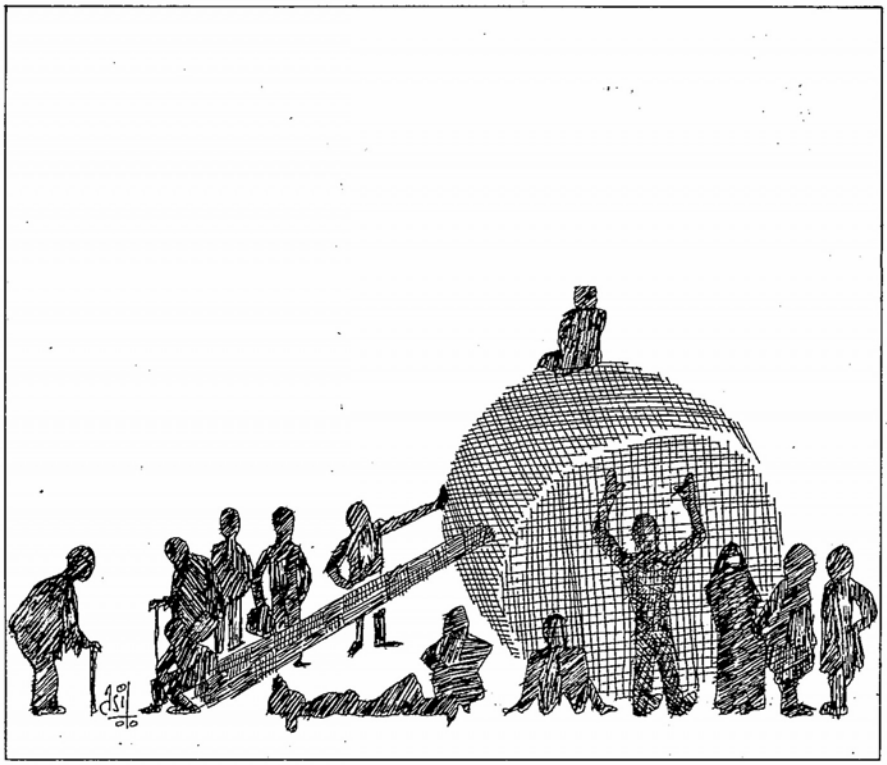
Rs.5 APRIL 1986

FROM THE LAWYERS COLLECTIVE





# Justice Gone Sour

The laws delays have caused the system of administration of justice to turn sour. To quote and make comparisons is tiresome but I must admit that the title of this article is borrowed from Lord Denning's sentence who said in *Allen v/s Sir Alfred McAlpine & Sons Ltd.* [(1968) 2 Q.B. 229] that, "the laws delays have been intolerable. They have lasted so long as to turn justice sour". He was dealing with a case in which the dismissal of a suit for want of prosecution was being considered.

Would any creative and imaginative judge tolerate delays of the magnitude that we see in India today? Or would he be quick to innovate new remedies and rules to cope with the felt needs of the times? The response of the legal community to the laws delays has been one of silence. Over the years while "eminent jurists" and judges have been quick to demand better conditions or employment for judges, there has been hardly a demand worth the name for changes which would make the life of a litigant more tolerable.

## Magnitude of the Problem

Several Commissions from 1924 onwards have been constituted to recommend ways and means of speeding up disposal of disputes. The last of the Reports made in 1979 by the Law Commission on delays in High Courts defined arrears as follows "arrears arise when - taking one calendar year, the rate of disposal in that year is less than the rate of institution. If disposal main-

tains a percentage equivalent to that of institution, then certainly no further arrears would accumulate and the problem would be only of dealing with the past arrears."

In 1979, Law Commission noted that the pendency of cases at the end of 1977 over 1972 was more than 50% in the case of nine High Courts and less than 50% but more than 20% in the case of three High Courts. The increase in the whole country of arrears in the High Courts in terms of percentages of the years 1973-1977 was as follows:

| Year | Increase in pending cases over previous year |
|---|---|
| 1973 | 7.0% |
| 1974 | 5.9% |
| 1975 | 9.7% |
| 1976 | 10.5% |
| 1977 | 8.4% |

The highest number of cases pending in 1977 was in Allahabad (1,32,749) followed by Calcutta (72,448), Bombay (52,592), Madras (51,763), M.P. (46,613), Punjab & Haryana (46,069) and Kerala (42,739). The figures for 1984 are Allahabad 80,00,000 writ petitions, 95,000 first appeals, 45,000 criminal appeals; Calcutta - 20,000 writ petitions, 1,00,000 first appeals, 11,000 criminal appeals. Filing in the Supreme court in 1984 was 42,000 including writ petitions, special leave petitions, civil and criminal, and appeals civil and criminal. Filing till October 1985 in the Supreme Court was 37,110 including writ peitions, special leave petitions and civil and criminal appeals.

**Total Cases Pending in the Bombay High Court**

As on 31-12-84

| Nature of Cases | Total cases pending | Over 1 year | Over 2 years | Over 3 years |
|---|---|---|---|---|
| **1) Original Side** | | | | |
| **i) Main Cases** | **38,561,** | **7,189** | **5,206** | **19,187** |
| **ii) Misc. Cases** | **8,244** | **880** | **1,543** | **3,260** |
| **Total** | 46,805 | 8,069 | 6,749 | 22,447 |
| **2) Appellate Side** | | | | |
| i) Main Cases (Civil) | 33,846 | 6,463 | 4,865 | 12,625 |
| ii) Main Cases (Criminal) | 5,218 | 1,022 | 926 | 1,478 |
| iii) Misc. Cases (Civil) | 15,232 | 3,552 | 1,947 | 1,882 |
| iv) Misc. Cases (Criminal) | 1,841 | 406 | 153 | 101 |
| **Total** | 56,137 | 11,443 | 7,891 | 16,086 |
| **Grand Total** | 1,02,942 | 19,512 | 14,640 | 38,533 |

## The Bombay Picture

The latest detailed breakup of cases in the Bombay High Court now available with us and published for the first time in this issue of ***The Lawyers*** shows that as on 31st December 1984, there were a total of 1,02,942 cases pending; 46,805 on the Original side and 56,137 on the Appellate side. Nearly 37% of the total cases were pending for over three years. A large proportion of the cases pending for over three years were in the Original side.

Civil matters (49,078) constitute the bulk of the pending cases on the Appellate Side out of the total (56,137). The rate of disposal in criminal matters appears to be much higher than that of civil matters.

Of the civil matters on the Appellate Side as on 30th June 1985, Writ Petitions (17,908), First Appeals. (6,814) and Second Appeals (4,577) constitute the bulk. Among the Writ Petitions, the category of 'others' is the largest (12,922), forming nearly 72% of the total.

In Criminal matters, Appeals (3,526) and habeas corpus petitions (1,492) make up the bulk. Though details are not available *habeas corpus* petitions are likely to be largely under anti-smuggling and similar preventive detention laws.

On the Original Side as on 30th June 1985, Civil Suits (14,735), Petitions (8,189), Company Petitions (5,144), and Income Tax References (5,042) constitute over two-thirds of the docket. Amongst Writ Petitions the 'others' category, for which detailed break-up is not available, is the largest (6,517), nearly 80% of Writ Petitions. Obviously they include matters under excise, customs and revenue laws.

## Law Commission's Reports

The Law Commission's 77th Report on delays in trial courts and 79th Report on delays and arrears in High Courts and other Appellate Courts made some suggestions, but these fall strictly within the existing structural framework and do not break new

CONTENTS

VOL. 1 No. 4

ground. In fact, the 79th Report states that, "the system which is in force in many other countries like the United Kingdom, Canada, Australia and the United States of America has won the support of most of those who have been dealing with law, and in our opinion, it would not be proper to condemn it as a legacy of the colonial days.

No doubt every system has to meet the needs of national and local requirements, and whenever we feel the necessity of making changes for that reason, we should not be averse to making such changes as may be called for".

Yet the report is striking for its utter lack of originality and creativity. It contains not one suggestion which according to the authors is dictated by national and local variation. What is even more amazing, it goes on to quote the 77th Report on trial courts as follows. "The present day complications and delays in disposal of cases are not so much on account of the technical and cumbersome nature of our legal system as they are due to other factors operating in and outside the courts. In spite of the fact that we are still heavily dependant on agriculture, we can no longer be regarded as an underdeveloped peasant society in view of the great strides that have been made in the direction of industrialization and urbanization of population, besides expansion of trade and commerce. It will be a retrograde step to revert to the primitive method of administration of justice by taking our dispute to groups of ordinary laymen, ignorant of modern complexities of life and not conversant with legal concepts and procedures."

**Break up of cases in the Bombay High Court**
*(Original side)*

| Type of Cases | Cases pending at the beginning of half year i.e. 1-1-85 | Institution during 1-1-85 to 30-6-85 | Disposed by single Judge | Cases pending at the end of year 30-6-85 |
|---|---|---|---|---|
| 1) Civil Suits | 13,757 | 1,566 | 588 | 14,735 |
| 2) Admirality | 236 | 14 | 51 | 199 |
| 3) Parsi Matrimonial | 12 | 10 | - | 22 |
| 4) Testamentary & TJ | 159 | 15 | 56 | 118 |
| 5) Insolvency | 295 | 269 | 228 | 336 |
| 6) Liquidation | 610 | 284 | 330 | 564 |
| 7) Chartered Accountants Act, 1949 | 9 | — | — | 9 |
| 8) Writ Petition | | | | |
| a) Service | 350 | 80 | 57 | 373 |
| b) Labour | 405 | 71 | 49 | 427 |
| c) Land Reform | 850 | 42 | 20 | 872 |
| d) Others | 6,141 | 1,044 | 588 plus 80 By DB 668 | 6,517 |
| 9) Banking Companies Act | - | - | - | - |
| 10 Company Petitions | 5,763 | 144 | 763 | 5,144 |
| 11) Income Tax Reference | 4,891 | 152 | 1 | 5,042 |
| 12) Sales Tax. Ref. | 218 | 6 | - | 224 |
| 13) Other Direct & Indirect Taxes | 812 | 54 | - | 866 |
| 14) Petition under Indian Arbitration Reference. | 1,434 | 117 | 29 | 1,522 |
| 15) Land Acquisition | 419 | 3 | 2 | 420 |
| 16) Election Pet. | 2 | 27 | 2 | 27 |
| 17) Matrimonial | 85 | 49 | 46 | 88 |
| 19) Original Side Appln. | 1,267 | 529 | 555 | 1,241 |
| 20) Misc. Interlocutary | 8,244 | 2,405 | 1,579 | 9,070 |
| **Total** | 46,805 | 7,198 | 4,652 | 48,716 |


Apart from showing a complete lack of understanding of the nature of uneven development of Indian society, such disdain for 'ordinary laymen' for whom judges dispense justice was hardly expected from a much venerated retired judge of the Supreme Court, Justice H.R. Khanna. It only proves the point that Judges of the High Courts and Supreme Court are by and large totally alienated from Indian reality and out of tune with the felt needs of the people for whom they dispense justice.

The Law Commission Reports and reports of bodies headed by M.C. Setalvad, P.B. Gajendragadkar and H.R. Khanna are characterized by their ***arithmetical approach*** to the problem. Apart from putting together a string of statistics and recommending increase in number of judges the 77th and 79th Reports do not make any serious attempt to deal with the cause of delays. The failure to identify causes lies at the root of the inability to suggest meaningful remedies.

# COVER STORY

**Break-up of Cases in the Bombay High Court**
*(Appellate Side)*

| Type of Cases | Pending at beginning of 1-1-85 | Institution during 1-1-85 to 30-6-85 | Disposal at priority State. | Total | Pending at on 30-6-85 |
|---|---|---|---|---|---|
| **Civil** | | | | | |
| 1) L.P.A | 547 | 193 | 133 | 146 | 594 |
| 2) First Appeal | 6,535 | 639 | 1,57 | 359 | 6,814 |
| 3) Second Appeal | 4,521 | 597 | 344 | 541 | 4,577 |
| 4) Misc. First Appeal | 1,362 | 477 | 174 | 246 | 1,593 |
| 5) Civil Rev. Appln. | 3,526 | 1,440 | 661 | 1,138 | 3,828 |
| 6) Misc. Petition | | | | | |
| A) Contempt | 271 | 137 | 53 | 78 | 338 |
| B) Writ Petition | | | | | |
| i) Service | 2,341 | 509 | 309 | 474 | 2,376 |
| ii) L.R & Land Ceiling | 1,693 | 479 | 247 | 794 | 1,378 |
| iii) Labour | 1,143 | 392 | 216 | 303 | 1,232 |
| iv) Others | 11,912 | 2,913 | 1,136 | 1,903 | 12,922 |
| 7) Others including Civil & Applications | 15,227 | 4,641 | 3,687 | 4,284 | 15,584 |
| **Total (Civil)** | 49,078 | 12,417 | 7,038 | 10,266 | 51,229 |
| **Criminal** | | | | | |
| 1) Appeals by | | | | | |
| a) persons convicted | 2,106 | 324 | 23 | 208 | 2,222 |
| b) by acquitals | 1,403 | 219 | 250 | 318 | 1,304 |
| c) Complaint under Sec. 378(4) | 414 | 34 | 3 | 33 | 415 |
| d) For enhancement under Sec. 377238 | | 47 | 18 | 22 | 263 |
| 2) Cr. Revisional Petition | 944 | 454 | 289 | 535 | 863 |
| 3) Confirmations Under/S.366 | 3 | 1 | 2 | 2 | 2 |
| 4) References | 1 | 2 | 1 | 1 | 2 |
| 5) Cr. Misc. Petition | 1,822 | 1,734 | 1,620 | 2,066 | 1,492 |
| 6) Other Habeas Corpus | 107 | 203 | 6 | 185 | 125 |
| 7) Applns. under Contempt | 21 | 16 | 7 | 13 | 29 |
| **Total (Criminal)** | 7,059 | 3,036 | 2,217 | 3,383 | 6,712 |
| **Grand Total (Civil & Criminal)** | 1,02,942 | 2,2651 | 9,255 | 1,8934 | 1,06,657 |

## False Solution

Faced with the staggering statistics of delays often the only response of the bench and the bar has been the oft-repeated "appoint more judges". Of course there is the argument also that one must improve the emoluments of judges to attract talented people. But, what is the indispensable, imperceptible quality that a "talented person" must possess? Nobody cares to define that. A man or woman learned in the art of quoting precedent of the House of Lords and Privy Council or a person who has a clear perception of what justice is all about, who does not see law and justice as two hostile enemies facing each other as adversaries. There is a charming tragic-comic story of a lawyer in a remote village, in a dispute over a dividing wall to partition a piece of land, citing a Privy Council decision on the size and weight of the bricks that should be used to construct a wall!

And what after all would be fair conditions of employment for judges. The Union Cabinet has just approved a new paay structure for Supreme Court and High Court judges; Chief Justice of India Rs. 10,000/-, other judges of the Supreme Court Rs. 9,000/- and High Court judges Rs. 8,000/-. In addition, judges will be given chauffer driven cars, water and electricity free and furnished accomodation.

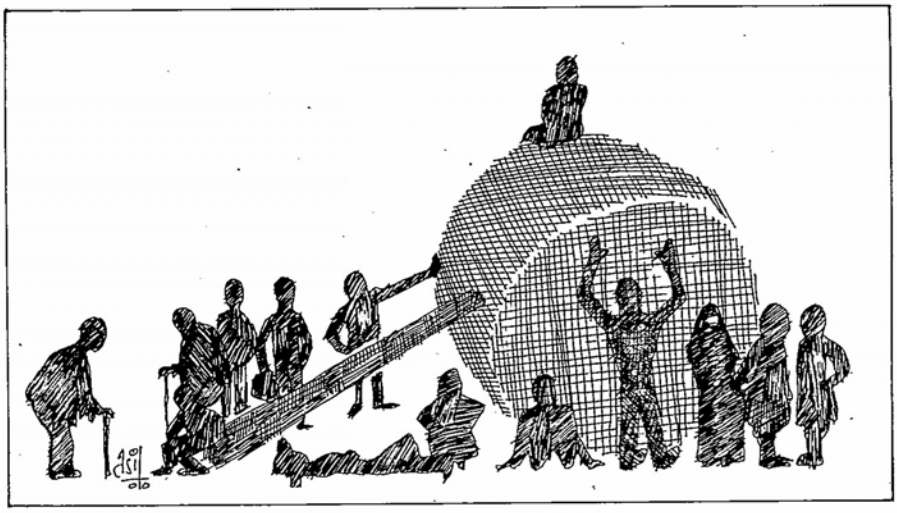
While it is a truism that judges must be adequately remunerated, their standards of living must, after all, bear some rational relation to the standard of living of an average Indian citizen - lest they run the risk of being even further alienated from the people for whom they dispense justice than they already are.

To say that the judiciary is not attracting talented people due to the low levels of pay, is an ***alibi*** for ignoring its own failure in checking declining standards in the administration of justice. Thirty years of indifference by judges and lawyers to the problems of the litigants have brought us to this sorry pass.

The reasons for the indifference are not too far to seek. The real victims of delays are the poor. The rich either get their cases pushed through by leapfroging and jumping the queue or settle their disputes in other ways and means without having to go to Court.

Only recently Jusitice O. Chinnappa Reddy of the Supreme Court was taken aback by the fact that the Karnataka Liquor bottles case in which Chief Minister Ramkrishna Hegde was involved was up for hearing within a matter of weeks while thousands of litigants were waiting for years! Strangely enough the judges went on to decide the case nevertheless.

Luxury litigation is indeed on the priority list. This is also reflected in the fact that priority is given to the problems of the Supreme Court and High Court Judges, and the problems of grass roots courts are totally ignored. The institutions themselves are referred to almost in a derogatory manner. It is only the down and out who find all other means of redressing their grievances closed, who knock the doors of justice in the hope that justice will soon be done, who find themselves caught in a maze, a maze they wish they had never entered.



While it can hardly be denied that the number of judges must be increased to keep pace with the increasing volume of litigation, that by itself can be no solution at all to the real problems.

The problem of increasing the number of judges was analysed by the 79th Law Commission Report in the context of total pendency of cases in all High Courts in India which was assessed at 4,96,172 in 1977 of which the total number of writ petitions was 1,34,639 on 31st December 1977. The total number of Writ Petitions pending on 1st January 1977 was 1,22,009, an increase of 10.35% in 1977 over the previous year.

The average rate of disposal per judge per year was assessed at 650 main cases, and at that rate it would take two years, two months and two days if the total strength of 352 Judges in 1977 were available to dispose of the then pending cases.

In 1977, the sanctioned strength of High Court judges was 352 of which only 287 were filled up. Of the actual strength, on an average 7 were entrusted with outside work. The effective strength for court work in 1977 was 280. As on 31st March 1979 the sanctioned strength of the permanent judges was 292 and Additional Judges was 79, making a total of 371. The actual strength was 345. The 79th Law Commission recommended that the sanctioned strength of High Court judges should be increased to ensure that disposals are not less than institutions and that at least a quarter of the backlog of old cases is cleared in one year. It suggested that the strength should be fixed keeping in view the average institution during the preceeding 3 years.

The Centre has now decided to create 80 new posts of High Court Judges in accordance with the norm - that no civil case should be pending in any court for more than two years and no criminal case for more than one year.

For clearing the backlog it recommended the appointement of *ad hoc* judges and additional judges. The Commission recommended appointment of additional judges to be eventually absorbed in permanent vacancies. It condemned the practice of additional judges, after a spell a year or two on the Bench going back to the profession. Such a practice was fraught with grave abuse and should not be countenanced it opined. It also recommended the appointment of *ad hoc* Judges under Article 224A from among retired High Court Judges for a period of one year at a time, extendable to three years.

Apart from these suggestions, the 77th and 79th Law Commissions made hardly any suggestions worth the mention to ensure speedy justice.

## Alternative approaches

As against the pattern of suggestions recommended by various Law Commissions, culminating in the 79th Report, there exists radically different approach repressnted by Justice V.K. Krishna Iyer, Chief Justice P.N. Bhagwati and Justice D.A. Desai on the other hand, all of whom, have made reports at different times, suggesting far reaching changes. They have clearly recognised the need for speedy justice at the grass roots level, and the structural inability of the present existing adversarial system to deliver justice to the vast majority of the people of the country. As Chief Justice Bhagwati once explained, the **existing system** is based on **"self identification of injury and self-selection of a remedy"** which are preconditions for the success of its functioning. These conditions simply do not exist for the Indian masses. It is no wonder then that for them, the system fails and fails miserably. They have all advocated alternative dispute resolution forums of different kinds. **Lok Nyayalayas** and **Nyaya Panchayats** are serious experiments at a search for alternatives. In several areas of litigation they have proved highly successful at speedy dispute resolution, apart from involving the people inthe the process of dispensing justice. The accumulated experience of these alternative forums should now make it possible to place them on a statutory footing with well defined functions and procedures. Conciliation cells in all disputes, not just in matrimonial disputes can help build up and institutionalise settlement and pretrial procedures. Every case which does not involve a question of law or is not precedent-setting should be capable of being disposed off by settlement or compulsory arbitration, culminating in a non-speaking award. Judges must begin to see as a part of their role as actively promoting settlements instead of taking a purely technical and hands-off-settlement view of the matter.

# COVER STORY

## Strategical Legal Services

Public interest litigation has been developed by the Supreme Court as a powerful tool to redress grievances of mass lawlessness by the administration, and if properly handled it can resolve the disputes of large numbers of people **eliminating the need for repeated litigation on the same question.**

The judge, in such litigation, should not see his function as coming to an end with the pronouncement of the judgement which can end up being an empty declaration, if its implementation is not instantly ordered and monitored. This will, to a large extent, eliminate the need for execution litigation which by itself is not only large, but a major source of delays in the relief reaching the litigant. Legal services ranging from socio-legal research in preparation of litigation to providing legal aid at community centres must become a reality, if welfare benefits are to reach those for whom they are meant, reach them fast and most of all to avoid litigation.

## Commercial Cases

The rich litigant fall into a totally different calss. He has nothing to lose and can gamble on litigation. There has developed litigious culture in the corporate class. Funds being unlimited, they see no harm in "taking a chance". No decision, not even that of the Supreme Court, is accepted as final and binding.

Moreover, today the system encourages dishonest Defendants. A person who borrows money and sits tight has a lot to gain even in litigation. A suit filed against him will lie dormant in the Courts for a minimum of ten years. At the end of which the Court may or may not award a decree against for the full principal amount. Courts hardly award interest over 6 percent. In the meantime, the dishonest Defendant will have lived on the interest on the principal amount alone. Similarly a Defendant who has a lot to hide does not lose out in the Courts. The reluctance of our Courts to order discovery and disclosure of documents results in truth being effectively suppressed and the wrongdoer benefitting.

Rules of the Court and procedure will have to be substantially rewritten to provide for meaningful interim reliefs, particularly in personal injury cases. In a situation in which interim relief has come to be the main relief, it should be possible for Courts to grant interim payments where the Defendant has admitted liability, or where the Plaintiff has obtained judgement for assessing damages, **or if the Court is satisfied that if the case proceeds to trial the Plaintiff would obtain judgement for substantial damages.** Section 32 of the Supreme Court Act, 1981 in England now provides that such interim payments can be made. There is no reason why similar changes cannot be made in India.

The Bhopal Gas Disaster provided the ideal opportunity for an amendment in the law, a case in which, interim payments would undoubtedly have been made as the liability could so easily have been established. The opportunity was lost by filing a suit in the U.S.A., thanks to our slavish mentality to continue to look to the west for all things good and beautiful. It is heartening to note that the Supreme Court, in hearing the Sriram Fertiliser case, before allowing a reopening of the plant, made it a condition precedent that the Company deposit the amount likely to be paid as compensation for personal injury claims and pay for the costs of medical examination of the victims of the gas leak.

The principles on the basis of which interim injunctions can be granted require restatement. Injunctions must be granted where the Plaintiff can show that there is a serious issue to be tried, and that the claim is not vexatious or firvolous and that there is a good chance of succeeding in the case.

The most significant advances in the law of Civil Procedure have been made in the field of discovery of documents, as part of pre-trial procedures. **Discvery need not be limited only to documents referred to but also to all documents which will directly or indirectly enable a party to advance his case or disprove the case of the Defendant or which may lead him to a train of enquiry which will help establish the case.**

It should be possible for a person **before bringing an action** to apply to the Court for discovery. Such a power has been given to the Courts in England by Section 33(2) of the Supreme Court Act 1981, in respect of personal injury claims. The object of this power to enable the Plaintiff to determine whether he has a good case or not. Thus, for example, Courts in England have ordered disclosure of maintenance records of vehicles which caused accidents. Discovery can also be ordered against third parties. This procedure has enabled plaintiffs in personal injury claims to seek hospital records.

Pre-trial and settlement procedures have also been substantially modified in other jurisdictions with the intention of speeding up trials. Increasing use of expert evidence is encouraged and such evidence is required to be disclosed by both sides who are required to exchange their reports and agree upon them. The procedure is based on fairness and mutuality between the parties. If the reports are not agreed upon, the parties can call the expert, but the number of expert witnesses is limited to 2 medical and one other. Photographs and sketch plans agreed upon are freely used.

## Conclusion

While these and other procedural changes can help speed up disposal of cases, in the Indian context, the need for a radical restructuring of the system of dispensing justice is obvious and cannot be denied. But for this, the Bench and the Bar must first admit to their accumulated failures over the last 35 years before a meaningful search for the right answers can begin.

***Indira Jaising***

# COVER STORY

*As a part of our effort to stimulate debate on the laws delays we interviewed two young lawyers practicing in the Bombay High Court, Mr. Gulam Vahanwati and Mr. Rajiv Mohite to express their opinions on the matter.*

## The basic problem is the lack of discipline — Gulam Vahanwati

**Q.** *Can you identify the main causes of delays in the High Courts?*

**A.** Judges, lawyers and the Executive, the persons operating the system are all responsible for delays, each in their own way.

**Q.** *In what sense are judges responsible?*

**A.** Recently at a dinner party hosted by the Bombay Bar Assoication, the Chief Justice of India drew the attention of the Bar to the tremendous wastage of judicial time. In several Courts judges do not work for the full length of the day. Naturally, this contributes to piling up of arrears.

**Q.** *You mentioned lawyers, can you comment on their role?*

**A.** The Lawyers, including solicitors, have a vested interest in delays. In the initial stages, there is a lot of enthusiasm to prepare a case and file it. They get huge advances at the time of filing. After that there is no preparation for final hearing. Lawyers must learn the virtues of moderation. They consciuosly and blatantly take conflicting work and disappear in the midst of an argument. Lawyers must be penalised personally with costs, without recource to clients, for unpreparedness, unnecessary long arguments and negligence. This will perhaps discipline them and lead to efficient use of Court time.

**Q.** *It has often been said that the judiciary is not attracting talented people as judges, salaries are too low. You must be aware of the Cabinet decision to increase their salaries. Do you think this will solve the problem?*

**A.** No, it seems that the proposals are not going to result in substantial benefits. It is more of a restructuring of the pay, which will result in better retirement benefits. Their salaries should be tax free.

**Q.** *But will salary increase alone or increasing the number of judges by itself solve the problem of delays?*

**A.** No, the basic problem is lack of discipline among lawyers and judges alike. To give you an example, two judges of the High Court have disposed off all the expedited Writ Petitions in 1985 and 1986. This was after full hearing on merits and judgement being delivered. It was possible to do this within the system. They did not grant any adjournments. Every Counsel, Senior or otherwise, just had to be there, and they were there for they know the consequences of not being there. That is the only way to deal with lawyers who consciously accept conflicting briefs in more than one Court. They did not allow the filing of unnecessary affidavits or the citing of irrelevant authorities nor did they allow lawyers to ramble on endlessly.

**Q.** *What about costs of litigation?*

**A.** Costs and interest should be realistically granted. Today a dishonest litigant gets away with murder because he knows he can use the Plaintiff's money for free. Realistic interest rates and heavy costs will discourage unnecessary litigation.

**Q.** *The State is itself a big litigant. To what extent does it contribute to delays?*

**A.** Most revenue cases are lost due to lack of preparation, lack of instructions and lack of motivation and competence. There is no coordination between different branches of Government. This leads to wasteful adjournments. State work should not be a matter of patronage or privilege but unfortunately it is nothing else.

**Q.** *What are your positive suggestions to cut down on delays?*

**A.** Reduce the length of pleadings. There is no need to quote every letter in the Plaint or petition and annex it as an Exhibit, unless of course lawyers want to charge by the page. The obsession with pleading is a thing of the past. In England today the writ has only a few paragraphs endorsed and nobody considers pleadings as handcuffs for the unsuspecting litigant. Relevant documents can be filed in Court. They speak for themselves, without advocates having to reproduce them. Judgement writing requires change. Unless the point is not concluded earlier, the highest Court can give very brief reasons. Cases cited can be listed in an appendix. There are other examples of waste of time. One whole judicial day a week in the Bombay High Court is wasted on a meaningless exercise called "directions". These directions can be given administratively. The amount of time a judge spends adjourning cases for lack of service, affidavits etc. is a national waste. There must be screening of cases by the Registrar and unripe cases must not go before Judges. Every case must have a progress chart in which the present stage of the case is noted.

Court fees are so unrealistic they make no sense. There is no justification for fixed Court fees for Company cases, Arbitration petitions and other cases where the stakes involved are very high and

the time consumed is considerable. Court fees must be time-oriented and service-oriented. There can be a flat fee to begin with and then a sliding scale depending on the Court time consumed. This will be a cure for unduly persistent litigants and unending arguments. The administration of Court fees must be made over to the judiciary so that it becomes financially independent and not made to run to the Government for grants.

**Q.** *What do you think of fees being charges by lawyers today? Are they in proportion to the labour they put in?*

**A.** No, they are not proportionate to the service rendered. What has happened in recent times is that the stakes involved in litigation have gone up tremendously. There was a time when a claim for a couple of crores of Rupees was considered a large claim. Today claims before the Courts run into hundreds of crores. Lawyers have begun to feel that they too have a larger claim to make.

# *Criminal Cases should be allowed to be settled*

**Rajiv Mohite**

**Q.** *Can you identify some of the major causes of delays in criminal courts and suggest remedies?*

**A.** What is required is a fundamental change in the jurisprudence of criminal law. At present criminal proceedings are between the State and the Accused. They are in the nature of proceedings *in rem*. This could be changed to a proceeding which is akin to a proceeding *in personam*. This assumes that monetary compensation to the victim of the crime can, in certain circumstances, adequately recompense for a crime.

**Q.** *Does the Law as it stands today allow for such a procedure? And how will it help reduce delays?*

**A.** Section 320 of the Criminal Procedure Code allows for the compounding of offences. The object of Section 320 is to ensure that minor cases are settled between the parties. The first part deals with minor offences which can be settled between the parties. The second which deals with slightly more serious offences can be settled with the permission of the Court. The entire procedure requires rationalisation. The distinction between major and minor offences should be related to the sentence by which the offences is punishable. All offences punishable with sentence upto 3 years rigorous imprisonment (R.I.) should be allowed to be settled between the Accused and the victim without the intervention of the Court. All graver criminal offences, punishable with sentences above three years but less than seven years should be settled by the Accused and the victim with the permission of the Court. Even the gravest criminal offences punishable with sentence exceeding seven years can be settled with the permission of the Court, where it is a first conviction and where there is no indication of deliberate preplanned offence. Matters can also be settled if the offences are committed under grave provocation by the victim.

**Q.** *How will this help solve the problem of delays in Court?*

**A.** What I am suggesting will result in a tremendous saving in judicial time. You must remember that a saving in judicial time for criminal work will automatically speed up civil work also. In the District and Session Courts, the same judges do civil and criminal work.

**Q.** *Would you like to comment on the manner and method in which remand applications are more or less automatically granted without much application of mind?*

**A.** The law should be amended to make it possible for a magistrate to consider remand applications in Chambers in the absence of the police. This will enable undertrials to complain about ill-treatment in lock-up without fear of reprisals from the police.

**Q.** *Would you like to make any other suggestions?*

**A.** Increasing the number of judges, better terms and conditions of work for judicial personnel, assigning work to judges depending on their known field of expertise, use of modern office machines, training for administrative staff, overtime wages for administrative work are some of the obvious suggestions. Replacing verification of affidavits by the Advocate's statement certifying that, the averments are based on instructions of clients will eliminate the need for litigants. The introduction of non-professional settlement boards comprising students and law professors could be set up. When a case is filed, on instructions, an advocate can state with the filing slip, that his client is willing to settle. The Court process addressed to the Defendant can then require him to answer if he is willing to settle. Where both parties agree the cases can then be transferred to the Settlment Board. These and other proposals need to be discussed to salvage the tattered remains of the shattered credibility of the Judicial system.

**We invite our readers to make positive suggestions for reducing arrears and delays. — Ed.**

## *SC Conditions on Sriram Reopening*

On December 4, 1985, following an Oleum gas leak over the city of Delhi from the factory of Sriram Food and Fertilisers, the entire factory was ordered closed by the Municipal Corporation of Delhi and the Delhi Administrator's Labour Department. As the local authorities did not allow reopening, the company approached the Supreme Court.

Chief Justice P.N. Bhagwati, Justice D.P. Madon and Justice G.L. Oza permited reopening on certain conditions after pointing out that all the five expert committee reports on the plant had unanimously stated that there was 'considerable negligence' on the part of the management of Sriram in the maintenance and operation of the caustic chlorine plant and that 'there were defects and draw-backs in its structure and design'. The Judges pointed out that the management did not take the necessary measures for installing safety devices to ensure the maximum safety of the workers and the community living in the vicinity.

While allowing reopening, the Court ordered the setting up of four committees to make time-bound reports to the Court on the Caustic Chlorine Unit. The First Committee was to inspect the plant at least once a fortnight for a complete check from design and materials to experimentation at site. The Company was ordered to deposit Rs. 30,000/- in the Court to meet the expenses of this Committee. The 2nd check was through the Chief Inspector of Factories who was directed to make surprise checks at least once a week and report to the Court as well as the Labour Commissioner. **The third check was through the Committee consisting of the Lokhit Congress Union and the Karmachari Ekta Union to report on any default or negligence, to the management and if the management did not heed their opinion, to make a report to the Labour Commissioner. Adequate training was to be given to these representatives.**

The fourth check was through the Central Board for the Prevention of Water Pollution which was diluted to make surprise checks of the effluents at least once a week and report to the Court on defaults.

The last check was by making the designated operator of each safety device in the Caustice Chlorine Division and also the head of the division individually responsible for the non-functioning or mal-functioning of the safety devices.

### Personal Undertakings of Chairman and MD

The management was directed to file within one week an **undertaking before the Court making the Chairman and Manaing Director of DCM as also the officers in actual management of the Caustice Chlorine Plant personally responsible to pay compensation for any death or injury in case of the escape of chlorine gas.**

The management was also bound to conduct refresher courses with mock trials at least once a week for the workers and instal loud-speakers, so that they may be fore-warned, have regular medical check ups for workers, and put up at the gate and all departments, notices in English and Hindi about what to do in case of a chlorine gas leak.

The Court directed the company to deposit Rs. twenty lakhs as a security to satisfy compensation claims against the Company for the leakage of Oleum gas. The company was directed to give a bank guarantee of Rs. 15 lakhs which will be encashed by the Registrar in case of an escape of chlorine gas resulting in death or injury.

On failure of the management to fulfil any of these conditions the orders for restarting the plant would stand withdrawn.

The Company applied to modify the condition that the Chairman and the Managing Director should give personal undertakings to meet any claims arising out of death or injury caused by escape of gas and the condition that workers representatives should be associated with monitering safety.

The Supreme Court declined to modify these two conditions but said that the Chairman or Managing Director will not be held responsible if they can show that the escape of gas was an act of God or *vis majeur* or due to sabotage.

The Court refused to dispense with the order requiring the workers to be associated with monitoring safety.

**"We do not subscribe to the view that workmen who have been working for years in a plant cannot acquire some elementary knowledge about the operation of various safety measures in the plant", they opined.**

Earlier, on the 4th March, 1986, the Court referred to a five member bench the following questions for decision:

1) Whether **limited companies** and other centres of economic power are **subject to all the fundamental rights in the Constituion.**
2) Whether **compensation** can be granted by the Court **for the violation of any of these rights.**
3) How far can the **principle of strict liability be projected into the assessment of the compensation.**
4) What is the **right of the citizens to information** from hazardous industries.

While referring the matter the Chief Justice said that all the three judges felt **that the protection of life and liberty should be available not only against the Government but also against all centres of economic power.**

One of the most important aspect of the order is the recognition of certain rights of workmen.

The case is listed to be heard sometime in April. Interested Groups may assist the Court by filing *amicus* briefs.

## *Thakkar Sisters:*

### Death sentence reduced to life

Justice R. A. Jahagirdar and Justice A. D. Tated of the Bombay High Court reduced the sentence of death imposed upon the Thakkar sisters, Shobhana and Aruna, for killing their sister-in-law Parul to imprisonment for life. The Thakkar sisters had been sentenced to death by Mr. J.N. Shambhu, Additional Sessions Judge, Greater Bombay.

The judges however differed in their views as regards the death of Manjula, the other sister-in-law who had been slain by the Thakkar sisters. While Justice Jahagirdar was of the view that the medical evidence on record would lead to the conclusion that the offence was one of culpable homicide not amounting to the murder punishable under Section 304 of the I.P.C., Justice Tated was of the opinion that evidence on record disclosed that the Accused sisters had intention of killing Manjula, that the crime was that of murder, punishable under Section 302 I.P.C. While Justice Jahagirdar was of the view that the Accused sisters should be sentenced to rigorous imprisonment for 10 years each. Justice Tated was of the view that each of the Accused sister should be sentenced to imprisonment for life. In view of the difference between the two judges the matter was referred to Justice P.B. Sawant.

Justice Sawant agreed with the finding of Justice Tated and held that Thakkar sisters were guilty of committing the murder of their sister-in-law, Manjula.

Case for the prosecution was that relationship in the Thakkar family were strained. The sisters of the Accused, Madhuri and Naina had committed suicide prior to this incident. The Father, Nanji and mother Damayanti had quarrels. Mother Damayanti had left the house and had settled down at Jamnagar. The family was divided against itself.

On 11th April, 1983 the sisters-in-law Manjula and Parul were in the flat with their one year and 3 years old sons. Between 2 p.m. and 3.30 p.m. the accused sisters fatally assaulted Manjula and Parul with a grinding stone and caused severe head injuries. Then they poured kerosene on the clothes of the victim and set them on fire with a view to cause the disappearance of the evidence of the crimes. They presented themselves at police station and made statements which led to their arrest. Police recovered from the flat a note said to have

been written by the Accused to their father and brother referring to the treatment meted out to them and explaining why they were acting against their sister-in-laws. It was stated in the note that their father and brothers were money-minded. They were not interested in getting the Accused sisters married. The Accused sisters were not given any pocket money and were often abused and called prostitutes and that their mother's property was being given to their sister-in-law.

## *SC Notice on Asbestosis*

On 10th February 1986 the Supreme Court issued notice to the Union of India, Digvijay Cement Company, Ahmedabad, Hindustan Ferodo Limited, Bombay and Hyderabad Asbestos and Cement Products Limited, Hyderabad, on a petition which seeks to stop unrestricted and unmonitored use of Asbestos for industrial process.

Manufacture and use of Asbestos is a hazardous process which can lead to Bronchitis, Tuberculosis and often to the incurable and fatal disease of Asbestosis. In order to prevent these occupational diseases, many Western countries have banned the use and manufacture of certain types of Asbestos. In India, Asbestosis is classified as an occupational disease both under Schedule III of the Employees' State Insurance (ESI) Act, 1948 as also under Schedule III of the Workmens' Compensation Act 1923. Under Section 87 of the Factories Act, 1948, many States, including Maharashtra, have classified the use and manufacture of Asbestos as a dangerous operation and laid down elaborate provisions to prevent its harmful effects. These provisions, however, are observed more in their breach than compliance.

Workers are exposed to extremely hazardous conditions. Many deaths have been reported. Independent studies have revealed that in India, **no company whatsoever complies with the legal provisions regarding Asbestosis and the workers are under constant threat of death.**

A study made in 1984 by Institute of Occupational Health, Ahmedabad shows that out of 800 workers of Asbestos Cement Ltd., 224 suffered from advanced stages of Asbestosis and another 128 workers had contracted the disease, though it had not reached the "acute" stage. Research conducted by the Central Labour Insitutute at Digvijay Cement Plant, Ahmedabad, indicates that out of a sample survery of 320 workers, 6.5 percent suffered from Asbestosis. According to some reports, there have been 13 deaths in the Asbestos Packing.

The Asbestos industry in India employs 7,000 people in 20 units. A study conducted by the National Institute of Occupational Health of a unit in Ahmedabad showed that 15% of the workers showed Asbestos bodies in their sputum, 50% had respiratory symptoms, 25% had crepitalions and 9% had opaque areas in their lungs. In a factory in Bombay, of 850 workers employed, 225 were suffering from acute Asbestosis.

In European and North American Countries, the movement against use of Asbestos was successful partly due to the heavy compensation which thee Companies were made to pay to the workers. This has not been possible in India because the maximum compensation under Workmens' Compensation Act and ESI Act is absolutely meagre. Also, workmen covered by these Acts are prevented from filing any suit for damages. Apart from this, even the compensation recoverable under these Acts is not easily available due to collusion between managements and government officials. Medical authorities are extremely reluctant to diagnose Asbestosis and 'diagnose' it instead as T.B. or Bronchitis.

In a recent decision of the Industrial Court, Maharashtra, an order of the ESI Medical Board refusing to grant compensation to a workman of Hindustan Ferodo Ltd., on the ground that he suffered from chronic Bronchitis was set aside and it was held on the basis of independent medical reports that he was suffering from Asbestosis. Eight months after the order, the worker had not been paid his dues.

In the pending Petition, interested groups may file *amicus* briefs in the Supreme Court. It will be possible to argue that the manufacturers are violating the right to life of the workers guaranteed under Article 21 of the Constitution. Those wishing to file *amicus* briefs may contact us for further information.

# LAW AND PRACTICE

## Forfeiture and Discharge

If the Accused fails to turn up on the day fixed for his trial in the Court, the Court may order to forfeit the amount of bond and issues warrant for his arrest. There are two distinct stages contemplated by Section 446 Cr.P.C. relating to the forfeiture of bonds. The first stage is for the Court to satisfy itself that a bond ought to stand forfeited and if it is satisfied it has to record the grounds on which it has come to the conclusion. The second stage relates to the realization of the forfeited amount of the bond. The Court may give notice to the executant either to pay the penalty or to show cause why it should not be paid.

The law contemplates that the surety becomes a nullity either by the death or bankruptcy or by Court order of forfeiture. In such cases fresh sureties are required to be furnished to avoid any proceedings against the Accused in Court.

**STANDARD BAIL APPLICATION FORM**

*(During pendency of investigation)*

IN THE COURT OF MAGISTRATE AT BOMBAY

C.R.NO. OF 1986.

The State
(Saki Naka Police Station)

Versus

ABC Accused

APPLICATION FOR BAIL

1. The Accused was arrested on _____ (specify date) under Section _____ (specify provision)
2. The FIR lodged and the statements recorded do not dislcose any offence committed by the Accused. No eye witness has even named the Accused. (in this paragraph show that there is no basis for arrest as no offence is made out).
3. That in any event the property is recovered and no cause would be served for remanding the accused to police custody.

   (In this para make out grounds why detention ought not to be continued.)
4. The accused comes from a respectable family. He holds a regular job at ABC Company. His relatives and friends are all in Bombay.

   (In this para give facts showing that the Accused has roots in the community and is not likely to abscond if granted bail).
5. The Accused is a sick person/a women/below sixteen (here state facts which make out a special case for grant of bail)
6. The Accused is prepared to abide by any reasonable terms and conditions imposed by this Court.
   The Accused, therefore, prays:

   — that the Accused be enlarged on bail on personal bond or any reasonable amount as this Court deems fit.

(Signature of Accused or Advocate).

## Anticipatory Bail

Under old Code of Criminal Procedure (the New Code was enacted in 1973), there was no provision for Anticipatory Bail. As a result, there was a difference of opinion whether under the inherent powers of the Court, Anticipatory Bail could be granted.

Pursuant to the 41st Report of the Law Commission, a specific provision, Section 438 Cr.P.C. for Anticipatory Bail was included. **Anticipatory Bail implies an order of the Court in anticipation of an arrest for a non-bailable offence to release the person on bail in the event of an arrest.**

The object of Anticipatory Bail is to free the person from the fear of unnecessary apprehension of arrest and possible disgrace. Thus the *raison d'etre* of the provision is that the person applying for an order of Anticipatory bail must have **reason to believe that he may be arrested on accusation of having committed a non-bailable offence.**

The application for Anticipatory Bail can be made to both the Court of Session and the High Court as both have concurrent powers in this behalf under Section 438 Cr.P.C. There is a difference of opinion as to whether the Court of Session should be approached first. However, it is advisable to approach the Court of Session first.

### Conditions

On granting an order of Anticipatory Bail, the High Court or the Court of Session can attach any conditions that it may think fit. This may include the following conditions.

* The Applicant shall make himself **available for interrogation,** as and when required, to any person;
* The Applicant shall **not threaten anybody** who knows about the case so as **to dissuade him from disclosing** the facts to the Court or Police.
* The Applicant shall **not leave India** without previous permission of the Court.

The Court is entitled to impose any other condition which the Court may deem fit while granting bail ordinarily.

If **after the order of Anticipatory Bail** the person is arrested by the police without a warrant, he **has to be released on bail, if he is prepared to give bail.** The bail may be offered either at the time of the arrest or any time thereafter in custody. If the Magistrate issues a warrant on which the police arrests the person, then the Magistrate shall issue a bailable warrant in accordance with order of Anticipatory Bail.

However, the bail system as it operates today is totally unsatisfactory. In the report of the Legal Aid Committee appointed by the Government of Gujarat, Justice Bhagwati emphasised this in the following words:

> "The Bail system, as we see it administered in the Criminal Courts today, needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the Accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the Accused from fleeing is of doubtful validity. There are several considerations which deter an Accused from running away from justice and risk of financial loss is only one of them and that too not a major one."

The Committee also noted that the bail system discriminates against the poor: The Supreme Court, through Justice Bhagwa-

ti, reiterated this when it observed in **Hussainara Khatoon's** (2) case as follows:

> "The bail system, as it operates today, is a source of great hardship to the poor and if we really want to eliminate the evil effects of poverty and assure a fair and just treatment to the poor in the administration of justice, it is imperitive that the bail system should be thoroughly reformed so that it should be possible for the poor to obtain pre-trial release without jeopardising the interest of justice as easily as the rich.

The Courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. The concept is outdated and experience has shown that it has done more harm than good. If the Court is satisfied, after taking into account the information placed before it, that the Accused has his roots in the community and is not likely to **abscond it can safely release the Accused on his personal bond.** To determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors, concerning the accused:

* the **length of his residence** in the community,
* his **employment status,** history and his financial condition,
* his **family ties** and relationships,
* his **reputation,** character and monetary condition,
* his **prior criminal record** including any record or prior release on recognizance or on bail,
* the **identity of responsible members** of the community who would vouch for his reliability,
* the **nature of the offence charged** and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and
* **any other factors** indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear."

Unfortunately observations like these, which are binding precedent, are not followed by the inferior Courts. The poor will have to wait for long before Article 21 becomes really meaningful for them.

References :

1) AIR 1978 SC 429
*Guddkanti Narasinhalu Vls PP Andhra Pradesh*
2) AIR 1979 SC 1360 (1979) LF.L.J. 1036.
*Hussainara Khatoon Vls State of Bihar.*

# Equal Remuneration Act, 1976

*Women are half the world's population, they do two-thirds of the world's work hours, but receive one-tenth of the world's income and own less than one-hundredth of the world's property. Despite the tall talk of equality of sexes, earning of women workers continues to be lower than their male counter-parts. To remedy the situation most governments in the world have passed Equal Remuneration or Equal Pay Acts. The Indian Parliament passed such a law in 1976. In this article, we explain the Equal Remuneration Act 1976, with the intention of encouraging its increasing use by women.*

***RI & SR***

It may be true that in many industralised countries, pay differentials have narrowed considerably since 1975, but on an average a woman is still paid only one-half to three-quarters of the money that a man can earn for doing the same or a comparable job. In India low levels of literacy, poor access to training facilities and adverse effects of technological changes in method of production, have ensured that women occupy "low status" jobs in the industrial sector and continue to get a raw deal. Today, there are more women destitutes in India than men. Women are worse off than they were. With the fast changing pace of technology, they are being displaced from the traditional sectors in which they have been employed without a corresponding increases in jobs in the high-technology sectors.

## Constitutional Mandate

The Constitution of India in Article 39 amongst other things, lays down as follows:

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
(d) **that there is equal pay for equal work for both men and women;**
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

Clause (d) of Article 39 enunciates the fundamental principle of "equal pay for equal work", which not only means equal pay for men and women engaged on similar work or the same work, but also implies that persons holding jobs with similar duties and responsibilities should not be treated differently in the matter of pay merely because they belong to different departments or have different status, such as permanent, temporary or casual.

Article 14 of the Constitution guarantees to the citizens equality before law and equal protection of laws irrespective of the sex. If follows that women doing similar work as men cannot be given lesser wages, as this would violate their fundamental right of equality.

# LAW AND PRACTICE

## Equal Remuneration Act 1976

Keeping in mind the requirements of Articles 14 and 39 of the Constitution, on 26 September 1975, in the International Women's Year, the Government of India promulgated the Equal Remuneration Ordinance 1975. The Ordinance was replaced by the Equal Remuneration Act, 1976 which received the assent of the President of India on 11th February 1976.

## Object, Scope and Coverage

The main object of the Act is to provide for the payment of equal wage to men and women wage-earners and for the prevention of discrimination on the ground of sex, against women in the matter of employment.

The Act extends to the whole of India and has been applied to all employments. Under this Act, no employer can pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the other sex in such establishment or employment for performing the same work or work of a similar nature.

**"Same work of a similar nature" has been defined to mean 'work' in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill, effort and reponsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment'.**

In case, before the commencement of the Act, the remuneration for men and women are paid differently, then the higher (in cases where there are two rates) or the highest (in cases where there are more than two rates) of such rates of remuneration shall be payable, on and from such commencement, to such men and women workers. No discrimination is to be made while recruiting men and women workers for the same work or work of a similar nature except where the employment of women in such work is prohibited or restricted by or under any law for the time being.

The provisions of the Act have an over-riding effect notwithstanding anything inconsistent contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of the Act. This provision, however, does not affect any priority or reservation for Scheduled Caste or Scheduled Tribes, ex-servicemen, retrenched employees or any other class or category of persons in the matter of recruitment to the posts in an establishment or employment.

The Act is administered by the "Appropriate Government". In relation to any employment carried on by or under the authority of the Central Government or a railway administration, or in relation to a banking company, a mine, an oilfield or a major port or any corporation established by or under a Central Act, the Central Government is the Appropriate Government. And in relation to any other employment, the State Government.

## Inspectors

The Appropriate Government is empowered to appoint Inspectors for the purpose of making an investigation as to whether the provisions of the Act or the rules made thereunder are being complied with by the employers. The Government may define the local limits within which an Inspector may make such investigations.

### Powers of Officers

Under the Act, the Appropriate Government is empowered to appoint such **Officers** not below the rank of a Labour Officer, **for the purpose of hearing and deciding**

* **complaints** with regard to the **contravention of any provision of the Act,** and
* **claims** arising out **of non-payment of wages at equal rates to men and women workers for the same work or work of a similar nature.**.

The Officer so appointed shall have all the **powers** of a **Civil Court under the Code of Civil Procedure, 1908** for the purpose

* of **taking evidence**
* of **enforcing the attendance of witnesses**
* **compelling the production of documents**

This implies that Orders XI, (Discovery and Inspection), XIII (Production and Return of Documents), XVI (Summoning and Attendance of Witnesses) of the Code of Civil Procedure become applicable.

An **'Inspector'** may within the limits of his jurisdiction:

* **enter at any reasonable time the premises, building, factory or vessel** of the employer
* **take on the spot or otherwise the evidence of any person** for the purpose of ascertaining whether the provisions of the Act are being or have been complied with
* **make copies or take extracts** from the register or other **documents**

The Inspector shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860. This implies that offences by or against public servants in the Indian Penal Code become applicable.

## Committees

Under Section 6 of the Act, the Appropriate Government is empowered to constitute one or more Advisory Committees to advise it for providing increasing employment opportunities for women and to advise it with regard to the extent to which the women may be employed in such establishments or employments as the Central Government may, by notification specify in this behalf. The Advisory Committee is to consist of not less than ten persons, to be nominated by the Appropriate Government, of which one-half shall be women and shall tender advice, having regard to the number of women employed in the concerned establishment or employment, nature of work, hours of work, suitability of women for employment, the need for providing increasing employment opportunities for women, including part-time employment. The Advisory Committee can regulate its own procedure. However, the final authority of decision making would remain in the hands of the Appropriate Government.

The aggrieved worker or an employer can prefer an **appeal, within thirty days from the date of the order** of the deciding authority to such authority as the appropriate Government may

by notification specify in this behalf. The Appellate authority may, after hearing the appeal confirm, modify or reverse the order appealed against. No further appeal lies against the order by such appellate authority.

If the appellant is **prevented by sufficient cause** from preferring an appeal within the specified period of thirty days, the appellate authority **may allow the appeal to be preferred within a further period of thirty days,** but not thereafter. The provisions of Section 33C (1) of the Industrial Disputes Act, 1947 have also been made applicable for the recovery of monies due from an employer arising out of the decision of the authority appointed under the Act.

A Writ Petition can still be filed under Article 226 or Article 227 of the Constitution of India to set aside the decision on well recognised grounds such as that the decision is perverse (that is not based on legal evidence) or it is without jurisdiction or there is refusal to exercise jurisdiction, or that is based on an erroneous understanding of law.

### Special Cases

The Act does no apply in 'Special Cases' These are as follows:

* When terms and conditions of employment of women are in consonance of law regulating employment of women, or
* When special treatment is given to women in connection with birth (or expected birth) of a child.

In these cases the requirement of equal treatment regarding terms and conditions relating to retirement, marriage, death, is not applicable either.

## Power to exempt

By virtue of Section 16, the Appropriate Government has been given the power to declare, by notification, that differences in regard to the remuneration of men and women workers in any establishment is based **on a factor other than sex** and as such any act of the employer, attributable to such a difference shall not be deemed to be a contravention of the Act. This is virtually a power given to the executive to exempt an employer from the application of the Act. It is a power to adjudicate upon a dispute, essentially, a judicial function, to be performed by the Labour Officers under the Act. How this power can be misused is illustrated by the **Air India case** In 1979, the Central Government passed a Resolution stating that the differences in pay and conditions of employment of Air Hostesses and Flight Pursers were based on different conditions of service and not on sex. The work done by the Hostesses Purser is substantially similar if not the same, the difference being of degree rather than kind. The Resolution goes on to state that the difference in pay based on differences in conditions of the services cannot be attributed to sex. By this Resolution, the Central Government defeated the very object of the Act. The Hostesses were not given any opportunity to be heard and were not even aware of it. On the basis of the Resolution, Air India has been able to successfully deny to the Hostesses, parity of pay with their male counterparts, the Flight Pursers. To say **that differences in pay are based on differences in conditions of service is begging the question.** The point is whether differences in conditions of service were based on sex alone. Thus equal pay for equal work has been denied to the Hostesses.

### Penalties

After the commencement of this Act, if any employer omits or fails to maintain any register, or other document or refuses to give any information or evidence or prevents his agent, servant or any person in charge of the establishment or any worker from giving evidence, he shall be punishable with fine which may extend to one thousand rupees. Furthermore, if the employer makes any recruitment in contravention of the provisions of the Act or makes any payment of remuneration at unequal rates to either sex of workers for the same work or a work of a similar nature or makes any discrimination between men and women in contravention of the provisions of the Act he shall be punishable with fine which may extend to five thousand rupees. If any person refuses to give required documents or information to an Inspector, he shall be punishable with fine which may extend to five hundred rupees. Similar action can also be taken against any company which commits offences of the nature described above.

## Defects in the Law.

The major problem with the Act is the definition of "same work" or "work of similar nature". The definition leaves much to be desired and can defeat the object of the Act. In India as in most other countries, there are many jobs which are sex-based. For instance, a study done on textile industry revealed that out of 27 job-categories, women were wholly concentrated in only one category i.e. reeling. Since there are no men employed in the reeling the question of discriminating against women for the "same work" would not arise. Yet the wages fixed for reeling are much lower than those for other categoreis in which women are simply not employed. By the present definition, such a situation would not be covered by the Act as women would not be doing the "same work" of 'work of similar nature' as the others. And yet the value of the work of the women reelers to the employer may be the same or as higher than that of the male workers. To cope with such situation the concept of **equal pay for comparable worth"** has come to replace "equal pay for same work". It is not the similarity or identity of work alone that will entitle women to equal pay but also work which is comparable in terms of skill required and its value to the employer that will entitle them to equal pay. By this method, a reeler can demand as much pay as a weaver, though they are not doing the same work.

Tragically, the denial came from the State, which is supposed to guarantee equality and that too in a public sector undertaking. As if this was not bad enough the Resolution was accepted without question by the Supreme Court in *Air India Vls Nergish Meerza* (AIR 1981 SC 1829), a judgement which was a tremendous setback to the right to equal pay for equal work.

## Judicial Intervention

There have been some advances made by the Supreme Court by directing the State to pay equal wage for equal work. In *Randhir Singh's* case (AIR 1982 SC 879) the Court held "equal pay for equal work" is not a mere dogmatic slogan, but a goal, capable of attainment through Constitutional remedies and the enforcement of Constitutional rights. Hov er, it needs to be

pointed out that *Randhir Singh's* case was not a case in which women were demanding equal pay with men, but one in which male driver-constables of the Delhi Police Force were demanding wages on par with male drivers of the Railway Protection Force. The only significant case which came before the Supreme Court which raised the question of equal pay for work between men and women, the *Nergish Meerza's* case, was decided against the women.

In United States, the concept of "comparable worth" has found legislative and judicial recognition. The idea of comparable worth was devised to raise womens' wages in female dominated-occupations upto the level paid in male occupations of "comparable worth". Also known as pay equity, "comparable worth" means that the jobs deemed to be of "equal value to the employer" should pay the same, regardless of sex or race typing ' (1)

Prior to 1981, the American Courts were unfriendly to charges of sex discrimination in pay across different jobs. In 1981, however, the Supreme Court ruled that the Title VII of the 1964 Civil Rights Act could be applied to prohibit wage differences in similar though not identical jobs. The decision in *County of Washington Oregaon Vls Gunther* involved female jail matrons who were paid 70 per cent of the salary of the male guards. Many States, including California, Minesota and Washington have passed statutes which require wages in the public sector to be set on the basis of comparable worth.

Another major problem with the Act, is that it operates only at the level of the hiring and payment of wages. No remedy is provided in respect of discrimination at the level of promotions and training, all matters of great importance to the career progress of employees.

## Conclusion

Despite the Act, having been on statute book for over ten years, women continue to occupy "low-status" jobs. The Act has thus remained virtually a dead letter. The Advisory Boards have not been constituted in most States. Employment of women in the organised sector has not gone up significantly during the period 1975-1986. There are hardly any significant cases of complaints being successfully argued under the Act. The procedures are cumbersome and Labour Officers unresponsive.

(1) Teressa Ameen of & Inlie Matheau, Comparable Pay in *Radical American* Vol 18, No. 5

# The Administrative Tribunals Act

*The Adminstrative Tribunals Act was introduced in 1985 to provide exclusive jurisdiction for service matters to the Tribunals. While the several challenges to the Act, pending in various High Courts and the Supreme Court, remain to be decided, in this Article we explain the main provisions of the Act.*

***Anand Grover***

The main purpose of the Administrative Tribunals Act is to vest exclusive jurisdiction in respect of service matters with the Tribunals and exclude the jurisdiction of all Courts, except the Supreme Court, initially only under Article 136 but now in respect of all its jurisdictions. The Act is to give effect to Article 323 A of the Constitution.

## Constitutional Provisions

By the Constitution (42nd Amendment) Act, 1976, the Constitution was amended and part XIV A was inserted with Articles 323A and 323B. While Article 323A deals with the setting up of Administrative Tribunals, Article 323B provides for setting up of Tribunals for other matters. (including for industrial and labour disputes.)

**Article 323A (1)** provides that **Parliament may enact a law which would set up Administrative Tribunals to adjudicate** or try **disputes or complaints** relating to **conditions of service in publice services.** This also includes **posts in connection with the affairs of**

* The Union (i.e. Government of India)
* Any State
* Any local or other authority, either in India or controlled by the Government
* Any Corporation owned or controlled by the Government.

**Artilce 323A (2),** amongst other things, also provides **that the law** enacted for the purpose of setting up of Adminstrative Tribunals **may also provide for:-**

* setting up of **separate Tribunals** for the Union and the States
* **jurisdiction** and powers of the Tribunals
* **procedure** to be followed by the Tribunals
* **exclusion** of jurisdiction of **all Courts**

  **except the Supreme Court under Article 136, with respect to the disputes or complaints referred to such Tribunals**
* **transfer** of cases to the Tribunals

**Article 323A(3)** further provides that it **shall have effect notwithstanding anything in the Constitution or any other law.**

**Article 323B (1) provides that the appropriate Legislature may enact a law** to adjudicate or try disputes, complaints or offences in matters specified in Clause (2). Clause (2), **amongst**

**other matters, includes "industrial and labour disputes"** (Clause 2(c).)

On 27th February 1985 Parliament enacted the Administrative Tribunals Act.
The Act was challenged in the Supreme Court and pursuant to the orders in the Petition, the Administrative Tribunals (Amendment) Ordinance was promulgated by the Prsident on 22nd February 1986 by which certain important changes have been made. These are referred to at appropriate places.

The long title to the Act is practically a reproduction of Clause 1 of Article 323A. The Statement of Objects and Reasons also makes it amply clear that the Act is to give effect to Article 323A.

## Exceptions

The **Act does not apply to certain persons** viz.

* **any member** of the naval, military or air forces or of any other **armed forces of the Union**
* any officer of the Supreme Court or any High Court
* any person appointed to the **Secretarial Staff** of **either House of Parliament** or any **State Legislature.**

The **original Act** also exempted persons who were **governed by the provisions of the Industrial Disputes Act. However, the amending ordinance has deleted that provision**

**The Act provides for establishing the Central Administrative Tribunals in respect of All India Services and State Administrative Tribunals in respect of State Services. It applies to the whole of India.** However, different provisions of the Act can be brought into force on different dates. The provisions of the Act are to come in force on such dates as the Central Government may notify.

## Establishment of Tribunals

Under Section 4, the Central Government is to establish a Central Administrative Tribunal.

By a Notification dated 26th July 1985 the Cenral Government set up the following Principal and Additional Benches with territories specified against them which fall within their jurisdiction. *(See Box)*

On the request of a State Government, the Central Government can also appoint a State Administrative Tribunal for that State. Two or more States may enter into an agreement to the effect that one Administrative Tribunal shall be the Administrative Tribunal for both the States. If the Central Government approves, then it may establish a Joint Administrative Tribunal for two or more States. The agreement for a Joint Administrative Tribunal has to contain provisions for members, the manner of selection and the places where the Tribunals shall sit as well as the expenditure for the same. Till date no State Tribunals have been set up.

The amending Ordinance also provides that members of a State Administrative Tribunal may be designated as members of the Central Tribunal in respect of that State and members of the Central Administrative Tribunal functioning in a State may be designated as members of the State Administrative Tribunal for that State.

In relation to the **Central or Joint Administrative Tribunals, the Cenral Government is the Appropriate Government,** and in relation to the **State Tribunal** it is the concerned **State Government.**

| Bench at | Jurisdiction of the Bench |
|---|---|
| Delhi (Principal Bench.) | States of Jammu and Kashmir, Haryana, Himachal Pradesh, Punjab, Rajasthan and the Union Territories of Chandigarh and Delhi. |
| Allahabad (Additional Bench) | States of Bihar and Uttar Pradesh. |
| Bangalore (Additional Bench) | States of Andhra Pradesh and Karnatka. |
| Bombay (Additional Bench) | States of Gujarat and Maharashtra (excluding areas falling within the jurisdiction of Nagpur Bench) and Union Territories of Dadra and Nagar Haveli and Goa, Daman and Diu. |
| Calcutta (Additional Bench) | States of Orissa, Sikkim and West Bengal and Union Territory of Andaman and Nicobar Islands. |
| Gauhati (Additional Bench) | States of Assam, Manipur, Meghalaya, Nagaland and Tripura and Union Territories of Arunachal Pradesh and Mizoram. |
| Madras (Additional Bench) | States of Kerala and Tamil Nadu and Union Territories of Lakshadweep and Pondicherry. |
| Nagpur (Additional Bench) | States of Madhya Pradesh and Judicial Districts of Akola, Amravati, Bhandara, Buldana, Chanda, Nagpur, Wardha, Yeotmal and Gadchiroli of the State of Maharashtra. |

However, the above statement is misleading as, for example, the Additional Bench at Bombay is actually situated at Vashi (New Bombay). There is no efficient and cheap and direct public transport system linking Vashi to the other areas. Therefore, the Supreme Court directed, in the pending petition, that where the Bench is not located at place which is the seat of the High Court, employees can file application in the registry of the High Court. *If application for interim relief is filed,* the member must make himself available within seven days till which time there would be an automatic **status quo** maintained. In any event one of the Members has to make himself available at the seat of the High Court every 10 days, unless there is no application, in which case a Member must make himself available every 14 days.

## Compostion and Qualifications

The Tribunals are to be composed of a Chairman, number of Vice-Chairmen and other Judicial and Administrative Members. (The concept of Judicial and Administrative Members is brought about by the amending Ordinance). A Bench is to consist of one Judicial and one Administrative Member. However, if in the opinion of the Chairman the questions involved are such that it requires consideration by a larger Bench, then he may appoint a Bench of more than two Members. In these cases also there has to be a minimum of one Judicial and one Administrative member.

A person who is or has been a Judge of the High Court or Secretary to the Government of India (or on a post in the Central or any State Government carrying a salary not less than that of the Secretary to the Govemnent of India) is eligible to be appointed as a Chairman or a Vice-Chairman. A person who has held a post for five years of Additional Secretary to the Government of India (or any post in the Central or any State Government carrying a salary not less than that of an Additional

Secretary) is also eligible to be appointed as Vice Chairman. A person who is qualified to be a Judge of the High Court or has been a member of and held a post in Grade I of the Indian Legal Service for three years is eligible to become a Judicial Member. A person who has held the post of Additional Secretary to the Government of India for two years or held the post of Joint Secretary to the Government of India for three years or posts in the Central or State Government carrying the scale of not less than the Additional Secretary or Joint Secretary, as the case may be, is eligible for appointment to the post of Administrative Member.

The Chairman and Vice-Chairman are to hold office for five years until they attain the age of 65 years, while other members may hold office for two years till they attain the age of 62 years.

All appointments to the post of Chairman, Vice Chairman or Judicial Member are to be made only in consultation with the Chief Justice of India. This is also provided for in the amending Ordinance.

On ceasing to hold office the Chairman of the Central Tribunal is ineligible to hold any office in any Government. The Vice Chairman is similarly ineligible to hold any office in any Government except that of Chairman of any Tribunal or Vice Chairman of the Central or any other State Tribunals. A Member is also not eligible to hold office except for the post of Vice Chairman or Chairman of any Tribunal or Member of any other Tribunal.

## Jurisdiction of Tribunals

The Central Tribunal and State Tribunals shall **exercise all the jurisdiction powers and authority exercised by all Courts (except the Supreme Court).** The original Act as it stood before the amending Ordinance also conferred to the Tribunal all the jurisdiction and powers of the Supreme Court except under Article 136.

## *The Challenge to the Act*

Practically immediately after the Administrative Tribunals Act came into force, Petitions were filled in the Supreme Court and the various High Courts challenging the Act.

In the Petition filed in the Supreme Court the Government agreed to amend the Act. Pursuant to that the Ordinance was promulgated. The Ordinance brings about the following main changes.

* Jurisdiction of the Supreme court is retained (earlier only the jurisdiction under the Article 136 was protected). So is the jurisdiction of Industrial & Labour Courts. However the jurisdiction of the High Court under Article 226 still remains excluded.
* Members are of two types, judicial and administrative. Each Bench has to have a minimum one each. The judicial members are to be appointed only with consultation of the Chief Justice of India.

However there are still a number of infirmities in the Act.

Today a public servant aggrieved by any order can approach a High Court under Article 226 and be granted relief. Most States have a Bench of the High Court. The exceptions being the North Eastern States. Some States like M.P. and Maharashtra have more than one Bench. Under the Administrative Tribunals Act two or more states are to have one Bench (e.g. Maharashtra and Gujarat). Some States don't have a Bench at all (e.g. Madhya Pradesh). The result being that a public servant from Saurashtra has to travel all the way to 'Bombay' for any relief. No other recourse is possible.

Moreover in the case of Bombay, the difficulties are compounded by the fact that the Additional Bombay Bench is situated at Vashi (New Bombay). There is no railway station at Vashi. Public servants were constrained to proceed to Vashi via Bombay. Bombay to Vashi and back itself takes a whole day. Access to justice is thus denied. This forms the first ground of challenge in various petitions pending in the Courts.

The other ground of challenge is based on the ouster clause contained in Section 29 of the Act, excluding the jurisdiction of all Courts.

The jurisdiction of the Civil Courts is conferred by Section 9 of the Code of Civil Prodedure except if their cognizance is expressly or impliedly barred. Therefore, another ordinary statute can exclude the jurisdiction of the Court. Section 29 is a wide provision excluding jurisdiction of all Courts including Civil Courts. This would, therefore, bar the jurisdiction of Civil Courts to try service matters or matters concerning recruitment. However, as hardly any matters are filed in Civil Courts, the exclusion of their jurisdiction is not of much practical significance.

Of much importance, however, is the intended exclusion of the High Courts under Article 226.

The jurisdiction of the High Courts under Article 226 is not expressly repealed. This is of some importance as jurisdiction under Artilce 226 is of an extraordinary nature.

Apart from Article 32, Article 226 is the only other provision which provides for **judicial review** of Executive action. The Courts have consistently held that exclusion of their jurisdiction cannot be taken lightly. More so in the case of exclusion of jurisdiction under Article 226.

Ordinarily, a statute excluding the jurisdiction conferred by the Constitution cannot be sustained in Court of Law. However, the Act draws its authority from Article 323A of the Constitution which provides, amongst other things, that Article 323A will have effect notwithstanding anything else contained in the Constitution.

Thus a proper challenge to the Act can only be made if Article 323A is also challenged on the doctrine of ***'basic structure'*** of the Constitution expounded in the *Kesavnanda Bharati'* case. The judges in that case held that Parliament can not amend what was termed as the basic structure or basic features of the Constitution. Judicial Review was stated to be one of the basic features which could not be excluded by an amendment to the Constitution.

The effect of excluding jurisdiction under Article 226 is to substantially curtail the power of judicial review of the Courts.

Most of the Petitions in the High Courts and the Supreme Court are founded on the basic structure doctrine. A Division Bench of Allahabad High Court in *M.B. Shukla versus Union of India* (Civil Miscellaneous Petition No. 10988 of 1983) has held that the Act does not exclude the jurisdiction of the High Court under Article 226.

# LAW AND PRACTICE

### Central Tribunal

The jurisdiction power and authority of Central Tribunals can be exercised in relation to

(a) **recruitment** and matters relating to recruitment to any

* **All India Service**
* any **civil service** of **the Union**
* **civil post under the Union**

post connected with defence (or in the defence service) filled by a **civilian.**

(b) all **service matters** concerning

* a member **of any All India Service**
* **a person** appointed to any Civil Sservice of the Union or civil post under the Union.
* a Civilian **appointed to any defence services or a post connected with defence.**

Such service matters must be **in connection with the affairs** of the

* Union of India
* any State
* any local or other authority in India or under the control of the Government of India.
* any Corporation or Society owned or controlled by the Government of India.

(c) **all service matters** pertaining to **service of a person** in **connection with the affairs of the Union** concerning a person who is in the service of

* any State Government
* any local or other authority
* any Corporation or Society, or
* any body
* and whose **services have been put at the disposal of the Central Government** for appointment to

* a post in the civil service of the Union or civil post under the Union
* a civilian post in the defence services or connected with defence.

### State Tribunals

The State Tribunals shall exercise jurisdiction, power and authority in relation to

(a) **recruitment** and matters relating to recruitment to any **civil post** under the State

(b) **all services matters** concerning a person

* appointed to any **civil service,** or
* appointed to any **civil post** under the State, **pertaining to the service** of such person **in connection with the affairs of**
* the State
* any local or other authority under the control of the State Government
* any Corporation or Society owned or controlled by the State Government.

(c) **all service matters** pertaining to **service of a person in connection with the affairs of the State** who is in service of

* any local or other authority
* any Corporation or Society controlled or owned by the State Government, and **whose services have been put at the disposal of the State Government** for appointment to,
* a post in any civil service or
* any civil post under the State.

It has been made clear that the jurisdiction of the State Tribunal shall not extend in relation to any matters to which Central Tribunal has the jurisdiction.

### Service Matters

Service matters have been defined under the Act as all matters **relating to the conditions of service, in connection with the affairs of**

* the Union
* any State
* local or other authority in India
* or under the Control of the Government
* Corporation or society controlled by the Government in respect of
* **remuneration** (including allowances), pension and other retirement benefits.
* **tenure** including confirmation, seniority, promotion, reversion, premature retirement and superannuation
* **leave** of any kind
* **disciplinary** matters
* any other matter whatsoever

### Authorities, Corporations and Societies

The Act extends the jurisdiction of the Tribunals to

* **local** or any other **authorities** within the territory of India or under the control of the Government.
* **Corporations** or **Societies** owned or controlled by the Government.

However, the application of the provision in this behalf is at the discretion of the Appropriate Government, which may extend the application of the Act through a Notification. Different dates may be specified in the Notification for applying the provision in this behalf to different categories of bodies. However, till date the jurisdiction of the Act has not been extended to any local authority, corporation or society.

On the Notification having being issued, the Tribunals will exercise all jurisdication, powers and authority of all Courts (except the Supreme Court) in relation to

* **recruitment** and matters concerning recruitment to any **service or post,**
* **all service matters** concerning a person appointed to any service or post,

in connection with the affairs of such local **authority** or **corporation** or **society** and pertaining to the service of such person in connection with such affairs.

The Tribunal has the powers of the High Court under the Contempt of Courts Act, in respect of any contempt of itself.

*To be continued.*

**These Grey Pages will be a regular feature of the magazine. They will have different page numbers from the rest of the magazine, enabling the reader to maintain them separately as a ready referencer.**

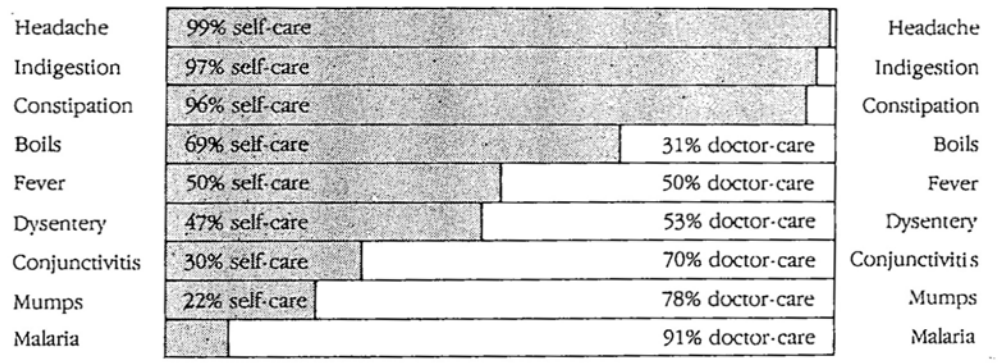
# GOOD HEALTH BEGINS WITH SELF-CARE

**Good health begins when people accept the responsibility for caring for their own health. This means avoiding health hazards, exercising regularly, eating sensibly and . . . . treating minor ailments with self-care medications.**

## 3 OUT OF 4 ILLNESSES ARE MINOR IN NATURE AND CAN BE SELF-TREATED

Self-medication for minor ailments is the first line of defense against ill health. It is, however, not a substitute for professional medical treatment in cases where the illness is serious.

Simple, reliable self-care medicines which people trust are ideally suited for minor, common ailments. In Bombay, a recent study showed that 3 out of 4 illnesses were minor enough to be self-treated. In Ahmedabad, a similar pattern was revealed, as shown in table below




## SELF-CARE IS THE FOUNDATION OF THE NATION'S HEALTH

For the individual, self-care medications provide a simple, convenient and reliable means to relieve the miseries of minor but bothersome illnesses.

For the nation, self-care helps promote a productive society because minor ailments left untreated disrupt daily work with major productivity losses. Also, if every minor ailment is treated by the medical profession, the strain and expenditure on valuable professional health-care resources would escalate enormously.

## GOVERNMENT POLICY CAN HELP MAKE SELF-CARE EFFORTS MORE EFFECTIVE

To achieve the national goal of "Health for All by 2000 A.D.", self-care must become a national habit. To make this a reality, the essential requirement is a constructive Government policy to

- facilitate widespread availability of self-care products in order to place them within easy reach of sufferers by the liberal issue of 20 A licences for the sale of nonprescription drugs.
- help disseminate information to educate the public on the symptoms and treatment of minor illnesses, building up a more self-confident, self-reliant public. The current policy of disallowing 20% of advertising expenditure for income tax seriously impedes this essential communication task.

# SELF-CARE IS ESSENTIAL TO INDIA'S HEALTH

*Issued in the national interest by Richardson Hindustan Limited.*

# ADAALAT ANTICS

## Delayed Corruption Trap

*It is reported that a litigant approached a lawyer complaining of rampant corruption in the Small Causes Court, Bombay. He told the lawyer in question that a Judge had demanded Rs. 50,000/-. The lawyer to whom the complaint was made approached the Acting Chief Justice, and he was informed of the demand of illegal gratification. The Acting Chief Justice suggested that the police should be approached for a trap.*

*The litigant's affidavit was filed and the ACB treated it as an FIR. Thereafter, the lawyer and the litigant are reported to have seen the Acting Chief Justice and two other Judges who enquired of the ACB whether this was a fit case for investigation. On being informed by the ACB that it was, the Acting Chief Justice gave permission to proceed.*

*Needless to say that much time was lost in the process of getting the necessary permission - you can guess how the story ended - the news leaked and instead of the Judge, his peon turned up. The affidavit, and the Report of the ACB are known to be available - One wonders what steps the High Court itself is taking to investigate and enquire and maybe take disciplinary action against the Judge in question.*

## Relative Justice

*Behere, District Judge, Pune, was due to retire on 31-12-1985 at 58 years of age. He is the son of the sister of Justice Tulzapurkar, at whose instance, his term was extended for three months. Strange, that a man who does not have anything outstanding to offer could not be dispensed with when we have so many District Court judges. But this one is special isn't he? The extension then was in the hope that he will be recommended as a High Court Judge. As nothing seems to have worked out, hectic efforts are being made by friends, relatives and well-wishers for a further extension of 3 months. Indeed the power of extension can be used by the Executive to dole out favours.*

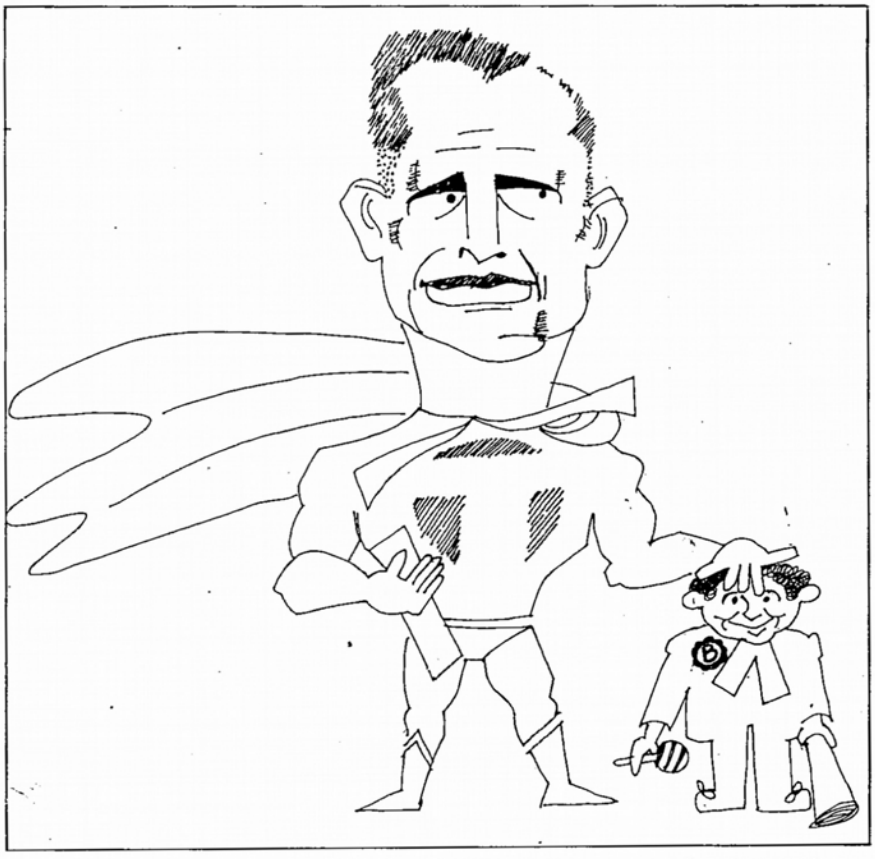
## Unnatural Justice

*But the desire to appoint your relatives as judges is normal you will say. As normal for Doctors to have their sons get first classes. As natural for Chief Ministers to have their sons and daughters follow in the footsteps. Yes, indeed it is! Here is another story of normal behaviour. When Justice Chandurkar was in Bombay (currently Chief Justice High Court Madras) selections were due to be made from Junior Judges to Assistant Judge. Among the contenders was one of Justice Chandurkar's relatives. Justice Chandurkar got himself included in the Selection Committee and selected his own relative. The list was sent to Antulay, who sent it right back to the High Court pointing out that there was no question of accepting a selection made by Justice Chandurkar who had a vested interest in the appointment.*

*A loss of face to the High Court, one would say, for judges who everyday sing the song of "natural justice." Justice Tulzapurkar however, thought differently. Referring to a House of Lord's judgement he argued that selections need not be set aside if the interested member did not actively participate in the selection process. He said that the list could be sent back to Antulay for acceptance.*

*Chief Justice Kantawalla, who has already been taken for a good ride not knowing the relationship between Justice Chandurkar and his relative then, refused to oblige. He must have known who participated in the selection and who did not.*

*Incidentically, one wonders, could this be one of the reasons for not appointing Justice Chandurkar to the Supreme Court-his past record?*



## Hot Air

*As we said earlier Justice Tulzapurkar never stops crusading for the Independence of the Judiciary. The latest of his achievements is his rightful tirade against Chief Justice Bhagwati for refusing to protest against tirade of Z. A. Ansari against the Supreme Court. How deeply, his honour as a Supreme Court Judge must have been hurt and how mean of the Chief Justice of India to refuse to protect that great institution and his brother judges, one might say.*

*His repeated protests fell on deaf ears. We are told that, "he (Justice Tulzarpur) has protested against such speeches and thrice requested the Chief Justice to convey the Supreme Court's criticism to the Prime Minister, but to no avail" (Daily 24.3.1986). But now as a free man, as a citizen and as an outsider, Justice Tulza-*

# ADAALAT ANTICS

*purkar can himself go around across the length and breadth of the country addressing his fans about how awful it is that Chief Justice Bhagwati did nothing to protect the honour of the Court, something that he could not do as an insider.*

*But would it not have been the easiest thing in the world to check up from the Chief Justice whether he did protest? According to available reports from the Prime Minister's office, the Chief Justice did in fact protest.*

*Sorry Tulzapurkar, Bhagwati baiting, your favourite sport has misfired yet again. So why not stop it and look around for better sales talk. But then spreading disinformation* is very fashionable these days.

Incidentially, have you noticed that, every time Ashok Desai cites a judgement written by Justice Tulzapurkar, he prefaces his remarks with "that great judge". One wonders why. Any good guesses? And we hope that Ashok Desai and Ashok Sen have nothing more in common besides their first name.

## *Judges Co-op.*

*Will wonders never cease? Among his several other qualities, Tulzapurkar has the capacity to change, adapt and keep pace with the times. Remember how vociferously he condemned the Judges of the Bombay High Court for thanking Antulay for the Judges Co-op Housing Society? Independence of the Judiciary was threatened, he said. Well post-retirement and pre-retiremment definitions do change! A man after all, matures with age. Believe it or not, but reports have it that he has honoured the Judges Co-op by becoming a member. With his entry, the society's rolls will read like a Judicial who's who. Residing under one roof and busy working overtime for Independence of the Judiciary, we all look forward to being delivered from our bondage, but forgive us for not knowing bondage from whom?*


## *What's all the fuss about.?*

| Name | Date of Appointment in Supreme Court | Seniority in High Court |
|---|---|---|
| *Justice Vaidyalingam* | *10.10.66* | *Kerala (3)* |
| *Justice Hegde* | *17.07.67* | *Karnataka (4)* |
| *Justice A. N. Grover* | *12.02.68* | *Punjab (2)* |
| *Justice A.N. Ray* | *01.08.69* | *Calcutta (2)* |
| *Justice Palekar* | *19.07.71* | *Bombay (6)* |
| *Justice K.K. Mathew* | *04.10.71* | *Kerala (4)* |
| *Justice A.K. Mukerjee* | *14.08.72* | *Calcutta (4)* |
| *Justice Y.V. Chandrachud* | *20.08.72 (Superseded Justice Bhagwati)* | *Bombay(3)* |
| *Justice Algriaswamy* | *17.10.72* | *Madras (6)* |
| *Justice Krishna Iyer* | *17.07.73* | *Kerala (6)* |
| *Justice Tulzapurkar* | *30.09.77* | *Bombay (2)* |
| *Justice D.A. Desai* | *30.09.77* | *Gujarat (4)* |
| *Justice A. Vardarjan* | *10.12.80* | *Madras (6)* |

*And with all this talk about wanting the recommendations of the Chief Justice of India to be final, why this appeal to the Executive (Governor) to upturn the recommendations of the Chief Justice?*
*Long live Independence of the Judiciary!*

## And More About Gentlemen Squatters

*In 1968, M.C. Setalvad wrote to the Chief Justice that as he was living in Delhi since 1950, he was using the Chambers only when he visited Bombay, during the period G.N. Joshi was using the Chambers. With the approval of G.N. Joshi, Mr. M.C. Setalvad permited R.F. Joshi and A.M. Setalvad to occupy the chambers. A request was, therefore, made that the Chambers should be transferred to the joint names of A.M. Setalvad and G.N. Joshi. This was followed by a letter from Mr. A.M. Setalvad in 1970 that his name be added as an allottee.*

*It is reported that in 1970 several lawyers wrote to the Chief Justice demanding to know on what basis allotments of Chambers were being made to certain individual laywers, why were they being treated as family entitlements, why name boards were being put up to create entitlements, why names were being added and deleted without proper notice being issued.*

*The Lawyers protested that there was no criteria for allotment known or made public and said that the allotments seemed unfair. They demanded an investigation. The questions are as valid today as they were in 1970, or perhaps more so with increasing High Court work and shrinking space. Obviously, they remain unanswered as the continued existence of squatters indicates.*

*Devil's Advocate*

## WARRANTS ATTENTION

# Towards a Uniform Civil Code

*For some time now, there has been a seething undercurrent of discontent amongst Christian women against their highly discriminatory and antiquated laws. Recently a number of Christian Women all over the country with support from their clergy have demanded changes in their laws relating to marriage, divorce, succession, custody and maintenance. More significant has been the meetings organised by the Joint Womens' Programme on 'Changes in Christian Personal laws' at Delhi. The Joint Womens' Programme along with a representative section of Christian women from all over the country have submitted a memorandum of appeal to Prime Minister, Rajiv Gandhi. The memorandum contains suggestions and recommendations regarding changes that require to be brought about in the Christian Personal Law so as to make it more egalitarian and responsive to the changing times.The appeal has been signed by Christian women and men of various church denominations from different parts of the country. The suggestions are a significant contribution to the debate for more equalitarian laws relating to succession and family.* ***Gayatri Singh*** *reports on the suggestions.*

The Indian Christian Marriage Act, 1872 and the Indian Divorce Act, 1869, deal with the law relating to marriage and divorce amongst Christians. Both these Acts were enacted by the British in the nineteenth Century but have remained stagnant compared to other matrimonial laws. As far back as in 1962, a Bill to amend and codify this law, entitled 'The Chirstian Marriage and Matrimonial Causes Bill', was pending before the Parliament. However, the Bill lapsed when Parliament was dissolved and was never reintroduced.

As far as marriage and divorce is concerned, two different laws are applicable to the Christian community viz. codified law and canon law. Canon Law recognises different customs of marriage ceremonies. However, under the Indian Christian Marriage Act, marriage of a Christian can be solemnised by a Minister belonging to any Church or by the Marriage Registrar appointed under the Act. Thus the Act (Sections 4 & 5) recognises marriages solemnised under different churches e.g. Church of England, Church of Scotland, the Roman Catholic Church. The Act, therefore, recognises different forms of marriages performed by sects belonging to different Churches. Because of this lack of uniform marriage laws relating to Christians, the Joint Womens' Programme has demanded that there should be a uniform marriage law which should govern all Christians irrespective of the different sects to which they belong. They have also demanded that the Act should deal with the Christians as one community.

The Indian Christian Marriage Act similarly does not provide for a common procedure for registration of marriages. There are different forms of registration depending on whether the mariages are solemnized by clergymen of the Church of England (Sec. 28) or of Rome (Sec. 30) or of Scotland (Sec. 31). They therefore demand a common procedure for registration of marriages regardless of the sect to which they belong.

Another recommendation made by the Joint Womens' Programme is that "No Church should perform a marriage where dowry has been given or accepted". Though the Acts do not sanction the giving and taking of dowry, it is common knowledge that dowry is in fact given. The recommendation is intended to put an end to this socially reprehensible practice.

### Indian Divorce Act, 1869

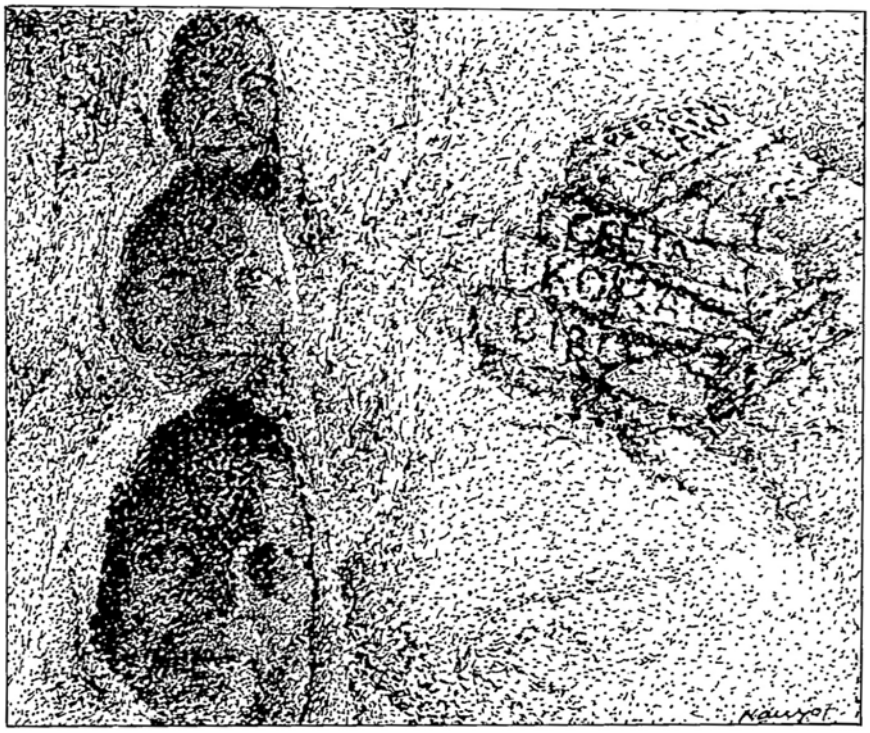
Section 10 of the Act lays down the grounds under which the husband and the wife may petition for dissolution of their marriage. The husband may petition for dissolution on the grounds of adultery of his wife. The woman, however, may petition for divorce on the ground either of cruelty coupled with adultery, desertion coupled with adultery, incestuous adultery, bigamy with adultery, or that her husband has been guilty of rape, sodomy or bestiality. The grounds for divorce available to a woman are extremely limited as compared with those available to women of other religions. In addition, they are discriminatory as compared with those available to Christian men. Whereas the husband can petition for divorce on the ground of adultery alone, a woman has to prove cruelty or desertion coupled with adultery. A woman is often, therefore, compelled to keep her marriage alive in form alone and rest content with petitioning for judicial separation.

The Joint Womens' Programme has demanded that the grounds for divorce should be made more liberal and that Section 10 be amended to make the grounds for divorce common for both men and women. They recommend that the Act should be amended to include **divorce by mutual consent.** Harassment for dowry, they believe, should be treated as a specific ground for divorce.

### Confirmation of decree

Section 17 states that a decree for dissolution of mariage passed by the District Court shall be subject to confirmation by the High Court. What this means is that even if a marriage is dissolved by the District Court, it will not be final until it is confirmed by the High Court. The decree can be confirmed by the High Court only after six months. The Joint Womens' Programme has demanded that Section 17 should be amended to abolish the need for confirmation by the High Court, making the decree of the District

# WARRANTS ATTENTION



Court final and conclusive. This would avoid the delay which would otherwise be caused if the parties are to wait for the confirmation by the High Court for six months.

## Damages

The husband can claim damages in a Petition for dissolution of marriage or for judicial separation, from any person on the ground of his having committed adultery with his wife. (Sec. 34). The Joint Womens' Programme recommends that the wife should also be allowed to claim damages from the husband, when he is found guilty of adultery.

## Alimony

The maximum alimony that can be ordered to the wife under Section 36 is one fifth of the husband's average net income from the three years immediately preceding the date of the order. The Joint Womens' Programme has suggested that the provisions for permanent and interim maintenance in matrimonial proceedings should be rationalised, without placing a limit on the amount.

## Indian Succession Act, 1925

Indian Christains are governed by the Indian Succession Act in respect of testamentory and intestate succession.

### Widow's Rights

When a person dies leaving a widow and lineal descendents e.g. his children, one third of his property goes to his widow and the remaining two-thirds goes to his descendents (Sec. 33). When a man dies leaving a widow and no children, one half of his property goes to the widow and the other half to those who are of kindred to him.

The Joint Womens' Programme has recommended that in such a case, the widow should inherit the entire property. At present, a husband can disinherit his widow by writing a will, except that a minimum of Rs. 5000/- has to be provided for the wife (Sec. 33A). The Joint Womens' Programme suggests that the sum of Rs. 5000/- should be suitably increased.

A widow will not be entitled to her husband's property if a valid contract has been made before her marriage exluding her from her share of her husband's estate (Sec. 32 Explanation). The Joint Womens' Programme considers this unfair and recommends that such contracts excluding widows from inheritance should be derecognised and under no circumstances should the widow be excluded from inheriting.

### Minor's Property

Section 22 provides for the settlement of minor's property, in trust, in contemplation of marriage. However, the settlement can be made only with the approval of the minor's father, or if the father is dead or absent from India, with the approval of High Court. Under this section the mother has no say as to how and in what manner the minor's property ought to be settled. The Joint Womens' Programme recommends that the mother should also have an equal right to approve the minor's pre-marital settlement.

## Illegitmate children

Illegitmate children have no rights to their father's property. The Joint Womens' Programme recommends that illegitimate children should have the same rights as legitimate children. It may be noted that by an amendment in the Hindu Marriages Act made in 1976, illegitimate children have been conferred equal rights.

### Rights of the mother

If the father of the deceased is alive, he succeeds to the property to the exclusion of the mother. The suggestion made is that the mother must have equal rights with the father in the property of her deceased child.

### Right to appoint guardian

The father has been entrusted with the power to appoint a testamentary guardian of his minor child (Sec. 60). The mother has no such power. The Joint Womens' Programme suggests that if the father is of unsound mind, the mother should have the right to appoint a testamentary guardian.

### Right to adopt

As regards adoption, the Joint Womens' Programme has suggested that Christian women and men should have the right to adopt children of either sex. Adoption should be capable of being made without the permission of the court.

The ultimate object of these suggestions is to provide for an evolution of a common law for Christians in matters relating to family law and succession.

**Editor:** *The views expressed in this article do not necessarily reflect the views of the author or the Editor.*

## SHOW CASE

# Abetment to Suicide

*Demands for dowry followed by harrassment of the newly married bride have led to several deaths of women in the age group of 20-25 years. The deaths have most often been due to burning. Often, it is difficult to tell whether the bride's relatives burnt her to death or whether it was a case of suicide. In this article* ***Deepti Gopinath*** *analyses a recent case in which the Sessions Court convicted the dead woman's relatives under Section 306 for* ***abetment to Suicide.*** *The judgment is important as it demonstrates the necessity of bringing charges of abetment to suicide where there is a known history of harrassment, so that the culprit does not get off scot free.*

***Deepti Gopinath***

In 1976 Ushabai the daughter of Jagannath and Rampyari was married to Basant Kumar of Rehanti, District Sihore of M.P. One boy child was born to them from this marriage. Basant Kumar's grandmother, Ladkibai, and his sister Meena Kumari also stayed with them.

### The Crime

On 7 October, 1980, 15 days after she was last returned to her husband's home, Usha was burnt. The house being only a few paces away from the Police Station, her cries were heard at the Station. Policemen Om Prakash Gupta and Saeed Khan rushed to the house. There they found Ushabai's body in flames and Ladkibai and Meenakumari just standing by and watching her burn. Horrified, Saeed Khan asked for a cloth to put out the fire, but the two women actually refused to give him one.

Finally the fire was put out, and after Basant Kumar arrived home, he wrote a note to his father-in-law, Jagannath, informing him that his daughter had been burnt. Then, together with a local 'leader', Dr. Ramesh Yadav, he took Ushabai to Bhopal, apparently for treatment. He neither made a police complaint though the police station was practically next door nor took Usha for first-aid to the local Rehanti Government Hospital.

Bhopal is a two hour journey from Rehanti. Usha was taken to Hamidia Hospital. Within minutes of her arriving, Usha died. No Dying Declaration was taken from her. Her post-mortem was conducted by Dr. K.C. Dube and her death was reported to be caused by "failure of the respiratory system caused by burning before death". Fortunately this report was placed before Dr. Hiresh Chandra, Professor of Forensic Medicine at the Gandhi Medical College of Bhopal. In his report, Dr. Hiresh Chandra stated that the death was not accidental (as it had been made out to be) and that the circumstance of the incident and other evidence should be investigated.

On 28 January, 1981 an F.I.R. was filed by B.S. Dube of the C.I.D. Branch of Bhopal and after investigation a charge-sheet under Section 306 I.P.C. was filed against Basant Kumar, Ladkibai and Meena Kumari, before the Subordinate Magistrate's Court and the case was committed for trial to the Sessions Court.

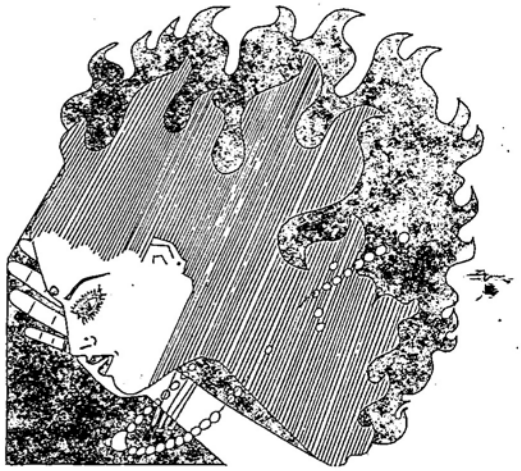
### Evidence of the Family

Rampyari was the mother of Usha. She stated in her evidence that Basant Kumar was not happy with the dowry given to him and hardly visited his in-laws. This fact was not even challenged by the defence and was therefore accepted by the Court. Rampyari also stood testimony to Usha's harrassment and torture by her husband and in-laws. She admitted that Usha has often cried to her about it and had shown her burn marks on her body, just few days before the incident.

Jagannath, Usha's father has stated that 15 day prior to the incident when Mahesh Kumar (the brother of Basant Kumar) had come to take Usha back to her in-laws house Jagannath had told him about the b ns on his daughter's body, and that he planned to go to her in-laws and speak to them. At this Mahesh had invited him to his home.

Yet, the fact remains that even though Usha's parents knew of her suffering at the hands of her husband and in-laws they always sent her back to them.

Kalabai was Usha's sister. After the incident of Usha's burning Kalabai had gone to Usha's husband house, and was told that Usha had poured 3 litres of kerosene on herself and set fire to herself.



Kalabai had also stated in her evidence that on the day of the incident when she had gone to Usha's house, the members of the family had tried to prevent her from speaking to the neighbours and had wanted her to go away as soon as possible. Besides she had also overheard Anokilal, the brother-in law of Basant Kumar, tell Meena Kumari and Ladikibai to "keep quiet, as he had suppressed the matter with great difficulty".

### Evidence of Police Officers

Sayeed Khan the Police Constable had stated that he had known Basant

Kumar to often quarrel with his wife.

Policeman Om Prakash Gupta stated that on the morning of the incident he had seen Basant Kumar assault Ushabai. This was confirmed by Sayeed Khan who said that he had heard Meena Kumari and Ladkibai tell Usha that if she was of a respectable home she would give her life by burning herself.

## Regretable role of the Police

Along the way some very incriminating facts regarding the role of the Police came to light. They were considered serious enough for the Judge to specially mention it and send a copy of the judgement to the Director General of Police of the State of M.P. for further action.

Uday Veer Singh was the Head Constable at the Rehanti Police Station. When the incident happened, though he went to the house on hearing Usha's cries, he stood at a distance of 15 to 20 paces doing nothing to help in putting out the fire.

In his **Case Diary** he had stated that prior to the incident the accused Basant Kumar used to harass and assault Usha. He had even stated in this report that on that very day, before the incident, Basant Kumar had assaulted Usha. But surprisingly before the Court he categorically refuted having written that statement, when it was read out to him.

Uday Veer Singh had also witnessed the actual scene and saw the women of the house stand by and watch Usha burn and even refuse to give policeman Sayeed Khan a cloth to put out the fire. He had also stated that Usha's entire body was smelling of kerosene. Inspite of knowing and witnessing all this, he did not care to register an offence and commence investigation. On the contrary when the report was lodged by a person called Bhagirath, he made a note at the bottom of this report which was written in the **Station Diary** "from the report, the incident is of burning due to sudden fire". It was evident that he made this remark with the intention to cover up the incident.

## Defence Version - Role of the Doctors

Defence witness Dr. Ramesh Yadhav who accompanied Ushabai to Bhopal had stated that it took about two hours to reach Bhopal. Ushabai was not given first-aid at Rehanti Government Hospital where her Dying Declaration might have been recorded and no where in his testmony did Dr. Yadhav say that he made any attempt to talk to Usha or that she tried to tell him anything. Evidently she must have been unconscious and therefore the question of making inquiries did not arise. The question naturally arose, if Usha had been burnt as a result of a genuine accident, why did none of the accused make a report at the Police Station at Rehanti which was, but a few paces from the scene of the accident. Dr. Yadav also stated that Usha was alive for half an hour after admission but according to the evidence and case history made by Dr. A.K. Dube at Hamidia Hospital, Usha died within 5-10 minutes of admission to the Hospital.

### Section 306 I.P.C. Abetment to Suicide

**If any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.**

Dr. A.K. Dube had admitted that when Usha was brought to the Hamidia Hospital she was unable to speak due to shock and therefore the entries made by him regarding the cause of her death (i.e. burnt by a stove) are based on what he was told by Ramesh Yadav and Basant Kumar. The Judge held the entries to be of no help to the accused.

Besides this, the time of admission to the hospital was given as 3.44 p.m. by Dr. Dube, whereas the telephone operator had made an entry that at 3.40 p.m. he had intimated the Tallaya Police Station regarding the death of Usha. It was impossible that at 3.44 p.m. Usha gave reasons for receiving burn injuries to Dr. Dube and so the entries regarding the cause of Usha's death seemed to be fictitious.

**The statement of the accused that Usha died as a result of an accident with a stove was found to be false**

The Judge agreed with the opinion of Dr. Hiresh Chandra and said that if Usha caught fire due to the explosion of the stove, kerosene could have sprinkled on some parts of her body but not on her entire body. And even if she caught fire by the flames from the stove it was not possible that her entire body should smell of kerosene. Therefore Usha could not have been burnt because of the stove (the stove itself had not been produced as evidence) and circumstances gave rise to a suspicion that either she herself or some one else poured kerosene on her and set her ablaze.

On reading all the above circumstance it was proved beyond doubt that the accused had both directly and indirectly **abetted Usha to commit suicide.**

The defence argued that merely because the accused were present at the incident and did not put out the fire did not imply that they had induced and abetted Usha's suicide.

The Judge however held **that the accused had created such circumstances that Usha was left with no other alternative but to commit suicide.**

## The Punishment

Considering the cruel behaviour of the accused during the burning, bordering almost on the barbaric, the Judge did not consider that any sympathy needed to be shown in sentencing them. In fact, he himself has stated that in most of these cases, to begin with, the offences are suppressed, and even when they are taken to court it is with great difficulty that they are proved.

For the offence punishable u/s 306 IPC the maximum punishment prescribed is 10 years. Consequently Basant Kumar and Meena Kumari were convicted under this Section and sentenced to rigorous imprisonment for 10 years each. On account of Ladkibai's age she was given the concession of being sentenced to 10 years of simple imprisonment.

## COMMENT

# Professionals in Domestic Inquiries

*The field of industrial relations is being overtaken by gate-crashing professional Inquiry Officers, qualified, unqualified and disqualified. The question whether an inquiry held by an advocate or a practising lawyer or a person who makes holding inquiries a profession is an inquiry held by an outsider in relation to an Industrial Undertaking and, therefore, not a Domestic Inquiry, assumes importance now. In this article* ***P. D. Kamerkar*** *analyses the function of a Domestic Inquiry and argues that the outside Inquiry Officer is a bull in a China Shop and the legality of such inquiry is highly suspect.*

***P. D. Kamerkar***

The growth of the Trade Union movement and its increasing militancy exposes their leaders to victimisation. In most cases where active Trade Unionists happen to be involved in disciplinary proceedings there is an apprehension of victimisation in the sense that the employer may be more concerned with eliminating the nuisance of an objector than with truth. The Standing Orders of most industrial undertakings provide that no action will be taken against an employee unless he has been given a charge-sheet specifying the particulars constituting the charges then and unless an Inquiry (a Domestic Inquiry) has been held. Termination without holding an inquiry is referred to as termination or discharge simplicitor.

### Domestic Inquiry

A Domestic Inquiry is an inquiry made by an employer to ascertain the truth of allegations against an employee. It is thus an agency for ascertaining facts and materials for basing conclusions as to an alleged misconduct. Its other object is to confront an employee with the facts appearing against him - facts which may ultimately constitute grounds for a penalty. It is thus an opportunity given to an employee for offering his explanation or defence. It is the latter part of its object which has gained greater importance viz. offering opportunity to an employee to defend himself against charges to show cause against penalty.

In *L. Micheal V/s Johnson Pumps Ltd.* (AIR 75 SC 661) the Supreme Court said "The Tribunal has the power and indeed the duty to x-ray the order and discover its true nature, if the object and effect of the attendant circumstances and the ulterior purpose is to dismiss the employee because he is an evil to be eliminated...But if the management, to cover up its inability to establish by an inquiry, illegitimately but ingeniously passes an innocent-looking order of termination simplicitor, such action is bad and is liable to set aside."

Item 5(f) of Schedule V of the Industrial Disputes Act, introduced in 1982, prohibits the following Unfair Labour Practice:-

> "5(f):- To discharge or dismiss workmen in utter disregard of principles of natural justice in the conduct of domestic inquiry or with undue haste."

If a Domestic Inquiry is not held, the discharge or dismissal must be deemed to be in undue haste.

### Domestic Inquiry Not a Court

The finding of the Domestic Inquiry enjoys a privileged position. It is not a Court of Record and the Industrial Adjudicator must not sit in appeal as a Court of fact. The Adjudicator cannot alter its findings unless they are perverse, (i.e. not supported by legal evidence)

The standard of proof in a Domestic Inquiry is not the same as in a criminal trial viz. beyond all reasonable doubt. The provisions of the Evidence Act do not apply. Uncorroborated evidence of an accomplice may be accepted. The Inquiry Officer may accept circumstancial evidence even if it does not exclude the possibilities of the innocence of the charge-sheeted person. The Inquiry Officer cannot administer oath. He cannot compel appearance of witnesses. Nor can he force a witness to answer a specific testimony. He has the liberty to accept transparently false testimony.

The reason being tht the Domestic Inquiry is not a 'proceeding' in law. It is a 'proceeding' held by an employer to satisfy himself whether a worker has in fact committed a misconduct of which he is charged and to give an opportunity to him to offer his explanation.

A Domestic Inquiry must reduce formalities and must not imitate a trial in a Court of Law, where a *lis* between parties has to be adjudicated by a third party who is independent. An Inquiry Officer is not such a third party, he is not adjudicating any *lis* between parties. Finding facts is his mission. The basic approach has to be a search for truth. An industrial establishment is regarded as one 'family' and that is the one single reason why the findings of a Domestic Inquiry are regarded inviolate except for gross and extreme circumstances.

**It is assumed that a Domestic Inquiry is held by a layman not trained in law.** He need not be entirely independent. Nor is it necessary that person who has some personal knowledge of the facts at issue is disqualified to hold a Domestic Inquiry.

### Departmental Inquiry

A Domestic Inquiry must be distinguished from a Departmental Inquiry. The latter is held under various

rules and regulations and to give effect to the protection provided by Article 311 of the Constitution of India. Departmental Inquiries are hemmed in by several rules and regulations. They are subject to appeal before high authorities. It is, therefore, not open for a Competent Authority to arrive at an arbitrary finding. No Officer who may have any interest in the subject matter of the inquiry or has bias in favour or against a party can hold a Departmental Inquiry. Whether this actually happens or not, this is what the law presupposes.

## Labour Advisors and Lawyers

Before the amendment of the Industrial Disputes Act in 1982, the legality of an inquiry held by a Labour Advisor came up for decision. In *Saran Motor V/s Vishwanath* (1964 II LLJ 139), the Supreme Court held that a Labour Advisor of a Company could not be more biased than other Officers. Therefore, an inquiry by a Labour Officer was held to be fair. This assumed that the Labour Advisor was attached to the Company and was its Officer. It was only a question of preference between various types of Officers. In *Dalmia Dadri Cement v/s Murarilal* (AIR 1971 SC 22) where the Manager was going to be examined as a witness in an inquiry into the unruly conduct of workmen towards the managerial staff of the Company, the inquiry


was assigned to an advocate. The question was whether under these circumstances, the inquiry was fair. The Supreme Court held it was fair.

The acceptance of these exceptions by the Supreme Court in these circumstances confirms the general proposition that an inquiry held by an outsider is not a Dosmetic Inquiry. However, these decisions are now being regarded as authorities to canvass the legality and propriety of lawyers acting as Inquiry Officers in Domestic Inquiries.

Taking these decisions as starting points some Courts, particularly Tribunals and Labour Courts, have gone all the way in attributing independence to advocates. Nothing could be further from the truth. No advocates can even be guilty of independence. Since the legal profession provides the judicial cadre, judges have given currency to the notion that it is a liberal profession. And some have outdone others by calling it a noble profession. One has only to look at oneself and around to realise how fallacious this impression is. A prostitute hires her body, no her soul. In contrast an advocates hire his intel lect, buries his conscience and then brazenly puts on the looks of respectability. For any one who sees liberality and nobility under a black coat and white bands, one can only recite what the Aadi Shankaracharya said, "PASHYAN AIP NA CHA PASHYASI OODH UDAR NIMITTAM BAHAKRUTA VESHAH". (Fool, can't you see what you see? All this is but the dressing up for earning the day's bread).

The rules of professional conduct prescribed by the Bar Councils prohibit advocates from engaging themselves in such activities for remuneration. But more dangerous than advocates are those whose sole qualification is their disqualification to practise law. Imagine the impossible eventuality of a professional Inquiry Officer arriving at the finding that an employer's allegations against his employee are not only false but actuated by the ulterior motive of victimising a Trade Unionist. Will he get another assignment from any one? It is the employer who will call the tune. The professional must guarantee results, or else ?!

## HAAZIR HAI

# Lord Tony Gifford

*Lord Tony Gifford, 45, graduated from Cambridge University in 1961. He was called to the English Bar in 1966 after having spent a few years abroad. In 1982, he was appointed Queen's Counsel. Together with several other barristers, men and women, he has set up a Collective outside the traditional structure of the Inns of Court. Members of the Collective, known as the Wellington Street Chambers, are radically different from other barristers in the mainstream of the legal profession in their perceptions of law and their own role in performing legal services.*

*As this interview shows, they have made an important structural breakthrough in the organization of the profession and broken out of the stuffy atmosphere, physically and mentally, of the 'Inns of Court'. Integrated with the profession and yet apart from its oppresive weight, they are a group of people who love their work and see no duality in their role as lawyers and conscious human beings. One thing in the Court, another outside, the codified 'ethics' of the legal profession is something they reject. Their contribution to legal services in the UK is historic and has already set a new trend influencing other barristers to break out of the traditions of 'common law' and start a movement for legal services relevant to the needs of the people. We interviewed Tony Gifford on the background to these developments.*

**Q.** *Could you tell us something about your social background?*

**A.** Although in conventional terms I have received a 'good' education - public school, law degree from Cambridge, I felt it to be narrow and limited. Socially I was ignorant of all but a privileged sector of British life. Educationally, my legal studies had been largely the learning of rules and precedents without any social context or even any theory of what law should be about. And there is the chauvinism in the English educational system which I began to sense when luckily I went on a comparative law summer school in Europe.

At the time, all I realised was that I wanted to escape. I worked in France for two years and came back looking much more objectively at Britain. I rapidly moved from conservative, to independent, to labour, and I have been a socialist ever since.

I went to live in North Kensington in the late sixties, the area of slum landlords and race riots. It appalled me that there was not a single lawyer in the area willing to tackle the injustices suffered by local people. Although in theory everyone without private means was entitled to receive legal aid, in practice private clients were more profitable than legally aided clients. So with a few other concerned people I set about raising funds for what became the North Kensington Neighbourhood Law Centre - the first of its kind in Britain.

**Q.** *What were the aims and objects of the Law Centre?*

**A.** The philosophy of the Law Centre was that the priorities for work were decided according to the needs of the people, not according to the profitability of the case. The Centre opened its doors in the evenings and at weekends. It was in the local high street where people could easily come. It had an emergency service at night. The local police station was amazed to find that young blacks who they were accustomed to pick up and frame up in late night arrests were asking for *their solicitor*. Landlords who evicted their tenants in the morning were faced with court orders obtained within hours requiring them to reinstate the tenant. The local Council which couldn't be bothered to repair its dilapidated estates found itself summoned under the public health legislation. It was only a small beginning, but at least it meant that law had become a possible tool for working-class people, not a remote and oppressive force.

**Q.** *How has the Law Centres movement grown in England?*

**A.** There are now fifty five Law Centres. Their value is universally acknowledged. At the moment like many other services they are being starved of funds by the Tory government. But they will survive. Eventually there should be a network of publicly-funded Law Centres in every town in Britain.

**Q.** *How did you set yourself up in practice as a Barrister?*

**A.** The English Bar seemed to be so steeped in tradition that no reform was possible. Every barrister had to work from a 'set of Chambers' in the 'Inns of Court'; the only way to get a precious place in a set of Chambers was to know the right people, and even then you had to work as an unpaid pupil-barrister for the first two years or more. It was a system which overwhelmingly favoured the sons of the rich - not even the daughters of the rich, for most Chambers were reluctant to admit more that one or two women.

In 1974, with a few progressive pupil-

# HAAZIR HAI

barristers, I broke away from the straitjacket of the Chambers systems. Six of us moved out of the Inns of Court and set up practice as a fee-sharing collective, first in Lambeth and later in Convent Garden at Wellington Street. Over the years we have grown and we are now 21 barristers, 12 women and 9 men.

**Q.** *In what way does your collective differ from other Barristers' Chambers?*

**A.** We are radically different from the conventional sets of Chambers, both in structure and in the objectives of our work. We are a co-operative in which all the barristers and clerks are members. All the fees are paid into one account and re-distributed as a monthly salary, increasing with every few years of experience. Pupils are paid a proper salary from the first day of their training, so that young people who would never have been able to afford a career at the Bar have been able to become first-class barristers. Members of the co-operative are paid during periods of sickness. Women are entitled to six months' paid absence for maternity, and men one month of paternity. There is a security which is completely absent from the usual barrister's practice.

**Q.** *Can you tell us something about your perceptions of law?*

**A.** The work which we do is a reflection of the shared socialist beliefs of the members of the co-operative. Many lawyers treat law as a set of skills and mysteries which they can impart like a commodity to the highest bidder on the market. They gravitate towards the big corporations and institutions which can afford to pay the highest fees. To them law is not about justice but about profit.

I believe that the practice of law would be immoral if it was not concerned with the pursuit of justice. The existing legal system in our unequal society has little justice in it. The 'common law' has been fashioned in English Courts for centuries in the interests of the propertied class. Even when rights are given to poor people by Parliament, the judges find ways of construing the law to prevent those rights being enforced. A striking example occurred recently concerning the homelessness law, passed in 1977 to ensure that no family with children was homeless. The House of Lords declared that this did not entitle anyone to a habitable home - so that a family of four could be accomodated in a tiny single room in a boarding house.

**Q.** *How does your collective visualise its role in the legal profession?*

**A.** We see our responsibility as putting our skills at the service of those who, in this unjust society, have the greatest need of them. We defend those who are under attack from the state. We take offensive action to assert the rights of the powerless. Outside our work in court, we are involved with political and community organisations, trying to explain and demystify the law. Specifically we act frequently for the victims of racism and sexism; for the low paid, the homeless, the unemployed; for prisoners, mental patients, immigrants - nearly always for people who traditionally have received little or no priority from the legal profession.

**Q.** *Can you tell us about a few notable cases dealt with by your collective?*

**A.** We responded collectively to the need to defend the miners during the 1984-5 strike. The forces of law and order grossly abused their power throughout the strike; massive road-locks thoughtout the mining areas; mass arrests on the picket line; blanket restrictions imposed by the Magistrates' Courts upon the movements of miners who appeared before them, and heavy charges of riot, carrying possible sentences of life imprisonment, were brought against hundred of miners. In the early stages it was very difficult to obtain any justice at all, so we used the weapon of publicity, trying to expose the injustice of the police and courts. When the riot charges came to be heard, we were involved as a team in one of the key cases which resulted in complete acquittals from the jury, and to the dropping of hundreds of charges against others.

In other fields it is not so much the single dramatic case which is important, but the building up over years of an expertise from which many can benefit. It is not enough to be politically committed and sympathetic to the client; it is necessary to be better at the job than the ordinary lawyers. In the areas of housing, child care, low paid workers, and the rights of protesters, we have achieved respect from judges who may hate our political motivation.

We have recently done cases for progressive institutions, for instance the Greater London Council, now abolished by Mrs. Thatcher, used us to defend the legality of its radical programmes for which conventional local government lawyers had no sympathy. And at the moment I am involved in an important task, to chair the inquiry into the Tottenham riots of October 1985. The inquiry was set up by the local municipal government after the Home Secretary refused a governmental inquiry.

In this way we are getting some experience of the use of power - but power used only in the interests of ordinary people.

**Q.** *You are a member of the House of Lords. Some see this as a contradiction to you work beliefs. How do you view it?*

**A.** I am a member of the House of Lords because my father was. It still maintains the hereditary principle. I believe that the House of Lords should be abolished; but while it still exists, I am prepared to use it as a platform for progressive ideas.

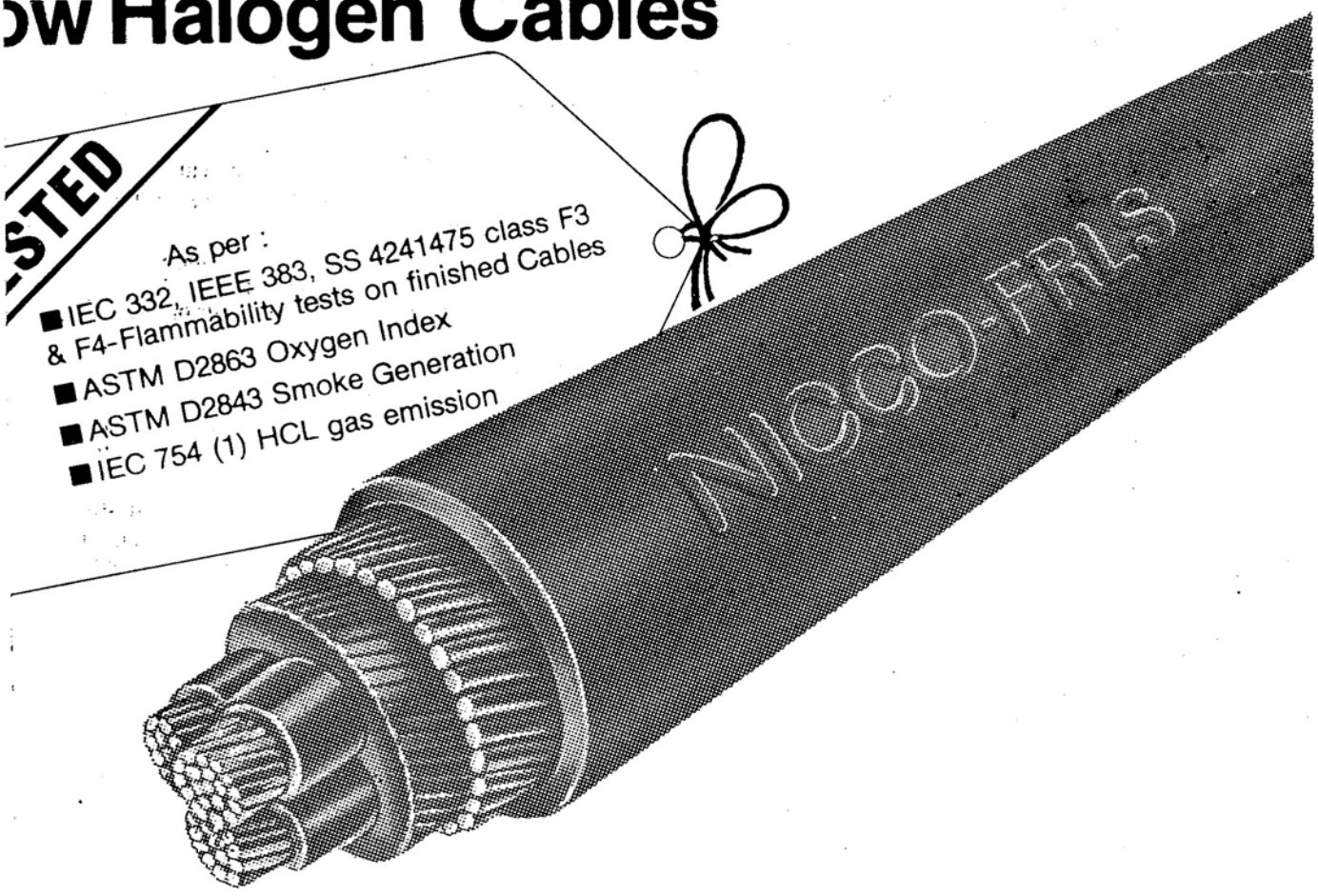
**Q.** *What are the reactions of the established legal profession to your collective?*

**A.** The established legal profession is in a dilemma in dealing with us. They think that we are dangerous because we question the traditional ideas of legal practice. But what we are doing is so sensible, and so badly needed that they can hardly criticise. We are still the only barristers who offer a living wage to pupil-barristers. We are the only Chambers in which women are in a majority. We cover areas of law which have been shamefully neglected. We do our work well. So there is little they can do to stop us.

I believe that gradually our ideas about the law are spreading. There are several new sets of Chambers with values similar to ours. With the law centres, and a growing number of radical solicitors, we are developing a movement which will one day wield a lot of influence.

# IICCO introduces
# lame Retardant Low Smoke
# VC and XLPE Power Cables

## nd New Generation **Fire Survival**
## ow Halogen Cables




O s FRLS — PVC AND XLPE Power Cables are
ırest Zero Risk Fire — Fighters for you
ɔrming to the highest International standards,
ınmatched quality backed by in-house R & D
s.

NICCO's FIRE SURVIVAL LOW HALOGEN Cables ensure un-interrupted power supply for three hours, even when exposed to a flame temperature of 1100°C.

***NICCO** SETS THE STANDARD FOR SAFER CABLES.*

MERIDIAN

**THE NATIONAL INSULATED CABLE CO.OF INDIA LTD.**

NICCO HOUSE HARE STREET CALCUTTA 700001 PHONE 235102 TELEX 021-2653 GRAM MEGHOM

d by Indira Jaising, Published by Mihir Desai for Lawyers Collective, 818, Stock Exchange Towers, Dalal Street, Bombay 400 023; Phototypeset at Trimurti putype Systems, Rani Sati Marg, Malad, Bombay Design by Satish Kulkarni, Illustrations by Asif Khan, and Printed at Continental Graphic, 24/26 Bomanji Lane, bay 400 001. 