely tried but is worth pursuing more and more.

Third, under the penal law, a police officer can be prosecuted for assault, hurt or even murder. Section 197(1) of the Code of Criminal Procedure, 1973, requires the prior sanction of the Government for prosecuting a public servant who is alleged to have committed an offence while discharging his duties. However, as is obvious from the spate of decisions of the Supreme Court culminating in the 1985 decision in **Balbir Singh V/s D.N. Kadian,** [(1986) I SCC 210] the police cannot take recourse to this section in case of the allegation of torture. This is because while committing torture, the police are not acting in the course of the performance of their duty and so no prior sanction of the Government is required for prosecuting such policemen.

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Sd.
MIHIR DESAI

I, MIHIR DESAI, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Dated: 15th March, 1986

HAAZIR HAI

Mr. S. Radhakrishnan

After the historic judgment delivered by Mr. Justice M.L. Pendse of Bombay High Court, wherein he had categorically found from all the material placed before him, that there was a reasonable inference that Chief Minister, Shivaji Nilangekar Patil of the State of Maharashtra and his daughter Mrs. Chandrakala Dawale were responsible for tampering of M.D. results, to enable Chandrakala to pass the M.D. examination held by Bombay University in October/November, 1985 as a direct sequel of which the CM had to resign along with his Cabinet. During the course of the proceedings in the High Court, ***Mr. S. Radhakrishnan,*** *Advocate for the University returned the brief when he was informed that the Executive Council of the University had decided to brief a Senior Counsel in consultation with the Advocate General, who was already representing the Chief Minister in the same proceedings.*

Q. *What is the background to the Court proceedings?*

A. In October, November 1985, the University of Bombay held the M.D. Gynaecology and Obstetrics examination. The theory examinations were held on 21st/25th October, 1985, the practicals on 6th/9th November, 1985. The total number of candidates from Bombay and Goa was 51. Very recently after the Judgement I have come to know through some of the Doctors that on 9th November, 1985 a list of successful candidates at the practicals was put up on the 1st floor of the Department of OG, KEM Hospital. I am informed that only 18 out of 51 numbers were on the list, and that it did not include the roll nos. of Mrs. Chandrakala Dawale, Mrs. Smita Thakkar and Dr. Dalvi who is the Registrar, working under Dr. M.Y. Rawal.

Q. *When were the results declared by the University?*

A. On the 30th November, 1985. There were 30 names on the list. This list contained the roll nos. of Dr. Chandrakala Dawle, Dr. Smita and Dr. Dalvi. Dr. Gosavi then approached the University for a re-evaluation as his name was not on the list. The Officer on Special Duty (OSD) informed him that this could not be done since no marks are given for the M.D. Exams and the rule of a minimum 10 marks difference in re-valuation, could not be applied.

Q. *What is the system of assessment for M.D.?*

A. The M.D. Exams are assessed on the basis of total performance on 16 heads, 10 in theory and 6 in practicals. There are in all 4 theory papers. The first, second and third theory papers have 3 questions each. All questions being compulsory, no choice is given. The fourth paper has only one question with no choice. In the six heads in practicals involve long surgery, short surgery and *viva voce*. The assessment of both theory and practicals is done on the basis of the following grades:-

G = Good
P+ = Little better than Passing
P = Pass
P− = Marginal failure
F = Failure

The final results in theory and practicals are indicated as P, passes, or F for failure. Generally, even if there is one P−, the student is failed. Rarely is a single P− condoned.

Q. *What did the investigation reveal?*

A. The O.S.D. found that in two cases, namely those of Dr. Chandrakala Dawale (daughter of Chief Minister), and Dr. Smita Thakkar, apart from final results which were altered, even individual grades in various heads were altered. In this *behalf, the O.S.D. found a prima-facie* case of tampering and manipulation. Accordingly, on 15th January, 1986, he sent a detailed report to the Vice-Chancellor.

Q. *What were the contentions in the Petition?*

A. On 16th January, 1986, Dr. Mahesh H. Gosavi filed a Writ Petition in the Bombay High Court, alleging that the results of the daughter of Chief Minister of State of *Maharashtra, Dr. Chandrakala Dawale, were tampered with by* the Chief Examiner, Dr. M.Y. *Rawal, and prayed for the cancellation* of her results and for condonation in his case to enable him to pass. On that day around 2.45 p.m. Mr. Justice S.P. Bharucha passed an *ex-parte* order by which all relevant papers, grade sheets etc. connected with M.D. (Gyneacology and Obstetrics) exams held in October 1985 were ordered to be sealed forthwith and custody of it handed over to the Court.

Q. *On whose instructions did you draft the affidavit of Mr. Arunachalam of 21st January, 1986?*

A. I took direct instructions from Mr. Arunachalam. He had personal knowledge of all the facts to which

he was deposing. The draft of the affidavit was approved by him and by Dr. Gore. Normally, when drafting an affidavit, I look at all the documents referred to and relied upon in the affidavit and all related documents. In this case Mr. Arunachalam was aware of all the details, which he furnished me.

To this affidavit was annexed a letter of Dr. S.N. Mukerjee, who categorically stated that he had not authorised Dr. Rawal to change the results or grades. He also annexed a letter of Dr. Rawal, dated 3.1.86 wherein he admitted making such alterations.

Q. *What happened after that?*

A. On 30th January, 1986, Mr. Justice S.P. Bharucha, after hearing all the parties fully, admitted the petition, observing that the University affidavit had left no doubt in his mind that the matter had to be investigated fully and also that it revealed a horrifying picture. He had directed the University not to issue passing certificates to the 12 candidates mentioned in the affidavit, whose results were altered. On 30th January, 1986, Dr. Rawal filed an affidavit stating that he had full discretion to alter the results, as he was the moderator.

On 21st February, 1986, the O.S.D. filed another affidavit stating that Dr. Rawal was not a moderator and in fact no 'moderator' was permissible in the post-graduate courses, and even moderation at graduation level was abolished two years back. The O.S.D. had also annexed in the said affidavit two explanations of the other two external examiners who had categorically denied that they had authorised or permitted Dr. Rawal to make alterations. This affidavit was fully approved by the O.S.D. and Dr. Gore.

Q. *It is reported that on 21st February 1986, in the evening the Chancellor, the Governor, called the Registrar of the University of Bombay Mr. G.M. Rajarshi, who is himself facing a charge sheet for manipulating the results of his Masseur's son, to the Raj Bhavan. Do you know this?*

A. I have heard that the Registrar met the Chancellor in the presence of the Advocate General of State of Maharashtra, Mr. Arvind V. Savant, in the evening on 21st February, 1986. It has also been reported that the Registrar was told to inform the Vice-Chancellor to change his advocate. Dr. M.S. Gore informed me that on the 21st evening he received a phone call from the Registrar informing him that the University should change its advocate. He also told me that he was not agreeable to do this. I thought the matter would rest there.

Q. *When were you first informed that the University had decided to engage a Senior Advocate?*

A. On 27th February, 1986, the Executive Council of the University of Bombay, with an unusual attendance, with one remaining absent, passed the following resolution:

Executive Council Resolution

"The Executive Council of Bombay University is of the view that the matter of the M.D. Branch II (Obstetrics and Gynaecology) arising out of a Petition of Dr. M. Gosavi against Bombay University and others is of such a serious nature that the **University be represented by a Senior Counsel to be appointed in consultation with the Advocate General.**

The Council resolved that instructions be given to the University Advocate to make a statement that the University proposes to request the Chancellor to institute an inquiry in the matter under the provisions of the Bombay University Act, 1974".

The same evening Dr. M.S. Gore sent for me and showed me the Resolution. I immediately felt that I would not be able to appear under a Senior Counsel, who would be a nominee of the Chief Minister. In my opinion, there would be clear conflict of interests, in as much as the Senior Counsel though appearing for the University would be also interested in the affairs of the Chief Ministers. Therefore, I immediately informed Dr. M. S. Gore that I was withdrawing from the matter and that I be relieved forthwith. The Vice-Chancellor very reluctantly agreed. Thereafter, on the same evening, the University sent a letter to the Advocate General who was appearing for the Chief Minister, to suggest a Senior Counsel for the University in accordance with the Resolution of the University Executive Council. On 28th February, 1986, in the morning a letter was received from the Advocate General, suggesting Mr. P. P. Khambatta as a Senior Counsel and Miss P.D. Anklesaria as a Junior Counsel. It appears that Miss Anklesaria also refused to be associated with the matter. Thereafter, I was again approached, but I refused to appear.

Q. *What has been the reaction of your colleagues at the Bar to your returning the brief?*

A. Some have been very appreciative and believe that I did the right thing. However, there are others who feel that I should have tolerated this kind of interference and continued. If it was just a question of the University wanting a Senior Counsel, I would have had no objection. But in this case, the Senior Counsel was to be nominated by the Advocate General who was himself appearing for the Chief Minister. I thought that this was a gross case of interference with the autonomy of the University which would undoubtedly have affected my own functioning as a professional. There was, therefore, no question of my appearing in the matter. How could I have functioned with a Senior Counsel who would have a dual interest to protect? This would have gone against my professional ethics as a lawyer, and as a human being, I found it morally wrong.

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