JUNE 1986 RS. 5

FROM THE LAWYERS COLLECTIVE

HOMELESS

A JOURNEY FROM NOWHERE TO NOWHERE
THE PLIGHT OF THE POOR AND THE SUPER POOR

HIGH COURT OF KERALA VS PRITISH NANDY
A CASE STUDY IN CONTEMPT OF COURT

PROTECTION OF ADIVASI LANDS

EDITORIAL

Shopping For Justice In the Wrong Forum

On the 12th May 1986 in a highly predicatable judgement (See *The Lawyers* Jan. 1986), the District Court Southern District of New York decided that India was the most convenient forum to sue Union Carbide Corporation for all claims arising out of the disaster at Bhopal.

Judge Keenan has held that an alternative forum with jurisdication to entertain the suit exists in India, and that it is an adequate forum. He disagreed with the Plaintiffs including the Government of India, that the Indian Judiciary is not creative or competent enough to decide the claims.

To the objection that there is no procedure for class actions, Judge Keenan notes that Order I Rule 8 permits suits in a representative capacity. More than 4000 suits already filed in Bhopal have been consolidated.

The Government of India has been added as a party to the suits in India and Court fees have been waived.

Judge Keenan has decided that India is the country with which the accident is most closely connected and that a major part of the cause of action arose here. Both public and private factors were in favour of transferring the case to India. This country, says the Judge, has an interest to protect "in knowing whether extant regulation are adequate". He comes to the conclusion that "the Indian legal system is in a far better position that the American courts to determine the cause of the tragic event and thereby fix responsibility".

Union Carbide Corporation has been put to terms, namely that it will submit to Federal Court Proceedures of discovery and inspection, it will agree to any decree of an Indian Court being executed in the US and that it will waive objections based on grounds of limitation.

The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 specifically empowers the Government to sue in the USA or in India. After the judgement, the Government of India, in the interest of the victims, was expected, indeed bound, to sue UCC and UCIL (which for mysterious and inexpliciable reasons has not been sued in any court) in Bhopal.

The obvious legal strategy for the Government now is to immediately amend the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 to empower a sitting Judge of the High Court to try the suit from day to day with power to grant interim relief. It could then make an application for appointment of a receiver of all assets of UCIL in India and an application for an injunction restraining UCC from transferring its US assets.

One hears vague rumours of a possible appeal by the Government against the judgement. According to one story making the rounds in legal circles in New Delhi, the Government is in a fix as it feels that American Courts will frown on the creation of Special Courts to try the Suit and this will enable UCC to argue the "minimal due process" was not followed. These fears, like all others previously expressed, about the capability of our Courts are baseless. Judge Keenan, while dealing with the endemic delays of the Indian system has specifically noted with approval that a Special Tribunal can be created to decide the suit from day to day. This has often been done. In the face of a contention that its own judicial system was not up to the task, it is ironical enough that it took an American Judge to tell the Government to go home and vindicate its claims on its home ground. U.C.C. has now agreed to submit to the jurisdiction of our courts. To appeal against the judgement could only prolong the path to final judgement and add insult to the self-inflicted injury.

The blunder on the legal front is compounded by the failure on the medical front. Till today, there exists no epidemological study of the victims of the effects of the gas nor is there a rehabilitation survey conducted. Only such studies can form the basis of legal claims. In the face of the Governmental failure, voluntary organisations have already started initiating their own surveys. The Government should help them instead of making their already difficult task more difficult by cutting off all sources of information and access to medical records. Whose interests are they protecting anyway?

Indira Jaising

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- **Editor:** ***Indira Jaising***

LETTERS

Muslim Womens Bill

The Muslim Women (Protection of rights on divorce) Act 1986, can rightly be called the *death warrant* of Muslim women. Far from protecting the rights of a divorced Muslim woman, it throws her into an atrocious situation.

The husband who has the unilateral right to divorce her at his whim and fancy is set scot free by this Act for he is not to maintain her after the 'Iddat' period.

Under the Act, the husband is liable to maintain the children of the marriage but only upto the age of two years. The husband can thus wash his hands off his responsibility towards the wife and the children. The Bill goes a step further to say that a divorced woman who has not re-married and is not able to maintain herself after the 'iddat' period, may claim maintenance from such of her relatives as would be entitled to inherit her property on her death according to Muslim Law.

The heirs of a divorced Muslim woman are her father, mother, son, daughter and other blood relations. Making a claim against any of these would be almost out of the question, for most of the time these are the people who shelter and look after a divorced woman until such time as she can get maintenance from her husband. It is often because they are unable to maintain her that she has to claim maintenance from her husband. To say therefore that she should claim maintenance from her relatives, is to negate the very claim for maintenance.

This leaves her at the mercy of the Wakf Boards, which again is not a very practical measure. It is a well-known fact that the Wakf Boards are notoriously short of funds, and are only meant for charitable purposes. Maintenance for divorcees is not a part of their function. Moreover, there are hardly any Wakf Boards in the country. Muslim women are reduced to recepients of charity, which is the last thing they want to be.

All pending applications are liable to be thrown out on the commencement of the Act. Considering that Dahod, a small town in Gujarat has 85 cases of Muslim women pending in Court under Section 125 Cr. P.C. one can well imagine the magnitude of the problem in the entire country.

And to top it all our young and dynamic Prime-Minister justifies the Bill by saying 'Equality is a western concept'. Does this imply that Muslim women should be pushed into the medieval ages whilst the rest of the country moves on to the 21st Century.?

Shehnaaz Sheikh
Bombay

HIGH COURT'S RECALCITRANCE

In a recent case of Arun Damka, the Supreme Court has once again criticised the Bombay High Court for rejecting Writ Petitions without giving any reasons.

Hundreds of such Writ Petitions are lying in the Bombay High Court having been rejected summarily, though many substantial questions of public interest and of law are involved in them. Will the Chief Justice of Bombay High Court be honest enough to recall all those Writ Petitions in which such cryptic orders have been passed, and issue instructions to hear the Parties and pass reasoned orders? Or does it require only rich persons who can afford to go to Supreme Court and get orders like Arun Damka?

In filing a Writ Petition, one has to spend thousands of Rupees for preparing Briefs, Copies, Exhibits, Lower Courts' Judgements etc., pay Solicitors for Drafting, then for Conference with Counsel, and finally for preparing Counsel for arguments. Everything is, however, washed off within one second by a cryptic word of the Judge "rejected", "dismissed", without any reasons for it. Imagine the utter despair of a party helplessly losing thousands of rupees within a moment only. He is completely bewildered and lost. Nobody comes to Court for fun or for losing his hard-earned money at the whims of a Judge who passed such orders in a cavalier fashion.

When a Lower Court passes such orders, it is these very High Court Judges who remit such orders back, directing them to pass orders with reasons. Why does the same rule not apply in its own case? Or are the advice and wise words meant only for preaching to the Lower Courts? People are day by day losing confidence in such type of dispensation of justice.

R.B. Kothari
Bombay

COVER STORY

Planning for the Homeless

Every person dreams of having a place to go back to or go forth from. In short, a home. And yet there are thousands who are rootless and roofless. Not by choice but by chance. Economic and social exegencies eliminate personal faiths while political expedience often assumes the role of a spectator.

But should it always be like this? Can anything feasible be done? Is there a reasonable way out? In this article, Meera Bapta raises (and answers) many questions pertinent to the problem of housing the poor. Her discussion is particularly relevant as we are on the threshold of the International Year of the Homeless.

Meera Bapat

Seeking shelter, along with food and water, has rightly been regarded as a fundamental instinct of human beings. Early man used nature's raw materials to provide himself with shelter. There was harmony between nature and man.

Modern society has disrupted this harmony. The market economy has made land a saleable commodity. As a result, the poor are driven out of the land market. Additionally, the plethora of legislation on housing obliges a citizen to conform to certain concept, standard and style of housing, the costs of which are so prohibitive that the poor simply cannot afford shelter. Consequently, the vast majority of people today 'squat' on land 'unauthorized' structures. In Bombay, appromixately 45% of the population live in unauthorised structures, popularly known as slums.

Housing Need

Poverty in the rural areas coupled with job opportunities in the urban areas is the cause of migration of the poor to a metropolis like Bombay. However, even in the urban areas the extent of poverty is quite high resulting in an average of nearly 48% on persons below the poverty line on an all India basis. *(See table)*

Over the years, migration has contributed decreasingly to the overall growth of Bombay's population. But this has not resulted in a decreasing growth rate. Today, the population of Greater Bombay is approximately 9 million. By the turn of the century, it is expected to cross the 15 million mark. *(See Table)*

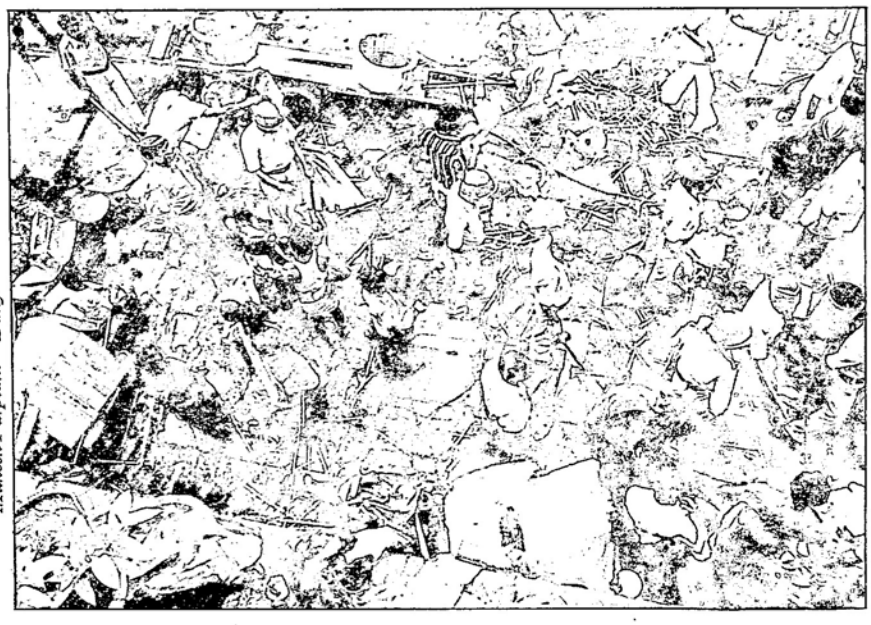
This implies that availability of

Percentage below poverty line in 1977- 78

Area	Percentage
Rural	50.82
Urban	38.19
All India	48.13

"The Poverty Line" is defined as the mid-point of the monthly per capita expenditure class having a daily calorie intake of 2,400 per person in rural areas and 2,100 in urban areas which amounts to Rs. 76/- in rural areas and Rs.88/- in urban areas.

Source: Business Environment
A weekly report for Top Management
(Tata Economic Consultancy Services, August 1 1981)



Mukesh Parpiani Daily

Growth of Population in Greater Bombay

Year	Population (Million)	Annual Growth Rate (%)
1901	0.81	—
1911	1.02	2.59
1921	1.24	2.16
1931	1.27	0.24
1941	1.69	3.31
1951	2.97	7.57
1961	4.15	3.97
1971	5.97	4.39
1981	8.36	4.00
1991	11.41	3.17.
2001	15.19	3.08

Source: Seminar Secreteriat, MHADA : *Non Conventional and Alternative Approaches to shelter the urban poor: Experience in Bombay,* 1981.

COVER STORY

Feroze Mistry Daily

housing stock has to increase, proportionately. However, all the agencies, public and private, put together are able to create a maximum of 15 to 20 thousand formal housing units a year. The annual gap in the decade of 1971-81 was 45,000 units per year. By the turn of the century, the gap will be phenomenal

However, these estimates do not take into consideration the need on account of dilapidated houses and slums which comprise nearly 80% of the population in Bombay.

In the matter of housing, land is the most important commodity. In Bombay, like other centres, land is concentrated in the hands of few. According to the figures available about the owners of excess vacant under the Urban Land (Ceiling and Regulation) [UL (C & R)] Act, in Bombay, about 3% of the land owners own and possess over 50% of the excess vacant land. Some of the major owners are the various 'Trusts' notable among them being Wadia at Kurla, Dinshaw at Mulund, Godrej at Vikhroli, Byramjee Jeejeebhoy at Goregaon, Sharma at Kanjur, Sawant at Borivli and Ekhar, Ballabdhas at Hariyalli and N.L. Mehta at Bhandup. The Godrej holding at Vikhroli alone is about 3,200 hectares, totally encumbered and unencroached.

What the Poor can afford

Nearly 4 million persons, or 45% of the population of Greater Bombay live in Slums. An additional 4 lakhs live on the pavements.

For the purpose of housing, people have been grouped into the following income categories depending on the monthly income:

Upto Rs. 350 - Economically Weaker Section (EWS)
Rs. 350 to Rs. 600 - Low Income Group (LIG)
Rs. 601 to Rs 1500 - Middle Income Group (MIG)
More than 1500 - High Income Group (HIG)

Nearly 80% of the slum households and nearly 90% of the pavement households have an income less that Rs. 600/ per month *(See Table).*

The fall in the category of Low Income Groups (LIG). These people spend most of their money on the basic necessities of life, food, clothing and transport. There is hardly any money left for shelter. However, studies show that assuming that credit was available to the poor, the housing budget of households earning less than 600/- would not be more than Rs. 8,300/- *(See Housing Profile)*

Income Wise Distribution of Slum Household

Monthly Income Group	% Slum Housholds
Less than 200	12.12
200 to 350	28.01
350 to 600	38.58
600 to 1000	14.14
1000 and above	3.86
Not recorded	3.29

Source: Seminar Secretariat, MHADA. *Non Conventional and Alternative Approaches to Shelter the Urban poor,* Bombay 1981.

Income Wise Distribution of Pavement Households

	% Pavement Households
Less than 400	78%
400 - 600	12%
More than 600	10%

Source: College of Social work : *A profile of Pavement Dwellers.* Bombay 1982.

Housing Budget Profile

Category	Monthly House-hold income	Total Housing Budget	Percentage Individual	Percentage Cumulative
	Rs.	Rs.	%	%
EWS	Less than 100	1000	1	1
	100 to 200	3200	12	13
	200 to 350	6400	29	42
LIG	350 to 600	8300	39	81
MIG	600 to 600	16000	15	96
	1000 to 1500	42000	4	100
HIG	More than 1500	Not Reported		

Source: BMRDA: Regional Housing Policy, Bombay 1978.

The cheapest formal housing programe under the various schemes of the UL (C & R) Act was intended to make formal housing tenements available at Rs. 135/- per sq. foot. Till recently, the smallest tenement of 25 sq. mts. (250 sq. ft) cost a minimum of Rs. 36,325/- Thus under the cheapest formal housing schemes neither the EWS nor the LIG can afford even the smallest tenament. The price has recently been raised to Rs. 180/- per sq. foot.

Increasingly, therefore, the poor in the city are forced to seek extra-legal means to fulfill their basic need of shelter. The legislation enacted till today does not confer any right to the poor either.

Legislation

Historically, the role of the Government in housing has undergone a considerable amount of change.

In the early period of British colonialism in India, housing was considered a concern of the individual. To build a house was only the responsibility of the individual. The Government did not come into the picture at all.

Municipal Acts

However, in the later stages, Municipal laws were amended, empowering the Municipal Corporations to provide housing for the poor classes. For instance the Bombay Municipal Corporation (BMC) Act, 1888 was amended in 1933. Section 354C was introduced. It provided for Improvement Schemes. Under this, resources permitting, dilapidated buildings and areas proving to be hazardous to health are to be improved by the Corporation. The Section also provides that the Corporation may construct houses for the poor classes. The Corporation is to acquire lands for this purpose.

Section 354 RM of the BMC Act empowers the Corporation to provide housing accommodation for poorer classes, if it is satisfied that there is no need for an improvement scheme. The houses have to be constructed on lands belonging to or acquired by the Corporation. Houses belonging to the Corporation can also be constructed into houses for poor.

Though these provisions authorise the Corporation to take positive action for providing housing for the poor, hardly any use has been made of them.

Regional and Town Planning Acts

There is much variation in the country with respect to Town Planning laws. We take for analysis here the example of Acts in the erstwhile Bombay State.

"Modern" Town Planning, based on the British legislation, came to India in 1915 when Bombay Town Planning Act was passed. In enabled local authorities to prepare Town Planning schemes for open areas within their jurisdiction which were in the process of development. Indigenous towns had grown without formal plans. The Town Planning Act was introduced in order to plan new development in a formal manner to avoid haphazard and unregulated extensions of towns and to ensure orderly development.

In 1954, this Act was superseded by a new Town Planning Act. It made obligatory for local authorities the preparation of development plans for the whole area within their jurisdiction. The objective was to plan for comprehensive development of an urban area, rather than planning for it in parts. The preparation, therefore, of an overall plan for the city was regarded as a pre-condition for ensuring its orderly and regulated growth. This Act brought the whole area of a city under formal planning, and Town Planning Schemes (as specified in the Act of 1915) were required to be prepared within the framework of a Town/City Development Plan.

Development Plans

A Development Plan is primarily a land-use plan. It contains proposals for zoning the development in residential, commercial and industrial areas, for allocations of land for public purposes such as open spaces, hospitals, schools, for infrastructural development such as roads, sewerage, drainage, supply of water and electricity and for traffic and transportation network. The plan document is accompanied by information regarding the cost of land acquisition, estimate of work and phases of development.

Development Control rules regulate

the division of large landholdings into individual building plots, the density of population, and the Floor Space Index (FSI).

Building bye-laws specify the minimum standards of structural quality, ventilation and sanitation, minimum area of accommodation to be provided and dimensions of open spaces around buildings.

In 1966, the Maharashtra Regional and Town Planning Act was passed. This Act enlarged the scope of physical planning further to extend over the region surrounding metropolitan and industrial centres. The Regional Plan, like the Town/City Development Plans, is primarily a land-use Plan.

City Development plans are prepared with reference to the framework set out in the Regional Plans where they are formulated.

In spite of the Town Planning efforts of over 7 decades, our cities bear vivid testimony of the ever worsening living conditions of a majority of urban residents. The plight of the poor is indescribable. A half of Bombay's population or a third of Pune's residents have to live in unauthorized hutments in what can only be apologies for shelter and with minimal basic services.

The procedure laid down for preparing these plans is such that they become irrelevant long before they are prepared and sanctioned by the Government. They simply remain declarations of the intentions of the plans. Statutory requirements as in the case of City Development Plans for providing estimates of work, a statement of cost and phases of development remain mere academic exercises. The actual implementation of the plans bears little relationship to them.

In no way can the planning exercise be said to have increased the access of the urban poor to land and infrastructural facilities. On the contrary, planning has incresed the polarization in living conditions between the rich and the poor. An increasing proportion of the urban population is forced to reside in unauthorized shanty settlements, in total contravention of the City Development Plans.

In the name of creating an orderly, hygienic and aesthetically pleasing environment, town planning in fact denies the poor access to adequate housing and environment. It is discriminatory, for it attempts to create "planned" environment at the cost of the availability of even basic services to the poor; they are forced to become illegal, unauthorized city residents because they do not have the means to afford even the 'minimum' authorized accommodation.

Town Planning determines the distribution of a city's resources (land, water, revenue etc.) among different groups of the city's residents. Since it takes place in the context of urban land market forces and private property development, what it achieves is to create infrastructural advantages (transport facilities, roads, public buildings, open spaces etc.) so that the private building sector can reap benefits. The poor being incapable of competing in the urban land and housing market are marginalised and have to live in wretched conditions wherever they can put up their unauthorised and meagre shelter. In this situation, the exercise of Town Planning in its present form is incapable of protecting the right of life and and livelihood of the poor by ensuring that they can live in the proximity of their work.

Slum Areas Act.

The Slum Areas (Improvement and Clearance) Act was passed in 1956 and applied to some Union Territories including Delhi. The Act primarily applied to dilapidated, overcrowded, and insanitary pucca, authorized buildings. By amendments made after 1964, the Act encompassed unauthorized hutment settlements also. Subsequently, similar Acts were passed by 11 States in the country.

Although this was an interim palliative, it has implication for the location of sites for low-income settlement. The Act provies for the improvement of existing slums by way of providing basic services piped water supply, latrines, drainage, paved pathways and street lighting. In a sense, the passage of this Act is an admission that Town Planning has not brought about orderly and hygienic development. But in spite of the dramatic deterioration in the housing situation which is perhaps the most vivid indicator of the condition of life in cities, the statutory basis of Town Planning and approach to housing have not changed. There is still the same pre-occupation with minimum standards of structural quality and the same controls, regulations and procedures. The basis for the distribution of a city's resources has remained unchanged.

The definition of a slum given in the Act refers to the inadequacy of shelter in its structural quality, hygienic condition and availability of basic facilities. It does not refer to the question of ownership of land on which a slum may be situated. Although the definition applies equally to insanitary authorized buildings and hutment settlements, the operation of the Act is limited to improvement work only in hutment settlements (except in Bombay where Building Repairs Board is supposed to repair old, unsafe and dilapidated buildings). Even in "de-

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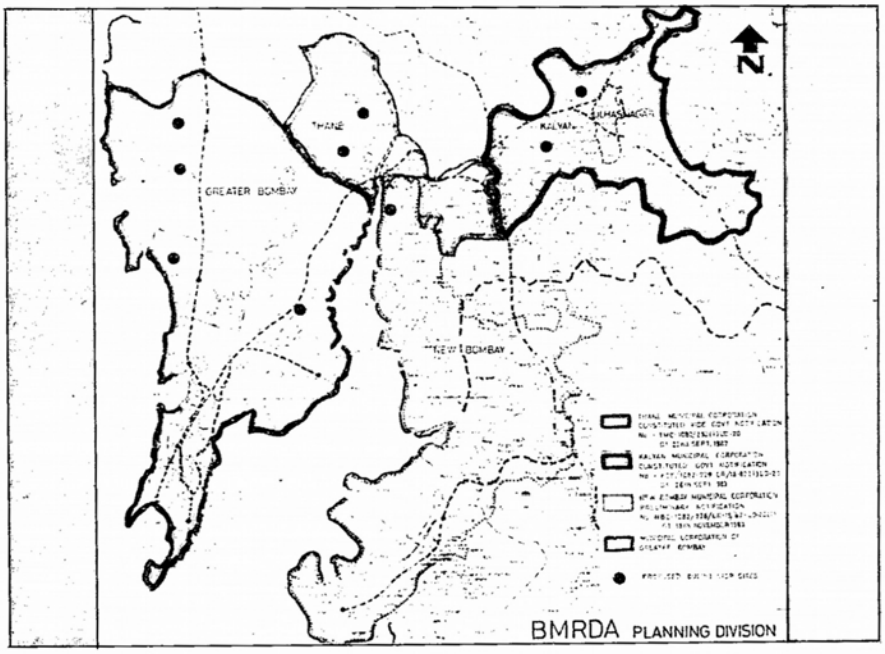
clared" or "improved hutments", the ownership of the land is retained with the original owner and the residents get no legal status or right to stay on it. These settlements remain aberrations on the City Development Plan. In fact the Act merely enables the Competent Authority to allow hutment settlements, without being treated as trespassers, even on privately owned land and provide them with basic services.

from the start because as an unauthorised settlement, it suffers from haphazard growth and lack of basic services.

The emergence of slums can be directly attributed to escalating land prices and building construction costs and Town Planning legislation and building regulations which lay down standards of space, services and construction, the achievement of which is beyond the investing capacity of the low-income population. In this situation, the Slum Areas Act provides no alternative to the question of shelter and sanitation for the poor. It merely aims at relieving the wretched conditions in hutment slums but experience shows that it fails to achieve even this limited objective because at the same time the present practice of Town Planning continues to exclude the poor from some of the fundamental necessities of a better life.



Major Owners of Vacant Land in Bombay

Name	Place
• WADIA TRUST	Kurla
• F.E. DINSHAW TRUST	Mulund
• SOLI GODREJ	Vikhroli
• BYRAMJI JEEJEEBHOY	Goregaon
• C.B. SHARMA KHOT	Kanjurmarg/Powai
• N.D. SAWANT KHOT	Borivali/Eskar
• SURAI BALLABHDAS	Hariyali
• N.L. MEHTA	Bhandup

Source: *Requiem of an Act on the Urban Land Ceiling and regulations Act, 1976 - by Colin Gonsalves on behalf of Planning Action Research Team, Yusuf Meherali Centre, Oct. '82*

Urban Land (Ceiling & Regulation) Act, 1976

It was partly with the realisation tht urban land is concentrated in the hands of a few, as reflected in the Fith-Five year plan, that Parliament passed the UL (C & R), Act in 1976.

The main objective of the Act as reflected in the Preamable is to 'prevent concentration of urban land in the hands of a few persons and prevent speculation profiterring therefrom and with a view to bring about equitable distribution of urban agglomeration to surserve the common good'. However, it is a classical example of legislation enacted in the name of the poor but skilfully manipulated to benefit the private builders.

To achieve the objectives of the Act, the Government is entitled, under Section 10 of the Act, to acquire excess vacant land. The compensation payable under the Act does not exceed Rs. 10 per sq. meter, a miniscule proportion of the market value today, and the maximum compensation payable is only Rs. 2 lakhs. The constitutional validity of the Act has been upheld by the Supreme Court in *Bhimsingh's* case (AIR 81 SC 234)

Concentration of Excess Vacant Land in Bombay.

Excess Vacant Land	No. of Cases	%	Total Vacant Land	%
up to 10,000 sq. m	1,599	84.6	828.66	29
10,000 to 15,000 sq. m	97	5.1	124.95	4.4
15,000 to 30,000 sq. m	103	5.4	252.89	8.8
30,000 to 50,000 sq. m	22	1.2	168.80	5.9
50,000 sq. m. & above	69	3.6	1477.53	51.7

Source: Government of Maharashtra: *Report of the High Power Steering Group for Slums & Dilapadited House,* Bombay 1981.

It is obvious the Government itself is not keen to implement the Act. Out of 17,181 statements filed by the land owners in Bombay 1982, only 1345 final statements have been issued nearly 8 years after the Act came into force. This constitutes about 1211 hectares of excess vacant land. Out of these in respect of only 1268 hectares, has the Government declared its intention to acquire the vacant land. But the final acquisition notification been issued for only 181 hectares. As a result of litigation, this figure has been reduced to a measly 27.13 hectares. Similar figures for all Maharashtra and all India make pathetic reading. The oft-repeated excuse of the Government that litigation (and presumably the Courts) is responsible for holding up the implementation of the Act, does not wash. It is the Government itself which is responsible for sabotaging the implementation of the Act.

The Act had provided a major opportunity to acquire and socialize urban land. As a result of the failure of the Government to acquire land the opportunity to house the poor may have already been lost.

It is only if developed land with minimum infra-structural facilities is made available to the poor at locations near their work places can there be any hope of a solution.

There is enough land to house all the slum and pavement dwellers of Bombay. According to the prevalent rules, 100 tenements per acre can be built. On an average 5 persons can be accommodated per tenement. With only 4,000 hectares of land the entire population of slum and pavements can be accommodated in Bombay. Considering that the Godrej holding in Vikhroli alone is about 3,000 hectres, there is no difficulty in making affordable shelter available to the poor of Bombay.

In the *Olga Tellis* case though the Supreme Court affirmed that the demolition of hutment of a pavement dwellers infringes the right to life guaranteed under Article 21, as it breaks the nexus with his habitat, it did not consider making the provision of alternative accommodation as a condition precedent for demolitions.

Land is the most crucial determinant of urban planning. The price of land is determined by the criteria of accessibility and neighbourhood characteristics. The price cruve shows that land prices fall from the city centre to the periphery, the fall is more gradual along main roads and there are bumps along secondary (commercial) centres.

Since the urban poor have very low paying capacity, in order to bring housing (even in the form of sites and services schemes where the people build their own shelter) within their reach, it has to be located where land is relatively cheap (and also less attactive to private builders for commercial exploitation). For this reason, in the revised Development Plan for Pune (Draft) a belt of land running along the periphery of the city has been reserved for accommodating the EWS of the population. Similarly, a distant location like Malvani has been suggested for rehabilitating the pavement dwellers in Bombay. In this process the poor are pushed out towards the fringe of the city, away from the services required for their livelihood. If the right to life as elaborated in the *Olga Tellis* case is to be brought into reality, the government must intervene to make sure that the low-income population is not expelled to the periphery as a consequence of the operation of the urban land market.

That is only possible if the Government seriously implements the UL (C & R) Act and makes land available near their place of work.

Dr. Meera Bapat is a development planner. She has published several titles including a major study on the development of Pune.

Sr. No.	Urban Agglomeration	Greater Bombay	Total
1.	No. of statement filed under Section 6(1)	17,191	74,796
2.	No. of statement where no surplus land indicated and cases closed.	2,099	9,452
3.	No. of draft statement issued under Section 8(3)	1,712	16,253
4.	No. of final statement issued and served under Section 9.	1,343	9,836
5.	Surplus Lands covered by Statement under Section 9 (in hectares).	1,211	11,239.16
6.	No. of cases where Gazette Notification issued under Section 10(1).	1,268	9,281
7.	No. of cases where Gazette Notification issued under Section 10(3).	29	710
8.	Area vested in Government under Section 10(3) (in hectares).	181.09	1,269.48
9.	Area of which possession taken over under Section 10(5) (in hectares)	27.13	457.64
10.	Area of land handed over (in hectares).	27.13	348.94

Source: *Government of Maharashtra: Urban Land Ceiling Act and Housing Policy*, Bombay, 1983.

COVER STORY

Damodar Tambe

Damodar Tambe is a pavement dweller staying at Karnak Bunder Opposite the docks. A carpenter by profession, he has been a leading activist of **'Zopadpatti Rahvasi Ekta Sanghatana'** *since its inception. In this interview he traces the struggle of the homeless in Bombay.*

Q. *When did you come to Bombay?*

A. I was born in Bombay at the Maratha Hospital, Jacob Cirlce. I am not a "migrant".

Q. *Where were your parents staying at that time?*

A. My father was a fitter in the Water Department of the Municipal Corporation and we were staying in the Municipal quarters near Maratha Hospital. In 1957, my father retired from services. We had to vacate the quarters. We shifted to a small room in a chawl near Rani Baug (the zoo), and after that to Sewri. My parents returned to our native village, in Naad in Ratnagiri District, Devgadh Taluka.

Q. *Where did you move?*

A. In 1976, we moved into the hut at Carnac Bunder, P. D'Mello Rd., where we are presently staying. We could not afford any better house.

Q. *Are demolition common at P. D'Mello Road, where you reside?*

A. Every year at least twice or thrice our huts used to be demolished and our belonging were taken away. However since 1982 after we obtained a stay in the Supreme Court our huts have not been demolished.

Q. *What happened in 1982?*

A. In that year notices were pasted by the Municipal Corporation on the entire street of P. D'Mello Road, threatening to demolish our huts. We decided not to take these demolitions lying down. In the process of debating the strategies for resisting the demolitions, we had to meet a number of other residents of our strech, which began the process of organising culminating in the *Zopadpatti Rahvasi Ekta Sanghathana'*.

Q. *What was your strategy?*

A. Immediately, we decided to try and get a stay order from the Court. With the help of our lawyers, a case was filed in the High Court at Bombay and a stay obtained. However, the Municipal Corporation appealed to the Supreme Court, which vacated the stay. The Corporation swooped upon us and demolished our hutments. The strategy which we then adopted was to prevent the Corporation from taking away our belongings. We decided not to go helter-skelter but to stay put in the pavement without having a roof over our head, because we knew that once we moved out of the pavement we would never be able to return again. Soon afterwards the Supreme Court granted a stay against our eviction. We reconstructed the huts and have been staying there ever since. There have been no demolition since then.

Q. *What were the other forms of stragegy you adopted?*

A. Apart from the Court case which we were following up, we used to have regular committee meetings, street corner meetings and demonstrations in front of the Corporation and legislative assembly building. In 1982 we occupied the Municipal Corporation building for a few hours, as a protest. We had a chain hunger strike which lasted for two months. Many of us also visited other pavement dwellers and hutment colonies all over Bombay giving them our support and seeking theirs in turn. It is only due to these factors that though the Corporation has been threatening to demolish our huts since the judgement, they have not been able to do.

Q. *What is your reaction to the Supreme Court Judgement?*

A. Bal Thackeray had said that the pavement dwellers should jump into the Arabian Sea. The Supreme Court's judgement amounts to the same thing. But judgement or no judgement we are not going to quit. Just because 5 men sitting in Delhi think so, 5 million hutment dwellers are not going to give up their lives. We will continue with the battle. Only now the scene has shifted from the Courts to the streets.

Q. *What are your demands?*

A. Give us an alternative accommodation near our place of employment or let us live at our present site.

Q. *A normal complaint against the pavement dwellers is that they are anti-social elements. What do you have to say about this?*

A. I read that Justice Chandrachud during the arguments said in the Court that the real criminals of Bombay live in the high rise buildings. It seems while writing the judgement he forgot this.

Q. *Have your tried approaching the Govt. and Municipality?*

A. Yes. They are playing a ball game with each other - each tells us it is the responsibility of the other. Ideally they would like to throw all of us out of Bombay. But they know it is not feasible and so they keep on carrying out sporadic demolitions keeping us under perpetual treat.

With Best Compliments

from

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Well Wisher

Joginder Kumar,
Bombay.

Protection of Tribal Lands

Though land grants have been given to the tribals, experience showed that the non-tribals were able to easily divest the tribals of their land. This article explains the provisions in the Maharashtra Land Revenue Code and various amendments made from time to time to protect lands from being alienated from the tribals.

Nirmal D. Suryawanshi

Widespread illiteracy, poverty and ignorance in the tribals has meant that the tribals have not been able to retain agricultural land in their occupancy. The property is alienated from the tribals by a purchase of it for a nominal amount or a lease for a fixed period. In Dhule District in Maharashtra alone, out of 1500 cases of transfers of lands belonging to the tribals it was found that 53% of transfers were illegal.

Committee

The Government was receiving a large number of complaints relating to suspected transactions of the land belonging to the tribals from all corners of the State. The issue was examined by the Government and ultimately on 15th March 1971, a Committee under the Chairmanship of the Revenue Minister was appointed to enquire into the complaints and to suggest a suitable remedy to meet the challenge.

The Committee examined all the aspects of the problem and suggested amendments in the Maharashtra Land Revenue Code 1966, and in the Bombay Tenancy and Agricultural Lands Act, 1948. The Committee submitted its report on 7th April, 1979 to the Government.

Amendment Act

As both the houses of the Maharashtra State Legislature were not in session and as the Government was determined to take prompt action, on 6th July 1974 the Governor of Maharashtra promulgated the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Ordinance, 1974. It was brought into force on the same day.

The Ordinance was replaced by an Act, the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974. It was brought into force retrospectively with effect from 6th July, 1979.

The Government of Maharashtra also framed the Rules known as Maharashtra Land Revenue" (Transfer of Occupancy by Tribals to Non-Tribals) Rules, 1975.

Occupancy

The term **occupancy** has been defined in Section 2 (22) of the Maharashtra Land Revenue Code.

Occupancy means **"a portion of land held by the occupant."**

Occupant means **"the holder in actual possession of unalienated land, other than a tenant or Government lessee."** A portion of unalienated land held and possessed by the tribal person is said to be an occupancy belonging to the tribal. Occupancies are generally created due to the grants of the lands belonging to the Government. Possession of Government lands is given to the tribals or the persons belonging to the backward classes for their personal cultivation by way of grants or lease. A tribal occupant always holds an occupancy land from the Government.

Old and New Tenure

The Occupancies are further classified into two classes (i) Occupant Class I (Old tenure land) and (2) Occupant class II (New tenure land).

"Occupant Class I" as defined in Section 29 of the Code, is a **person, who holds the unaliented lands from the Government in perpetuity and without any restriction on the right to transfer.** These occupancies are popularly know as the old tenure lands. The occupant of such a piece of land is as good as an absolute owner of the land and can deal with it by way of partition, lease, mortgage, sale, gift or in any manner, as he would desire; and he is also entitled to create encumbrances and charge on the said property, without any prior permission of the Collector or Government.

Occupant Class II, which is popularly known as new tenure land, is a person **who holds from the Government unalienated lands in perpetuity, subject to the restrictions on the right to transfer.** These occupancies are, no doubt, transferable. But the right to transfer by the occupant is subject to the restrictions laid down under the Code or the Rules framed under the Code. The new tenure lands cannot be transferred except with the prior permission of the Competent Authority. The Collector of the District is the Competent Authority under the Code to grant or refuse such permission. Generally, in the State of Maharashtra, the Collectors of the Districts have delegated their powers to grant such permission, to the Deputy Collectors or the Sub-Divisional Officers.The power to grant such permission is to be exercised according to the rules and directions given by the Government from time to time.

Protection of Tribals

The occupancies beloning to the tribals have been given special status in the Code.

Section 36 of the Maharashtra Land Revenue Code restricts the

These Grey Pages are a regular feature of the magazine. They have separate running page numbers. This will be indexed at the end of the year allowing the reader to keep it as a ready reference

transfer of the occupancies belonging to the tribals. Before the amendment of Section 36, both classes of tenure, i.e. the old tenure or the new tenure, occupancies could not be transferred from tribals to the non-tribals without the previous sanction of the Collector. Therefore, before effecting a transfer of his occupancy, a tribal had to submit an application for such transfer to the Collector. The Collector then, had to consider the ability of the occupant to cultivate the occupancy land personally and any other relevant factors for such transfer. However, the provisions of Section 36 were not directly applicable to the occupancies in all parts of the State. They were applicable only to the notified areas. For their application, a notification was required to be issued by the Government.

When the occupancies are granted to the tribals, various conditions are incorporated in such grants. The occupant has to observe those conditions strictly. A breach of the conditions or of the provisions of the Code or the Rules entails the punishment of forfeiture of such occupancy and the eviction of person found to be in illegal possession of such occupancy. Such persons were liable to be evicted summarily be the Collector.

Previous sanction

By the Amending Act, the Collector is competent to sanction the transfer of the occupancy of tribals only in respect of a transfer by way of a lease or mortgage for a period not exceeding five years. In all other cases of transfer, the Collector can sanction the transfer only with the previous approval of State Government. The powers of the Collector to sanction the transfer and occupancy belonging to the tribal is limited. The Collector cannot sanction the transfer, unless he is fully satisfied that no tribal residing in the village in which the occupancy is situated or within five kilometers of it is prepared to take the occupancy from the owner on lease, mortgage or by sale or otherwise. The previous sanction by the Collector can only be given in such circumstances and subject to such conditions as may be prescribed. The circumstances and conditions are prescribed in the Rules 3 and 14 of the Maharashtra Land Revenue (Transfer and occupancy by Tribal to Non Tribal) Rules, 1975. According to these Rules, a sanction can be given for the sale of occupancy where it is being sold for any *bonafide* non-agricultural purpose or in execution of a decree of a Civil Court or for the recovery of arrears of land revenue. However, the Collector should not give sanction in cases, where the tribal is likely to be rendered landless. The lease of an occupancy of a tribal can be permitted for the period of five years if the lessor-tribal is a minor or a widow or is under any physical or mental disability.

The mortgage of a land of a tribal occupancy is permissible for raising a loan for the development of the land. The exchange of an occupancy is permitted where the land is being exchanged. The transfer of the occupancy of the tribal is also permissible if it is required for a *bonafide* industrial operation, or for any educational or charitable purpose or for the benefits of a co-operative society. In all these cases the Collector must be satisfied, before granting a sanction, that the tribal is not rendered landless.

Illegal Transfers

Any transfer of a tribal occupancy without the previous sanction of the Collector is void *ab initio* and such transfers are illegal in the eyes of law.

The permission granted by Collector for the transfer of occupancy of tribal would also be illegal if the approval of Government is not obtained, in case of sale, gift, exchange or any kind of transfer except a lease or mortgage for a period not exceeding five years. It would also be illegal if such transfer renders the tribal landless or it is not otherwise in accordance with law.

Enquiry

The new Amendment Act further provides that the non-tribal transferee or his successor in interest in possession of the occupancy belonging to a tribal illegally, shall be evicted summarily by the Collector.

In Section 36 and S 36-A of the Code and also in the Rules framed under these provisions, an exhaustive procedure has been laid down for the eviction of a non-tribal transferee. The Collector is competent to take action *suo moto* or on an application by any person interested in the occupancy.

Such an application should be made within three years from the date of transfer. In both cases the Collector had to hold an enquiry in the prescribed manner and to decide the matter.

The Rules further provide that the Collector should issue a notice, in the prescribed form, to the tribal transferor and non-tribal transferee calling upon them to show-cause why the transfer should not be declared invalid. The notice must also specify the date of hearing.

The Collector has to hold a summary enquiry. In the enquiry, he should examine the parties and record their statements. He can also record the evidence of witnesses and may make such enquiry as he may consider necessary. In the enquiry the Collector has to find out whether the previous sanction of the Collector was obtained in accordance with law for the transfer in question. He should record his finding in his order.

If the finding is that the transfer is made without the previous sanction of the Collector he should declare the transfer to be invalid and evict the non-tribal transferee from the occupancy. The decision of the Collector should be communicted to the parties concerned.

After the declaration made by the Collector, that transfer of the occupancy together with the standing crops vests in the State Government free of all encumbrances and it has to disposed off in such manner as the State Government may from time to time direct.

Disposal of occupancy

The occupancy can be disposed of by the Collector after giving a notice in writing to the tribal transferor requiring him to state within 90 days from the date of receipt of such notice whether or not he is willing to purchase the land. The tribal transferor has to be given an opportunity to enter on his occupancy, though it may have been vested in Government due to the invalid transfer made by him. After receiving such a notice, the tribal transferor can purchase the land after paying the prescribed purchase price and after executing the undertaking to cultivate the land personally. However, the tribal transferor is entitled to this benefit only when the total land held by him either as a owner or tenant does not exceed an economic holding.

"Economic holding" means 6.48 hectares of Jirayat land or 3.24 hectares of seasonally irrigated land or paddy land or 1.62 hectares of perennialy irrigated land.

The jurisdiction of Civil Court has been barred under the new amendment Act. No Civil Court has jurisdiction to settle, decide or deal with any question which is by or under section 36, 36-A or 36-B required to be settled, decided or dealt with by the Collector. The jurisdiction of the Mamlatdar Court is also barred.

Act is Constitutional

The validity of the Amendment Act, was challenged on the ground of being beyond legislative competence of State Legislature. In *Moghu Jagobhai Zade and others V/S Tahsildar, Nagpur and others"* (1977 Mah Law Journal 564) the High Court of Bombay upheld the validity of the Act and held that the State Legislature is competent to make the amendment. In another case, *Raoji Baliram Urkude Vls State of Maharashtra and Another"* (1985 Mah Law Journal 843) the Bombay High Court held that the new section 36-A of the Code does not contemplate compulsory acquisition of the occupancy property. It vests in the State because of an illegality committed, and a person when he chooses to enter into a invalid transaction cannot make a grievance on the basis of Article 31-A of the Constitution or about losing property without receiving the market value. In this case the constitutional validity of the amendment Act was also examined. It was held that the Act does not violate Article 14 or 19 of the Constitution.

Child Labour

The Government of India is proposing to legalize child labour through a comprehensive law. While the tendency the world over is to banish child labour, the proposed Bill appears to set the clock back. In this article we examine the existing provisions scattered in various statutes, which by themselves are inadequate to give effect to the Consitutional mandate of Articles 24, 39 and 45.

RI & SR

Children, of course, constitute wealth. But if they are too many, this wealth stinks. And this is exactly, what is happening in developing countries, including India. Every six seconds, 12 children are born in the world's developing countries. Of these, two will die in early childhood. Five will never go to school. Of the five who will, only two will complete elementary grades. All will be afflicted with diseases. All will experience hunger, and several will suffer from the effects of malnutrition all their lives. Only two of the original 12, will be trained for anything more than menial tasks; the rest will be condemned to a life of hard labour at the lowest level of poverty. In this article, we are concerned with the last category.

Child Labour-Not a new phenomenon

Exploitation of children is not a new phenomenon to our times. It has existed in one form or another in all countries in all historical times. In ancient India, it existed in the form of child slaves. What is, however, new is its perception as a socio-economic problem.

Definition of Child Labour

There is no consensually validated definition of child labour. There is no law in our country which gives a precise definition of the term "child labour".

The Encyclopedia of Social Sciences, defines Child Labour as follows:-

"When the business of wage earning or of participation in self or family support, conflicts directly or indirectly with the business of growth and education, the result is child labour".

"The function of work in childhood is primarily developmental and not economic."

"Children's work then as a social good, is the direct antithesis of child labour as a social evil".

The Report of the Committee on Child Labour (1979), gave a broad definition of child labour by describing it as "that segment of the child population which participates in work either paid or unpaid".

Causes of Child Labour

Child labour is cheaper. It is more amenable to discipline. Chronic poverty induces and perpetuates child labour. Large families do not have any surplus to sustain themselves in periods of financial difficulties. The shortest and the easiest way is to withdraw the child from school and send him for a job. Parents collude with the child's employer in violating the law and put the child under risks of inhuman exploitation. Poverty and child labour thus beget each other.

Extent of Child labour

The statistics of child labour in the world and in India are mind-boggling. According to the International Labour Organisation's (ILOs) Report, around 52 million minors (under the age of 15) are working. Eighty percent of them work without pay for their families who use them in the fields, in crafts or in small industries. The remaining are made to contribute to the maintenance of the family as servants, messengers, itinerant peddlers, shoe-shiners, and construction helpers for a mere pittance. Much to our disgrace, India has the largest child labour force in the World. One-quarter of the children in Bombay begin to work between the age of six and nine and nearly half between ten and twelve.

Enquiries and Surveys

The employment of child labour has attracted the attention of every Committee or Commission in India, since the First Bombay Factory Commission of 1857.

The Royal Commission of Indian Labour (1929-31) observed as follows:-

"Workers as young as five years of age may be found working without adequate meal intervals of weekly rest days and 10 or 12 hours daily for sums as low as 2 annas in the case of those of tenderest years".

The Labour Investigation Committee (1944-46) found that the legislative measure relating to child employment had met with little success. It further observed:

"The important fact that has emerged from the investigations is that in various industries, the prohibition of employment of children is disregarded quite quite openly and owing to the inadequacy of the inspection staff, it has become difficult to enforce the relevant provisions of the law".

The Labour Bureau, Government of India, in its enquiry on child labour (1954) observed that in the small scale industries and cottage industries, such as match manufacturing, cashew-nut processing, bidi making, carpet weaving etc. employment of under-aged children, either uncertified or having false age certificate has continued. The actual hours of work were found to be in excess of the prescribed working hours under different enactments. In cottage industries, children were required to work as long as adult workers, except where the home-work system was prevalent. The working conditions for children in the bidi and glass industries continued to remain deplorable.

The National Commission on Labour (1969) has observed that, "child labour is employed mostly in agriculture, plantations and shops and in the small-scale and unorganised sectors."

The way child labour is used in the unorganised sector is still disturbing. The general observation of the National Commission on Child Labour (1969) is that though the employment of children was almost non-existent in organised industries, it persisted in varying degrees in the unorganised sectors such as small plantations, restaurants and hotels, cotton ginning and weaving, carpet weaving, stone breaking, brick-kiln, handicrafts and road building. Child labour, below the prescribed age, was also reported to be continuing in far-off places and in rural areas, where enforcement of statutory provisions was difficult. The members of the Commission found, during the course of their observational visits, prevalence of child labour in handloom and powerloom units, brocade work and in carpet weaving.

The survey undertaken by the Labour Bureau of the Government of India in 1979 as part of the observance of International Children's Year Programme, on employment of child labour showed that children are continously exploited in our country. The Survey disclosed deplorable conditions of child labour and showed that child workers are not members of any trade unions and on arrangements had been made for any formal training for them.

It was Ms. Jebb, an English woman, who first set in motion international efforts for providing the child with a status. Her pioneering work in child welfare resulted in the "Rights of the Child" a declaration adopted by the League of Nations in 1924. But the Second World War undid all this good work and the declaration died along with the League. It was only in the fifties that the United Nations decided to draft once again a charter of the Rights of the Child, and after certain modifications it was adopted unanimously at the plenary session of the UN General Assembly in 1959.

The preamble of the Declaration affirms that mankind owes the child the best it has to give and that efforts should be made to achieve children's rights through legislative and other means. The declaration incorporates ten rights to which the child is entitled.

Principle 9 of the declaration states

1. The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.
2. The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which prejudices his health or education, or interferes with his physical, mental or moral development".

Position in India

There is no general law on the Indian Statute Book, regarding child labour. This is because, historically, legislation was passed not with a focus on the employment of children or, for that matter, persons falling under any other age-group, or any particular general category, but with reference to the need to regulate employment in a particular industry as and when such need arose.

Constitutional safe-guards

There are three articles in the Constitution of India which reflect the concern of the founding Fathers for the child. They are found in Chapter IV containing the Directive Principles of State Policy.

Article 24 prohibits employment of children below the age of 14 years to work in any factory or mine or engage in any other hazardous employment.

Article 39 calls upon The State to direct it policy towards securing

(a) that children of tender age are not abused and children are not forced by economic necessity to enter avocations unsuited to their age or strength;

(b) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood is protected against exploitation and against moral and material.

Article 45 calls upon the State to make provision for free and compulsory education for all children.

These articles no doubt express very noble sentiments but they have not been translated fully into practice so far.

Statutory protection

There are six main enactments which give legal protection to child labour in Bombay.

The Children (Pledging of Labour) Act, 1933 prohibits the making of agreements to pledge the labour of children, and the employment of children whose labour has been pledged under such an agreement.

The Employment of Children Act, 1938 regulates the employment of children in certain employments. It prohibits employment of children in occupations connected with:-
transport of passengers, goods or mails by railway,
cinder picking, clearing of an ash pit or building operation in the railway premises;

work in a catering establishment at a railway station, involving the movement from one platform to another or into or out of a moving train.

It also prohibits employment of children in work connected with the construction or railway station or work in close proximity to, or between the railway lines. The Act further prohibits the employment of children in any occupation connected with a port authority within the limits of any port.

The Act also prohibits employment of children in workshops wherein any of the following processes are carried on, viz.

(a) bidi making; (b) carpet weaving; (c) cement manufacture, including bagging of cement; (d) cloth printing, dyeing and weaving; (e) manufacture of matches, explosives and fireworks; (f) soap manufacture; (g) tanning and (h) wool cleaning.

The Minimum Wages Act, 1948, prohibits the employment of children for more than 4 hours for any day.

The Factories Act, 1948 totally prohibits the employment of a child under 14 years of age in factories. A child who has not completed his fourteenth year is not permitted to work in a factor for more than 4 hours in any day or during night. Such a child cannot also be employed in 2 shifts and cannot be allowed to work in more than one factory on the same day.

The Motor Transport Workers' Act, 1961 prohibits the employment of children in any work in any motor transport undertaking.

The Beedi and Cigar Workers' (Conditions of Employment) Act, 1966 prohibits the employment of children in any industrial premises.

A major criticism of child labour legislation has been that it lacks uniformity. The various Acts do not conform to a single agreed minimum age, which differs from statute to statute, and industry to industry. The same anomalies exist in hours of work, rest intervals and night employment restrictions. Employers have been found violating the legislative provisions with impunity. Usually, child employment is concealed by not maintaining proper records.

Conclusion

Many tears are shed on the plight of child labour, but in terms of action, very little is done.

Legal measures have proved inadequate to eliminate the evils of child labour, particularly in the unorganised industries. Even though laws are enacted, implementation becomes difficult because of (a) the scattered nature of child employment, and (b) corruption among officers in charge of implementation. Thus, there is a wide gap between legislation and its enforcement.

The Factory Managers are able to obtain certificates of age even in respect of children of hardly 8 to 10 ages. Often, the minimum age restriction is evaded by the sub-contractor system in which the material is issued to workers at their own premises. Due to several glaring loopholes in the labour laws, violations of these laws seldom come to light. And when it does, the penalties are too light to act as a deterrent. So the vicious circle continues.

Neither government nor trade unions seems to be interested in protecting the interest of child labour.Each of them insists that it is the other's task. The Government of India's inaction on continuing evil of child labour is best illustrated by the fact that it rejected, in March 1981, a recommendation by the Committee on child labour that the minimum age for employment of children should be 15, on the ground that the time was not 'ripe' for acceptance of this recommendation.

The Harbans Singh Committee appointed by the Government to investigate the problem of child labour in various factories and industries in a district of Tamil Nadu, submitted its report in 1977. In its report, the Committee concluded that, "A community of interest has developed between employers and employees, as a result of which employment of children continues without protest and the government agencies have also been partly responsible for this".

The Report has accepted that banning child labour would not effectively halt the practice; instead it has suggested that working hours should be reduced, and wages increased. The Report has also recommended that the piece rate be abolished and wages be linked to the cost of living index. Recommending that non-formal education be given to children in factories, the Report adds "that School attendance be made compulsory and should be a condition precedent for employment in factories". No action on the Report has been taken so far, despite lapse of ten years. As a matter of fact, the report has not been made public.

The employment of children is both an economic and a social problem. Unless the socio-economic realities of a society are changed, children will continue to be the victims of poverty and exploitation. Child labour is as much the cause as consequence of adult unemployment and under-employment. On the one hand it supplements the family income and on the other hand it depresses it. In a way, child labour is a subsidy to industry. At the same time, it is an incentive to the payment of low wages to adult workers. Children's entry into the labour market reduces opportunities of employment for adult workers. It weakens their bargaining power. Experts estimate that if child labour is eliminated from the India's labour force, 15 million adult unemployed workers would get absorbed in the labour force. They also feel that the labour productivity will go up.

If a child has to be fed, clothed, housed and educated, at least modestly, a per capita income of at least two hundred fifty rupees a month, at current prices would be necessary. But not even a third of our population has this order of income. The economic aspect of the problem can be solved only by providing adequate economic means i.e. by increasing the income of the parents. Those who argue that child labour increases the earnings of the family and keeps children away from mischief making, ignore the fact that child labour deprives children of educational opportunities, minimises their chances for vocational training and hampers their intellectual development. The social aspect can be tackled by arousing consciousness among the people themselves. Education has an important role to play in this field. Kerala which has the highest rate of literacy in India has the lowest rate of employment of children.

It is very essential that the existing legal provisions pertaining to prohibition and regulation of children should be consolidated into a single comprehensive - The Child Labour Code. Under no circumstances, should child labour be engaged in hazardous occupations. Punishment for violating the Child Labour Code should be heavy and the persons responsible for implementation of laws should be made accountable to the Society and the Courts.

Law Relating to Abortion

Does a woman have right to obtain an abortion, or is it an offence under Indian law? Though the issue has not assumed significant legal importance in India, there is hardly a country in the world in which a definite stand one way or the other has not been taken. Attitudes to abortions have been moulded by diverse factors such as religion, prevailing notions of morality and the need for family planning. Women, on the other hand, have seen it as an issue of freedom of choice, the freedom to decide whether or not they want to be mothers. In this article, we examine the Indian law on the subject.

Gayatri Singh

The Indian law does not mention the word "abortion". The Indian Penal Code mentions the word "miscarriage" whereas the Medical Termination of Pregnancy Act, 1971 uses the "Termination of Pregnancy". Normally, the word "miscarriage" is used when a foetus is expelled from the fourth month to the seventh month of gestation, before it is viable, whereas the term "abortion" is used only when the ovum is expelled within the first three months of pregnancy, before the placenta is formed. Since there is no statutory definition of Miscarriage and abortion, in common parlance both these terms are used synonymously. (Modi's Textbook on Medical jurisprudence and Toxicology.)

Abortion or termination of pregnancy was generally regarded as a taboo in most countries. In countries where abortion was banned, women sought termination of unwanted pregnancies at great risk to their lives. The increasing incidence of high maternal mortality deaths became a serious problem which compelled most of the countries which had initially banned abortion, to legalise abortion, albeit under certain conditions.

The Soviet Union was the first country to legalise abortion as early as in 1920, followed by Iceland in 1935. But Russia reversed its policy in 1936 and then repeated that in 1955. Four Eastern European countries namely, Bulgaria, Czechoslovakia, Hungary and Rumania have recently narrowed the conditions under which women can obtain legal abortions. In restricting their abortion laws, these countries were driven by a concern to prevent a long term decline in their labour forces. In contrast to these four, more than 40 countries have liberalised their laws since the late sixties. Britain liberalised its abortion law in 1967. In the U.S. restrictive laws enacted in the nineteenth century remain in force till 1969-70, when a number of states such a Alaska, Hawaii and New York liberalised abortion. In January 1973, the U.S. Supreme Court invalidated the anti-abortion laws on the ground that abortion is a private matter between a woman and her physician. The Court also held that the right of privacy was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. However, despite the liberal laws, the U.S. Congress has virtually eliminated the use of federal funds for abortion. (The Hyde Amendment). Many French hospitals still refuse to provide abortion services — years after the passage of France's liberal abortion laws.

The liberalisation of the abortion laws in most of the countries, was more a result of the pressure and demand by the womens' movement to legalise abortion in order to make it easy for women to terminate their pregnancy as and when they desire to do so.

Religious taboos

Historically, abortion in India was condemned both by the Hindus and the Muslims. Manu believed that a woman who underwent abortion ought to be treated as an *outcaste* or murderer of the husband, depending upon how and when it was obtained. The rationale behind these stringent measures was that a foetus from conception was considered a human being and hence could not be aborted by human interference. In a joint Hindu family, a male child in womb in entitled to a share in the family property on birth. Since in those days it was not possible to detect the sex of the foetus, the preservation of the foetus became important for fear of aborting a male foetus. Muslims treated *azi* (abortion) as a serious offence. Thus, amongst Hindus and Muslims abortion was a religious taboo, and was treated as equivalent to human killing.

The Indian Penal Code 1860

With the enactment of the Indian Penal Code (IPC) in 1860 by the British, abortion for the first time became a statutory offence in India. The IPC does not mentions "abortion"; instead the term "miscarriage" is used. 'Miscarriage', however, is not defined in the Code. The relevant sections dealing with miscarriage are Sections 312 to 316. The severity of the punishment depends upon the stage of the pregnancy. The IPC recognises the distinction between a "quick" and a "non-quick" foetus. However, it prohibits miscarriage of both a quick and a non-quick foetus. If, for example, the foetus is "quick", the punishment is more stringent. "Quickening" is associated with a more advanced stage of pregnancy and when the embryo has taken a foetal form, usually after the first trimester period (each trimester consists of three months). If the miscarriage is performed without the consent of the pregnant woman, the gravity of the punishment is greater. Thus, under the IPC both the woman who undergoes the abortion as well as the abortionist are liable to be punished unless they are able to show that the "miscarriage" was done in "good faith" to save the life the woman. The punishment for preventing or causing the child to die after birth, was even more stringent.

The provisions dealing with "miscarriage" under the IPC are consistent with the British view that abortion or micarriage was

tantamount to murder and hence had to be dealt with severely. It was felt that a foetus was a human being and anyone who killed the foetus was a murderer. The Catholic concept of life which valued the life of the foetus more than that of a woman's lay at the root of the provisions dealing with miscarriage in the IPC.

In England, the Offences Against the Person Act 1861 (now subject to the Abortion Act, 1967) prohibits attempts to procure miscarrige from any time after conception of the child until its birth. The Infant Life (Preservation) Act, 1929 prohibits the killing of any child which is capable of being born alive. Prior to the enactment of any statute dealing with abortion, the Common Law punished those abortions which were of "quick" foetuses. To procure an abortion before this occured was not a crime. The distinction between quick and non-quick foetuses gave rise to complications and it disappeared in the re-enactment of the law by the Offences against the Person Act 1837 where all abortions were prohibited. The Indian Penal Code of 1860 recognised miscarriage both a quick and a non-quick foetus an offence, the only difference being the severity of the punishment. As a result of the prevailing law the pregnant woman had no right to decide whether she wanted the child or not.

Thus, the abortion law, as it stood, was heavily weighed against women who had to resort to "illegal" abortions under extremely unsafe and unhygienic conditions. A startling number of illegal abortions were being performed resulting in a phenomenal number of deaths of women.

The Introduction of the Medical Termination of Pregnancy (MTP) Act.

In 1964, the Central Government, upon the recommendation of the Central Family Planning Board appointed an eleven member Committee under the Chairmanship of Shantilal Shah, the then Health Minister of Maharashtra, to consider the problem of abortion in its "legal, medical, moral and social aspects". The Shantilal Shah Committee submitted its reports in 1966. In its report it stated that one out of every three pregnant woman sought an abortion in unsafe places. It was estimated that out of a total population of 500 million nearly 3.9 million abortions were performed illegally. Hence the need for liberalising the abortion law was felt. Finally, in 1969 the "Medical Termination of Pregnancy Bill" was presented before the Joint Committee of Parliament. Before being passed it was amended twice. In 1971 the Medical Termination of Pregnancy Act was enacted which came into force from 1st April 1972. The purpose for the enactment was ostensibly to put an end to the large number of illegal and unsafe abortions, which were jeopardising the health and lives of pregnant woman.

Another reason for the enactment of the MTP Act was the overriding concern of the Government to make the family programme successful. It was evident that the campaign for the promotion of the use of contraceptives had failed to achieve its purpose. It was hoped that the enactment of the Act would achieve that purpose. Thus, the background to the enactment of the MTP Act was completely different from those of the other countries.

The statement of the Objects and Reasons to the MTP Act state that the Act was conceived (1) as a health measure; (2) on humanitarian grounds - such as when pregnancy arises form a sex crime like rape and (3) eugenic grounds - where the child if born was likely to suffer from deformities and diseases.

Termination of Pregnancy

The MTP Act now legalises abortion in certain circumstances and subject to certain formalities. It has made it relatively easier for a woman to obtain an abortion. Under the Act, a pregnancy can be terminated only by a registered medical practitioner at a place recognised or approved by the Government. The pregnant woman has to consent to the MTP. She can claim a medical termination of pregnancy either on the ground that the pregnancy was the result of **"failure of contraceptives"**, or that the continuance of the pregnancy would cause risk to the woman's life or **grave injury to to her physical or mental health,** or that there is substantial risk that the child if born would be **seriously, mentally or physically handicapped,** or that the pregnancy was due to **rape.** Failure of contraceptives as a ground is unique to India's abortion law. The plea of failure of contraceptives can be availed of only by **married women. Thus, unmarried women cannot obtain an abortion on the ground of "failure of contraceptives.** The registration form requires the woman seeking MTP to disclose her marital status. As a result, unwed pregnant women usually mention rape or grave injury to physical or mental health as a ground to obtain abortion. The doctor has the discretion to decide whether the woman will suffer grave injury if the MTP is not carried out. The doctors are thus vested with enormous discretionary powers. Since the procedures in Government and municipal centres are strictly enforced, unwed pregnant women are reluctant to obtain MTP at such centres. Most of such MTPs are thus carried out by private clinics, where questions asked are few and where the case might not be registered at all. There is no reason why the ground of "failure of contraceptives" should not be made available to unwed pregnant women also. Especially so when the Government has itself allowed unwed mothers to claim maternity leave.

Time period

If the pregnancy does not exceed 12 weeks, then the Act authorises a medical practitioner to terminate the pregnancy if he or she believes that any one of the conditions laid down under the Act have been fulfilled. The termination of the pregnancy can be done only with the consent of the pregnant woman. If the pregnancy exceeds 12 weeks but does not exceed 20 weeks, the concurrent opinion of two registered medical practitioners will have to be taken before the termination of the pregnancy. Thus, under the Act, no termination of pregnancy can take place if the pregnancy is beyond 20 weeks. Such MTP is illegal and the relevant provisions of the IPC will apply. An MTP within the 12 weeks period was considered safe and hence required the sanction of only one registered medical practitioner. The MTP Act thus prohibits abortion after 20 weeks of pregnancy.

The only circumstance under which an MTP beyond 20 weeks can be performed is when it is done in "good faith" to save the life of the pregnant woman. The requirement of the concurring sanction of two registered medical practitioners is exempted under **Section 5** if the medical practitioners are of the opinion, formed in good faith, that the termination of pregnancy is immediately necessary to save the life of the pregnant woman.

In a case reported in Times of India (23rd June 1980 Delhi), an unmarried pregnant woman expelled a live child during an abortion in a MTP ward of the All India Institute of Medical Sciences. The foetus was 26 weeks old. This incident raised a hue and cry in the legal profession since a foetus capable of

being born alive cannot be aborted under the MTP Act, as it would amount to foeticide, and is punishable under the IPC.

Consent

The Act is 'liberal' in that in requires only the consent of the pregnant woman for performing MTP. It is not necessary that her husband or parents should consent to it if she is "sane" and above 18 years. However, in a Punjab case, it was held that if a wife undergoes abortion without the husband's consent at a time when the husband and his relatives are "anxious for a child" her conduct would amount to "cruelty" within the meaning of the Hindu Marriage Act 1955.

Section 3(4)(a) states that no pregnancy of a woman who is below the age of 18 years or who is a "lunatic" can be terminated except with the consent in writing of her guardian. The consent of the woman herself is not required. This clause is extremely discriminatory against women as it presupposes that women below 18 are not capable of taking decisions. The Committee on the Status of Women has pointed out that the denial of the right of the women below 18 years of age to give their consent for abortion is discriminatory, as generally children above 12 years are required to consent for the surgical operations to be performed on them (Towards Equality - Report of the Committee on the Status of Women in India, Dept. of Social Welfare, Government of India, New Delhi 1974-75). An American State statute requiring parent's or guardian's consent for performance of abortion on unmarried minor woman was held unconstitutional. The State Courts held the statute to be violative of the "due process" and "equal protection" clauses of the U.S. Constitution (*Doe V Doe* 314 N.E. 2d. 128 Mass 196G).

The Rules

Section 4 of the Act provides that pregnancies can be terminated only at the Government-run hospitals or a place approved by the Government. The Rules lay down the requirements of the place where the abortion is to be performed, if it is to obtain the recognition or approval by the Government. The Government of India by a notification issued on 10th October 1975, revised the Rules and Regulations under the MTP Act on the recommendations of the workshop on the "implementation of the programme of the medical termination of pregnancy at district hospitals and blocks levels" organised by the World Health Organisation (WHO) at New Delhi. The new Rules liberalised the requirements of experience or training required of a medical practitioner. However, the experience or training of the doctor must be obtained in a Government recognised or approved hospital. Restricting practical training in gynaecology and obsterics only at such hospitals is an impediment in producing sufficient number of registered medical practitioners qualified to become certified practitioners under the Act. Though the Rules pertaining to a qualified medical practitioner and approved places for MTPs are extremely liberal, yet an overwhelming number of abortions are being done in private clinics or by quacks. The reason for this is because there is an acute paucity of government hospitals or approved places in rural areas. Even after the Act came into force, a large number of deaths have been taking place owing to lack of proper medical facilities or total absence of such facilities. It has been reported that nearly 10,000 women die each year on account of abortion. There are about 2,934 recognised centres all over India, the majority of which are concentrated in cities and big towns. Maharashtra alone has about 555 recognised centres, out of which 120 are located in Bombay alone. Out of the 120 recognised centres, as many as 80 are private clinics.

Cases

In *Griswold Vls Connecticut* [381 U.S. 479 (1969)] the U.S. Supreme Court held that the State cannot make the use of the contraceptives by married persons a crime and so cannot punish someone who provides married persons with contraceptives or with providing information concerning their use. The State's regulation was condemned as invading "area of protected freedom" which included "the zone of privacy".

In *Eisenstadt Vls Baired* [405 U.S. 438 (1972)] Justice Brenan writing for the majority observed that "if the right of privacy means anything, it is the right of **individual,** married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child". In 1973, the Supreme Court further extended *Griswold* and *Baird* to the case of abortion holding in *Roe Vls Wade* [410 U.S. 113 (1973)] and *Doe Vls Bolton* [410 U.S. 179 (1973)] that the right of privacy recognised in the contraception cases was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy". Specifically, the Court held that, because the woman's right to decide whether or not to end a pregnancy is fundamental, only a compelling State interest can justify state regulations impinging in any way upon that right. For example, there would be a compelling State interest in the foetus if the State could show a viable life in which it had an interest. The majority in *Roe Vls Wade* however found no basis for calling the foetus a person.

The A.P. High Court in *T. Sareeth V.T. Venkata Subbaiah* (AIR 1983 A.P. 356) while dealing with restitution of conjugal rights discussed the concept of privacy under Article 21 of the constitution. The High Court held that Article 21 guarantees a woman a right to control her own body and to decide whether or not to have a child. The A.P. High Court has cited several decisions of U.S. courts which held that the right to privacy belongs to each partner of the marriage and that the State has no constitutional authority to prevent a woman from terminating her pregnancy. Unfortunately the Andhra Pradesh case was disapproved of by the Supreme Court in a later case. In *Kharak Singh Vls State of U.P.*, (AIR 1963 SC 1295) the Supreme Court, by a majority decision rejected the argument that "personal privacy" is a part of the right to personal liberty enshrined in Artilce 21. However, the minority view was that the "said right is an essential ingredient of personal liberty". Later cases (*S.N.Sarkar Vls State of Madhya Pradesh,* AIR 1973 S.C. 1425 and *Govind Vls State of Madhya Pradesh,* AIR 1975 S.C. 1378) however have recognised that "personal privacy" is an essential part of personal liberty.

Conclusion

The decision to engage in sexual intercourse but not to parent another human being reflects the deepest of personal convictions. A woman who is forced to bear a child and who is unable to obtain an abortion easily because of stringent State regulation may suffer from an extreme violation of her privacy.

In the Indian context, the question of "privacy" has not acquired the importance that it has a say in America. The background to the enactment of the MTP Act has been more of a health and family planning measure than anything else.

REVIEW

Eclectic Exercise In Awareness

Raju Z. Moray

The book under review* is an eclectic exercise in awareness. 'Systematic' seems to be the key adjective with which to describe Justice Masodkar's endeavours.

The book is divided into five chapters, titled rather alliteratively - Dialectics, Debate, Diktat, Disability and Defection. That the question of electoral disqualification is exhaustively discussed in this book is evident from its schematic pattern. Whilst the chapter on 'Dialectics' deals with the question of interpretation and its relevant principles, the one on 'Debate' covers the Tenth Schedule introduced by the controversial Constitution (Fifty Second Amendment) Act, 1985. The chapter entitled 'Diktat' describes in brief the concept of political parties, their rights and obligations. The bulk of the book, however, is contained in the penultimate and final chapters, namely 'Disability' and 'Defection'. These bring out the scheme of Constitutional disqualifications. The former examining disqualification on the ground of disability and the latter dealing with defection.

Justice Masodkar is sceptical about the efficacy of representative democracy, especially in the wake of the Constitution (fifty-second Amendment) Act, 1985. An indepth analysis of this Act and its implications is to be found in this book but we can take a quick dip into Justice Masodkar's thesis here.

Another aspect which angers the author is the additional bar on the jurisdiction of Courts imposed by paragraphs 6 and 7 of the Tenth Schedule despite the existing bar contained in Article 329. He says "Barring the matters of judicial review cannot be inferred merely from an enactment of Legislature, for Constitutional jurisdiction in this regard exists in Articles 32, 226 and 227 in favour of the Supreme Court and High Courts respectively. Legislative enactment cannot affect that jurisdiction".

From a historical perspective, he observes, "Party rise is traced to innate drive of men to organise themselves and articulate socially in that manner. Free elections lead to free competitive party system and eventually representative form of government becomes party government, or government of majority group. This party then becomes and is medium of power of people. It involves process of double delegation, first in favour of the party and second through its media on the delegate who would enter democratic government". But what does all this lead to in practice? Justice Masodkar states, "Truth remains, that more the political groups become powerful, more distant becomes the dream and realisation of democracy". And why does this have to happen? Justice Masodkar a has readymade answer, "The distinction lies in the fact that the people who are governed are nor the same people who govern". A truism, which does not add anything to our understanding of politics.

But let us now focus upon the heart of the matter. The Tenth Schedule added by Section 6 of the Constitution (Fifty Second Amendment) Act, 1985 spells out the grounds on which a legislator can be disqualified on ground of defection. Briefly, these are a) if he has voluntarily given up his membership of his party or b) if he votes or abstains from voting in the house of which he is member, contrary to any direction issued by his political party and if such voting or abstention has not been condoned by such political party within 15 days from the date of such voting or abstention.

Justice Masodkar is clearly dissatisfied with this provision. He feels that a distinction ought to have been made between a "political defection" with political, amoral, ulterior, selfish and non-ideological motives and "parting of ways" based on freedom of choice motivated either by "desperation" at the functioning of ones' own party or even by a "prick of the conscience". But how and where he would draw the line between "political defection" with political immoral and selfish motives and a parting of ways "motivated by prick of the conscience", is a matter the author does not explain. Given the fragile nature of the conscience of legislators, and the dominant political consideration of staying in power at any cost, does the author envisage the lack of this distinction as being a real problem? Would it not be better for such a legislator to resign from Parliament, instead of hanging on to his seat and membership of the party?

The need to preserve the democratic ideal is a theme of the book. A penetrating analysis of parliamentary legislation on electoral disqualification and a perceptive examination of judicial options in the light of Constitutional provisions of the Supreme Court decisions is what this book is about. The fact that its author is not only an erudite scholar (he has already authored 5 books on law) but also a senior sitting Judge of the Bombay High Court adds significance to its candid and constructive observations and makes it a book worth reading. An actual attempt at doing so might prove a bit too strenuous for an average reader as Justice Masodkar's prose is not exactly readable. But that is another matter all together. A more compact and readable version in a future edition, preferably in paperback, may well enhance the value of this work and make it a worthwhile member of any well-equipped library.

The voting pattern of the ruling Congress (I) Party in the Lok Sabha on the Muslim Womens' (Protection of Rights on Divorce) Bill 1986 becomes relevant in this context. Despite the issuance of a three line whip to all members to remain present and to vote in support of the Bill, as many as 48 members remained absent and more

Continued on P. 15

* ***Law Relating To Electoral Disqualification.***
Author : B. A. Masodkar;
Publisher: N.M. Tripathi.
Price: Rs. 85/-.

Calcutta High Court to Vacate Town Hall

Presently, the High Court and the Municipal Corporation of Calcutta are engaged in a battle over the occupancy of certain rooms in the Town Hall building.

Several years back, the Town Hall was taken by the West Bengal Government Judicial Department to locate some of the offices of the High Court. The understanding was that the High Court would vacate the rooms as soon as the new building, which at the time was coming up, was completed. The Agreement stated that the Town Hall would be vacated upon the Calcutta Municipal Corporation issuing a three months notice. The High Court building known as Centenary Building, was subsequently completed.

The Corporation decided to preserve the Town Hall as a building of national and historial importance and decided to get it vacated by 31st March 1986, so as to reopen it on 9th May 1986, the 125th birth anniversay of Rabindranath Tagore. Notices were issued and the Mayor addressed a personal letter to the Chief Justice, Mr. Satish Chandra. Many of the other occupiers have moved out or are in the process of moving out. It seems, initially the High Court agreed to vacate. However subsequently, the High Court authorities wrote back to say that unless alternative accomodation is provided they would be unable to vacate. The Corporation on the other had has taken the stand that finding alternative accommodation is the job of High Court and State Government.

The Corporation has decided to treat the High Court's adamant attitude as an 'illegal action' and is planning to proceed legally against it. The next few months will prove of much interest as both the sides are rolling up their sleeves to take the fight to its logical end.

Ex-judge Receives Accident Claim

The Motor Accident Claims Tribunal, Bombay, recently awarded approximately Rs. 26.26 lakhs as compensation to Mr. R.D. Hattangadi, Ex-Judge, City Civil & Sessions Court, Bombay.

Mr. Hattangadi had been travelling in a car owned by Pest Control India (Private) Limited, when the vehicle collided head-on with a lorry near Mangalore on 20th May, 1980. It was found that the car was on the wrong side. Mr. Hattangadi was rendered paraplegic owing to the accident.

A claim for compensation was filed against Pest Control, the lorry owner and the Insurance Agents. Constitution of Tribunal took much time at Mangalore, resulting in Mr. Hattangadi filing a petition in the Supreme Court for transfer of the claim petition to Bombay.

In 1985, the Supreme Court authorised transfer of the application. 37 witnesses including a sitting judge, a former minister of Maharashtra State, eight doctors, eight lawyers and Physiotherapists were examined as witnesses.

The Tribunal awarded Mr. Hattangadi compensation of Rs. 26,25,992/- with interest at the rate of 12 per cent per annum payable from the date of application till actual date of payment.

Habeas Corpus in Magistrate's Court:

In a pathbreaking judgement, the Andhra Pradesh High Court held that it is possible to claim the relief of Habeas Corpus even from a Magistrate's Court.

The judgement bases itself on compassionate as well as on legal grounds. The normal practice in case of unlawful detentions has been to file a 'Habeas Corpus' (produce the body) petition in the High Court, whereupon the High Court requires the detaining authority (most of the time the police) to produce the detenue in Court and thereafter order his release.

However, the friends and relatives may have to travel long distances and incur large expenditure to move the High Court for the release of the person who is unlawfully detained. The delay caused because of this, may also prove crucial in the cases of those who are unlawfully detained.

Showing concern about these facts, the High Court observed that even Magistrates in the local area have powers to immediately release unlawful detenue. The Judge held that under the Criminal Procedure Code, the Magistrate has powers to direct the police to produce the detenue in Court and require his immediate release.

Child Detenues

In the recent judgement passed by the Supreme Court much concern is expressed about the practice of keeping children below the age of 16 years in jails for number of years.

The order of the Supreme court was passed in the pubic interest litigation filed by Shiela Barse, complaining about the conditions of children in prison. The Supreme Court observed that though it is an elementary requirement of a civilised society that children should not be confined in jail as it has a dehumanising and harmful effect on them, still surveys made by the Home Ministry and Social Welfare Departments show that children below the age of 16 years are confined to jail

Eclectic Awareness *Cont.*

than 30 pressed the wrong button saying "no" instead of "yes" (of course they apologised for this simultaneous "mistake" later). One is left wondering however, if the whip were not issued how many Congress (I) members would have actually voted against the Bill. Justice Masodkar is not at all convinced about the concept of forced ethics. He says that this measure "impinges *exfacie* upon liberty, associative rights, rights of free representation and public interest as well as parliamentary privilege of speech and expression". He raises the question "If we were to treat vote, as ordinarily should be, the part of speech and expression, within the meaning of Article 194(1) as a privilege standing by itself, it cannot by reasons of voting against the mandate lead to the result of removal. That itself would be breach of privilege. The assured privilege of freedom thereunder is lost. How could such privilege or its exercise be termed as defection, without something ulterior added to it?" But here again the author does not discuss the inconvenient question of the expectations of the electorate.

COMMENT

Legal Journalism

"If a layman untrained in Law can understand the issues involved in a legal report at the very first reading then the reporter had done a good job". In this article B.I. Taraporewala, a highly experienced and respected legal journalist who has been reporting on the Bombay High Court for the past 37 years, takes a look at his own profession.

B. I. Taraporewala

A successful senior counsel enumerated to his juniors the methods of getting on in the profession. These were: (a) devilling for the senior and working up his briefs and looking up the law for him, (b) lecturing to law students and coaching them, (c) reporting legal cases so as to keep abreast of the law, (d) marrying the offspring of a successful solicitor or advocate so as to ensure financial support, and (e) luck.

A soldier is trained in the use of arms so that he can successfully attack the enemy and defend himself and his country. A lawyer is like a professional soldier. His armoury consists of ideas and their expressions. He should be a competent craftsman in the use of words and language, and a psychiatrist and artist in swaying reluctant judges. One of the best forms of training is learning the art of legal reporting. This art and skill is acquired by long practice, for complicated issues are presented with simplicity, without sacrifice of accuracy, and a difficult area of study is made as simple as it could be to readers. If a layman untrained in law can understand the issues involved in a legal report at the very first reading then the reporter has done a good job.

To ensure simplicity, accuracy and clarity a reporter should ask six basic questions about the topic to be reported: What, Where, When, Why, How, and Who? These six questions form the fundamentals of all cross-examination to elicit information about a topic under investigation. The opening paragraphs form the soul of the report, and the remaining paragraphs fill in the details. To every litigation there are four basic things, namely, the forum, the parties, the cause of action and the reliefs sought. A report is incomplete when any of these four things is not mentioned.

The Art

A skilled reporter must master the art of precise writing - not a word extra, not a word redundant. Unless there is clarity of thought, there cannot be clarity of expression. A reporter must be able to cut through the thickets of unnecessary facts and verbiage, so as to arrive at the most essential facts. Then he should present them with clarity in a logical sequence and order, so that at the very first reading the reader is able to absorb them.

The practice followed in the Bombay High Court as regards law reporting in professional journals is as follows:
On the first page of the transcript there is a list of questions to be answered by the Judge delivering the judgement. One such question is whether the judgement is to be reported in the law reports. Another is whether newspaper reporters are allowed to see the judgment. If the Judge is of the view that the judgement is worth reporting in the law reports, then the stenographer prepares a number of copies of the judgement for various journals. The journals, however, work under constraints imposed by the number of pages of the journals printed annually. All judgements directed by the Judges to be reported cannot possibly be accomodated in every law reporter, and the editor of the journal must exercise his independent discretion and select which judgement is to be published.

A cynical experienced reporter or editor might suggest that the higher judiciary should be deprived of services of stenographers and be compelled to write their own judgements in long hand themselves, preferably while standing up. Then, their judgements would be shorter, sounder and to the point, without wastage of energy or paper, and perhaps more intelligible to the readers.

How does a law correspondent of a newspaper select his material? He does it by keeping his eyes and ears open, keeping his mouth shut and keeping his innermost thoughts to himself. He does not shun any possible source of information, however lowly or unlikely. Sometimes it requires a lot of legwork and contacting numerous people before the reporter can get at the right source. More often than not, a reporter is racing against time to meet a deadline. The text of a judgement might not be available. Some doubts might have to be cleared. In such contingencies, the methods to be adopted might be to contact the legal representative of one of the parties and get the material from him, and then have the material counter-checked by the representative of the opposing party. This would ensure that the report is not one-sided or biased, but is a balanced and fair one.

Justice Seen to be Done

Lord Hewart said : "A long line of cases shows that it is not merely of some importance, but it is of fundamental importance, that justice

should not only be done, but should manifestly and undoubtedly by seen to be done." Some learned Judges, however, deliver their judgment in open Court in such a low voice that it is audible only to the stenographer. Microphones should be installed in every courtroom to ensure that arguments of counsel and the judgment delivered by the Judge are audible to all present. It can hardly be said that judgment was pronounced in open Court, when its delivery was almost whispered into the ears of the stenographer alone and it was inaudible to all other parties interested in knowing the outcome of a highly controversial public issue. Another acceptable alternative would be that the Judge should reserve judgment and then when the judgment is delivered have copies available for parties and for the press. The installation of a microphone in courtrooms would be a public boon and make the task of legal correspondents easier. Some Judges follow the healthy practice of summarising points resolved at the end of their judgments. This is particularly helpful in reporting highly complicated matters.

What are the criteria for selection material for legal reporting? One of the prime factors is the prominence of personalities involved or the instances of political skulduggery brought to light. In a democractic set up these and election matters must be given the widest publicity.

The legal correspondent covering the High Court and the Supreme Court is always on the look-out for matters where some new legal proposition is laid down or a legal principle is extended to cover fresh areas not yet covered.

Nanavati Case

Giving too much publicity to a sensational case can sometimes lead to unforseen complications and at times hysterical reactions. A case in point is that of Commander Nanavati, a highly trained officer of the Indian Navy, who was tried for murder of a businessman, Prem Ahuja, who had seduced his wife. This widely publicised trial attracted huge crowds at the trial. When the jury returned a verdict of not guilty by a majority of eight to one, the Sessions Judge, Mr. R. B. Mehta, was so agitated that he said that the Constitution of the country was in peril. He differed with the verdict of the jury and referred the matter to the High Court. The hearing of the reference before Mr. Justice J.M. Shelat and Mr. Justice V.A. Naik was also reported at great length. It was a taxing time for the law correspondents. Mr. Justice Shelat completed delivery of his oral judgment around 5.30 p.m. and he found Nanavati guilty of murder and in the facts and circumstances of the case sentenced him to imprisonment for life. Correspondents worked well past mid-night to have the report published the next morning. The next day the judgment of Mr. Justice Naik, who delivered a separate but concurrent judgment, was almost inaudible. Then came the legal drama. The Navy was keen on saving the career of Nanavati. The Governor of Maharashtra passed a conditional order under which Nanavati did not have to go to jail but was to remain incustody of the Indian navy till the disposal of his appeal by the Supreme Court of India. The High Court Judges were so aroused by this order that they held an impromptu high level judicial conference in the corridor and sat almost 45 minutes later than usual. When Mr. N. A. Palkhivala appeared for Nanavati before Mr. Justice Shelat and Mr. Justice Naik to apply for leave to appeal to the Supreme Court, the Judges were most curt, and the question of validity of the Governor's order was referred to a special Bench of five judges headed by Chief Justice Chainani. Two out of the five Judges were of the view that the Governor's order was constitutionally invalid, while two other Judges took the opposite view. The fifth Judge, Mr. B.N. Gokhale, was of the view that the order was valid and ultimately the majority view prevailed. But when Nanavati went before the Supreme Court of India, the Court refused to hear the appeal unless he first surrendered to his sentence. The Supreme Court dismissed the appeal and the Press Trust of India reported this decision tersely and laconically in a couple of paragraphs. So ended this legal drama, which had wounded too many prominent egos.

Civil cases can also provide human interest stories. One such instance was a proceeding filed by a poor Hindu couple demanding recovery of a baby girl from another poor Hindu couple on the basis that the babies had been switched over in a charitable maternity clinic where both mothers had delivered baby girls Justice Coyajee who heard the matter, negatived the plea of the Plaintiffs for a blood test and after a detailed hearing on merits dismissed the matter.

Humour

Humour in court is like a shaft of sunlight in a gloomy building. It brightens the life of lawyers and reporters and releases tensions built up during acrimonous hearing. While dealing with the issue of interpretation of circumstantial evidence, Mr. A.S.R. Chari, counsel for Nanavati narrated to Mr. Justice Shelat and Mr. Justice Naik the story of a Brahmin holding a glass of buttermilk in his hands. No one was prepared to believe that he held a glass of buttermilk, just because he was standing in front of a toddy shop. There was an instance of a Judge telling a junior counsel, who stood before him without his brief, that a lawyer without his papers was like a barber without his razor.

If a secret formula or a trade secret is the subject matter of litigation, publication of detailed reports of such proceedings in court can ruin parties. In matrimonial matters or in cases involving sexual offences, a witness or a party might feel great embarassment if compelled to testify in open court before spectators bent upon lapping up juicy scandals. In cases where a political leader is being tried, the exigencies of the case might require the trial to be held in premises other than regular court premises. So also in cases where a political leader is assasinated, to ensure the safety of the accused, the trial might be required to be held in places providing greater safety of the accused or of witnesses e.g. Tihar Jail in Mrs G's case - In such cases only a few representatives of the press might be allowed to attend the trial. In matters under the Official Secrets Act, trials might be held *in camera* for reasons of national safety. In cases involving minors, like those involving questions of custody or cases of kidnapping or sexual offences against a minor person, it would be proper not to report the proceeding in a manner in which the identity of the minor is revealed, for

this might blast the future of the minor. As a normal rule, matters heard in *Chambers* as distinct from those heard in open court, should not be reported without permission of the Judge hearing such matters.

Escorts Case

Reporting a complicated legal matter is rendered difficult by reason of the fact that several parties are involved in a variety of actions. This can happen in civil cases as well as in criminal cases. The case of transfer of shares of Escorts Ltd. is a case in point. It was a case of multiplicity of parties and of causes of action. It involved the Union of India, the Reserve Bank of India, the Punjab National Bank, the Caparo group of companies registered abroad controlled by Mr. Swraj Paul, a British national of Indian origin who had bought shares worth crores of rupees, the share brokers and the sellers of the shares and also the Life Insurance Corporation of India and other financial institutions who controlled the majority of shares of Escorts. Various strands of the case were inextricably mixed up and in effect it was like hearing ten interconnected writ petitions simultaneously.

One area of sensitivity in matters of legal reporting is that of contempt of Court. Here, of necessity, the judges are the aggrieved parties, and they have to be Judges in their own cause, whereas, the normal rule is that no person should be allowed to be a Judge in his own cause. The truth of the allegation said to constitute contempt is rarely a defence accepted by Courts in matters of contempt. Justice is said to be an attribute of divinity, but judges whose duty it is to administer justice are all too human with all possible human infirmities and foibles. It sometimes does happen that our sacred illusions about courts and justice are blown sky-high by the explosion created by the truth of the allegation.

References to departed leading counsel and to departing judges generally provide solemn occasions for paying tributes to dominating personalities who shaped the law and history of the country.

Perhaps the finest tribute paid to any judge of the Bombay High Court was that given by Mr. C. K. Daphtary, one of the most polished Advocate Generals to Mr. Justice Weston on the latter's elevation as Chief Justice of the Punjab High Court. Speaking on the occasion, Mr. Daphtary recalled the saying of Socrates that four things belonged to a Judge; to hear patiently, to answer wisely, to consider soberly and to decide impartially, then he said that these four attributes were to be found in His Lordship in a balanced and even measure.

It is necessary that a legal correspondent should be a person of integrity and independence, free from passions and from pride, unaffected by greed or delusion of his own power of the pen. Only then, will the reports be balanced, free from hysteria, unbiased and provide public education.

B.I. Taraporewala is an Advocate and a law reporter. Besides law, his interests include photography and yoga.

WARRANTS ATTENTION

In Defence of Truth

Investigative journalism has invited contempt of Court proceedings in several cases. There is hardly a time when issues of public importance are not pending in Court and the press naturally comments on such issues. Allegations about falling standards of conduct in the judiciary are openly made in day to day conversation, but when put in print they can invite contempt proceedings. It is a matter for consideration whether our existing laws of contempt serve to instill confidence in the judiciary. In this article, we do a case study of contempt proceedings against the Illustrated Weekly in the Kerala High Court.

Indira Jaising

With the induction of Balakrishna Pillai into the Kerala Cabinet on 26th May 1986, the wheel of politico-legal events turned full circle. The exit of Balakrishna Pillai from the Karunakaran Ministry on 6th June 1985 was preceeded by something of a judicial event, the filing of a petition by Congress (I) man, K.C. Chandy, for a Writ of *quo warranto* against Balakrishna Pillai. Relations between the partners of the delicate coalition of the Congress (I) and the Kerala Congress, to which Pillai belonged, were tense. Chief Minister K. Karunakaran was looking for a way of increasing his share of power. Pillai had reportedly made a speech on the 25th May 1985, calling for a Punjab type agitation to gain concessions from the Centre.

K.C. Chandy v/s Pillai

It is in this context that K.C. Chandy, a Congress (I) Block President filed a petition for a writ of *quo warranto* against Pillai. The petition argued that Pillai had committed sedition and violated his oath of office as a Minister. He therefore lost his authority to continue as a Minister.

Then followed a sequence of bizzare events that directly called into question the role of the judiciary in the subsequent resignation of Pillai. The petition was filed on 4th June 1985. It came up for admission on 5th June before Justice Radhakrishnan Menon, who while admitting the petition remarked **"If the reports in the newspapers are established, the allegations in the original petition also will stand established. If there is a breach of the oath taken while assuming office, the incumbent is not entitled to continue in office. He on his own accord should step down observing the high traditions of the Parliamentary system of Government provided for under the Constitution. If not, the machinery provided for under the Constitution to restrain him from functioning as a Minister can be set in motion by any citizen of the country"**

Justice Radakrishnan Menon

On 6th June Pillai did resign.

Contempt of Court

The mission of the petition was accomplished and all would have been forgotten, were it not for the publication in the *Illustrated Weekly* of 7th June 1985 an article "Troubled Times"

The flood gates of litigation against the publisher and editor of the *Weekly* Pritish Nandy and the author of the article Venu Menon were thrown wide open. On 9th June 1985, only two days after the article appeared, the High Court issued *suomoto* notice for contempt of Court against the publisher and Editor of the *Illustrated Weekly* Pritish Nandy and the author of the article, Venu Menon. The following paragraphs in the article were said to constitute contempt:

1. "But when the petition was admitted and the High Court judge made some preliminary remarks that seemed prejudicial to Pillai, the event took on a darker colouring."
2. "Balakrishna Pillai did step down apparently in observance of the "the high traditions of the parliamentary system of Government". **But questions arose instantly as to whether the judge had observed the high traditions of the judiciary.** There is believed to be no precedent of a judge making such remarks at the stage of admitting a petition."
3. **"If Balakrishna Pillai's anxiety to resign is suspicious, so too Judge Radhakrishna Menon's impulse to make adverse observations while admitting the petition casts doubts about the impartiality of the judiciary. Already the capital is agog with loud whispers about the telephone conversation Chief Minister Karunakaran is believed to have had with Judge Radhakrishna Menon at 9 p.m. from Cliff House, the CM's official residence, the night before the judge's remarks came."**

Search for Lawyers

"The search for a lawyer in Cochin to defend us was difficult, if not impossible. Nobody was willing to defend us and argue that there was no cause for contempt. It was difficult enough to find someone even to tender an apology on our behalf" says Venu Menon.

The atmosphere in the Cochin Bar, he felt, was heavily politicised. Few were willing to look at the issue as one

WARRANTS ATTENTION

of freedom of speech and expression. It would appear that ultimately, being left with no option, the Publisher and Editor Pritish Nandy made a statement that the article was published 'inadvertently' while Venu Menon tendered an unconditional apology.

Judgement on Contempt

The judgement of the Court delivered on 30th July 1985 makes interesting reading. After a long-winded sermon on the virtues of freedom of speech and expression, the Court found that the statements in the article **"clearly show that a reckless and scurrilous attack has been made against a learned Judge of this court, imparting oblique motives in the discharge of his judicial functions and suggesting an unholy acquaintance and constant contacts with the Chief Minister, for the purpose of moulding reliefs in the pending writ petition"**. The judges came to the conclusion that the charges against the *Weekly* were "grave and serious". However, the explanation given by Pritish Nandy that the article was published inadvertently was accepted but not without a word of stern advice. "We hope that in future Pritish Nandy will use his power of editorial censorship with greater precision so as not to affect the administration of justice and the impartiality of the judiciary". So far as Venu Menon was concerned, in view of his "youthful enthusiasm in journalistic adventure, his open regrets" he was fined Rs. 1000/- under Sec. 12(1). (See High Court of Kerala V/s Pritish Nandy KLT 732).

Judgement on Pillai

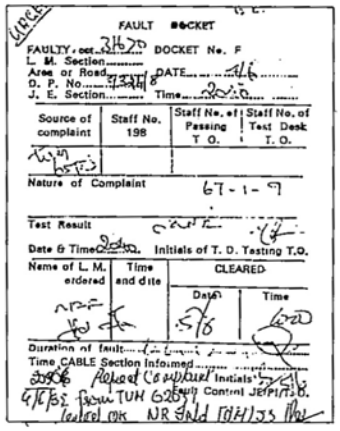
What happened to *Chandy V/s Pillai* in the meantime? On 19th August, 1985, the Court while holding that it has the jurisdiction to issue a Writ of *quo warranto* decided **"it would not be even expedient for the court to exercise the discretion for the issuance of a writ asked for when the Chief Minister is already seized of the matter"** (See Chandy v/s Pillai 1985 KLT 762). What began with a bang in June 85 came to an unceremonious end in August 1985.

In Defence of Truth

Apparently the *Weekly* was not going to take the admonition lying down without trying to establish the truth of its allegations.

On 22nd September 1985, an article appeared in the *Weekly* titled "In Defence of Truth".

Along with the article was published the photocopy of the subscriber's fault card and fault docket of the Post and Telegraph department in respect of the Telephone number of Justice Radhakrishna Menon. It is clear from these documents that someone at the residence of the Chief Minister was trying to call the residence of Justice Radhakrishna Menon at 20.40 hrs on 4th June 1985.



FAULT DOCKET

FAULTY ... DOCKET No. F

L. M. Section.....

Area or Road..... DATE.....

D. P. No.....

J. E. Section..... Time.....

Source of complaint	Staff No. 198	Staff No. of Passing T. O.	Staff No. of Test Desk T. O.

Nature of Complaint

Test Result

Date & Time..... Initials of T. O. Testing T.O.

Name of L. M. ordered	Time and date	CLEARED Date	Time

Duration of fault.....

Time CABLE Section Informed.....

Initials

Control

Advocate General gives notice

Several advocates sought permission from the Advocate General to take action against the *Weekly* under Section 15(1) (b) of the Contempt of Court Act for publishing the second article of 22nd September, 1985. In order to decide whether permission should be granted, the Advocate General gave notice to the Publishers of the *Weekly* and to the Telephone Department. The Publishers denied they had committed contempt and refused to produce the original documents of the Telephone Department. The Department itself appeared and admitted that the original documents were missing from the file. The Advocate General then did a dramatic about-turn and this time in contrast to his earlier attitude decided in December 85 **"it would be a waste of time if any contempt proceedings are started based upon the allegations in the impugned article"**.

Judiciary's bruised image

Pillai's political fortune is currently on the upswing. But it is a matter for consideration whether the judiciary has come out of the whole affair with a bruised image. Why was the same court which was so quick to react to the article of 7th July 1985, stunned into silence by the publication of the Fault Card? If the first of the two articles was "reckless and scurrilous" why did the Court fight shy of looking at the original documents of the Telephone Department? The Judiciary indeed exercises enormous power to pick up an issue when it wants to and drop it when it wants to. No explanations need be offered. Truth it is said, is not a defence to the charge of contempt of court. Publication of any matter relating to pending proceedings tends to interfere with the administration of Justice and constitutes contempt. In between, some lip sympathy to freedom of speech and expression is due. To this day, the *Weekly* has in its possession the original fault cards. "We would still welcome an enquiry" says Sailesh Kottary . The issue is larger than contempt - the relationship between executive and judiciary . But who cares for the truth - the mission of the petition was accomplished. Balakrishna Pillai got back to his place in the sun a year later.

Balakrishna Pillai's re-entry

Balakrishna Pillai had in the meantime gone into political oblivion biding his time to stage a come back. The waiting game finally paid off. All petitions having been disposed off or gone into the background, he chose his time to force a comeback. In May 1986 in a face-saving operation, Chief Minister Karunakaran appointed Janakiama, a retired Judge of the High Court to give a legal opinion on whether or not Pillai could be reinducted as Minister. The choice of Janakiama who had earlier made several statements that there was nothing wrong in the speech made by Pillai would have made the outcome of the whole operation predictable. Karunakaran announced that he had cleared Pillai's induction into the Cabinet. Venu Menon commented "Pillai's exit had the blessings of the judiciary. His entry was clothed with legal sanction by retired Judge Janakiama".

SPECIAL REPORT

NET-OEN : Trials and Errors.

Raju Z. Moray

A Writ Petition has recently been filed in the Supreme Court of India for restraining the Union of India, The State of Andhra Pradesh and the Indian Council for Medical Research (ICMR) from further testing, recommending for use or administering the injectable contraceptive Net-Oen (Nor-ethisterone oenanthat), which has not been proven a safe drug for long term use and which has infact been found to be a definite health hazard when used even for a short term under Indian conditions. The Petitioners are three womens' organisations, five reputed medical practitioners and a journalist.

The Petition outlines the relevant available data on Net-Oen and details the disastrous consequences which a continued use of the drug entail. Briefly, Net-Oen works as follows:

Physiological imbalances

The physiological balance of the reproductive system in women is maintained primarily by two hormones, namely, oestrogen and progesterone. Net-Oen is a synthetic progresterone. When it is administered in a high dose, it totally disrupts the cyclical integrity of the natural hormonal balance in the body and produces many side-effects. One such effect (just one) is contraception.

As against the advantage of the contraceptive effect, the injection of Net-Oen results is menstrual chaos i.e. irregular bleeding, spotting, changes in the frequency, duration and amount of blood loss, heavy and prolonged bleeding or a total absence of bleeding. It is also pertinent to note that the incidence of menstrual abnormality increases with each successive dose of the injection. Further, till now, there has been no effective treatment worked out to manage the bleeding problems.

Phase IV Trials

In August, 1984, at the request of the Ministry of Health, the ICMR decided to conduct Phase IV trials for NET-OEN. These trials are also called programme introduction studies. The Phase IV trials are to be conducted only after successful completion of earlier Phase III trials. Both the Ministry of Health and the ICMR felt that the results obtained in the Phase III conducted by the ICMR were encouraging enough to justify the Phase IV stage.

What is shocking is the fact that the Phase III Trial Report of the ICMR clearly showed that as many as 70% of the women in the study did not find the injectable contraceptive Net-Oen an acceptable method of contraception. The study also indicated that thin built, under-nourished women (who would form the majority of India's women population) are at an increased risk of pregnancy while on Net-Oen. This finding becomes even more disturbing when the possibility of congenital malformation in children exposed to Net-Oen *in utero* is considered.

Informed Consent

What is particularly sickening is the grossly unethical manner in which the Phase IV trials are conducted. The trials are conducted as part of family planning camps where the injectable Net-Oen is offered along with other approved methods of contraception. This gives the misleading impression that Net-Oen has already been approved for general use. This procedure is wholly contrary even to the guidelines laid down by the Government of India for use of Net-Oen. The ICMR has gone a step further and done away with written informed consent in cases of Phase IV trials. These actions clearly violate the guidelines laid down by WHO's 1964 Helsinki Declaration (later revised at the World Medical Assembly, Tokyo, Japan 1975).

According to these guidelines and also according to medical ethics, in **any research on human beings, each potential subject must be adequately informed of the aims, methods, anticipated benefits and potential hazards of the study and the discomfort it may entail.** The doctor should then obtain the subjects freely given informed consent preferably in writing. The ICMR has thrown all such precautions to the winds. This paves the way for the duping of innocent victims and their conversions into helpless guinea-pigs.

Guinea Pig

On April 1, 1985, members of one of the Petitioner organisations namely Stree Shakti Sanghatana, visited the Patancheru Primary Health Centre (PHC) near Hyderabad, where a 'camp' was organised to inaugurate the injectable contraceptive Net-Oen. This centre was selected by the Osmania Medical College for the Phase IV trial. The paramedics with whom the petitioners spoke said that they had been assigned the task of 'procuring' 20 'recruits' for the trial from nearby areas. They told the petitioners that if they had informed any of these women that they were subject of an experiment or that there were possible side effects, no one would have volunteered. The women who assembled that day at the PHC were from the poorest class. They told the Petitioners that the only information they had been given was "Injection le lo bachha nahi hoga".

It is the petitioners contention that the Government of India and ICMR have no right or authority to experiment with dangerous contraceptives on women in India as this would be violative of Article 21 of the Constitution especially since 'life' as interpreted by the Supreme Court does not mean mere animal existence but also includes all factors which enable healthy life.

The petition seeks to emphasise that all citizens have a right to question the implementation of policies which amount to practices derogatory to women. To put an end to such practices is a fundamental duty of every citizen. Any action by the Government which refuses to recognise this fact would be contrary to the provisions of Article 51A of the Constitution.

The Supreme Court has already issued notice to the respondents upon the filing of this petition.

SPECIAL REPORT

Health and Safety at work

Bharat Electronics

Bharat Electronics Employees Union and its General Secretary Mr. N.K. Sharma have filed a Petition in the Supreme Court against Bharat Electronics Ltd. (BHEL) Ghaziabad UP, the Competent Authority, Division of Radiologial Protection, BARC and the Government of India. The Petition raises questions of great importance for the entire trade union movement viz. **The right to know and the right to be protected against all occupational hazards of work.**

Kylstron Tube

BHEL manufactures electronic components and equipement. For the last 12 years it has been manufacturing radars used to track aircrafts at long distances. These radars are fitted with powerful transmitters which emit microwave beams of high intensity, which are amplified by high power tubes known as **Klystron tube.**

During testing, the Klystron tube emits high intensity X-rays which can prove fatal to human beings.The intensity of X-rays is proportinate to the voltage applied. In BHEL it ranges from 180 KV to 250KV. Lead is required to protect persons from X-rays. It is the case of the workmen that crucial lead shielding at the top of the Klystron tube was never provided, exposing the assembly room workers to high X-ray Radiation. People exposed to the level of radiation can develop cancer, genetic damage and depression of the immune system. There is no threshold level below which radiation is considered harmless. However, the International Commission on Radiological Protection formulated the maximum permissible limits of radiation For workers exposed to X-ray radiation the maximum permissible limit is fixed at 5 rems per year and 50 rems in an entire lifetime.

Lead Shields

The Petitioners had been complaining about the excessive exposure to radiation, but nothing was done. Matters came to light when a team of BARC specialists came to the factory to test certain indigenously manufactured lead shields. So shocking were the high readings on the radiation meters, that the team members literally ran out of the room. It was this that surprised the workers and alered them for the first time to the extent of radiation hazard being faced by them. They demanded a copy of the report made by the team of scientists. BHEL refused to furnish a copy of the report, yet insisted that radiation levels were well within permissible limits. It is the case of the workmen that the Radiation Protection Rules, 1971 framed under the Atomic Energy Act, 1962 have not been observed. On the contrary, they say, the management is bent on suppressing the truth regarding radiation hazards.

The petitioners have stated that the workers, engineers, managers and visitors must be **warned and given full information about the danger posed by radiation to their health. Accordingly they called upon the Management to provide instruments for monitoring radiation fields for their intensity.** The workers must be provided with portable or pencil dosimeters which will enable them to measure the fields and calculate the maximum time they could spend in a radiated environment. This has not been done.

The workmen had repeatedly drawn attention to the physical disorders suffered by them, such as severe headache, skin diseases, eye irritation, breathlessness, premeature greying, back-ache and high blood pressure. They demanded that all of them be medically examined. After a great deal of insistance, only 4 were sent for a medical test. Requests for copies of occupational and medical histories of the workmen fell on deaf years.

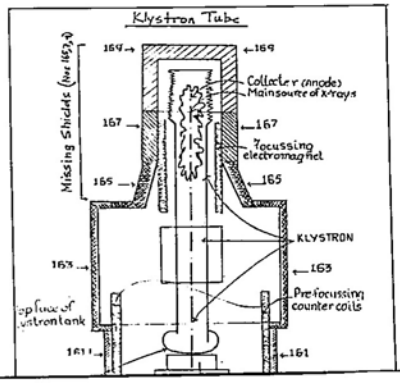
After a lot of insistance only 4 of the workmen (out of a total of 98 who had been exposed) were sent for specialised medical examination. Even these reports were not made available to workmen.

Reliefs

The reliefs claimed in the petition include

* a declaration that the failure the Klystron tube with adequate lead shielding and the failure of BHEL to use all adequate safety proceedures has resulted in violation of the rights of the workmen under Article 21 (right to life);
* a declaration that there has been a failure to follow rules resulting in exposure to excessive radiation levels.
* for compensation to be paid to transmeter assembly-room workers;
* for a direction to BHEL to, observe all safety proceedures;
* for a direction that all assembly workers to be medically examined by expert physicians;
* for an order requiring BHEL to monitor the health of assembly room workers for the rest of their lives;
* for a direction to BHEL to give to the workmen the full text of the survey report of the transmeter room, medical reports of all workmen and correspondence between BHEL the competent authority and the Government of India relating to the health and safety of the workmen.

The Supreme Court has issued notice on the Petition and passed an order directing all 68 employees presently working in the Transmeter Assembly room to be medically examined by I.C.M.R. Delhi.



HAAZIR HAI

Dr. Pritam Phatnani

Forensic Medicine, has advanced by leaps and bonds in the post-war period. It would not be an exaggeration to state that in many a celebrated case the role of the forensic pathologist has been invaluable, nay key. Yet in India the importance of the forensic pathologist is hardly realized. We talked to Dr. Pritam Phatnani a leading Forensic Pathologist about this and other related matters.

Q. *What is the role of Forensic medicine in crime investigation?*

A. Forensic medicine renders valuable help in crime investigation. By examining the victim and accused of a crime in cases of physical violence, sexual assaults it can provide vital evidence in establishing the guilt or the innocence of the accused. It also helps settle the cases of disputed paternity, establish age of an individual.

By examining dead bodies on post-mortem, vital clues of crime can be provided by the doctor. He can determine the cause of the death, whether death was natural or unnatural and if it was unnatural then whether it was a murder, suicide or accident. During the post-mortem examination, time since death can be determined which may help in making or breaking of the *alibi* of an accused. Identity of deceased can be established in cases of mutilated bodies.

Q. *Why does so much crime go unpunished?*

A. A Forensic Pathologist should always form a part of the investigating team when crime against the human body is committed. This does not always happen. Either he is never called or called too late after much disturbance of the scene of crime has taken place.

A Forensic Pathologist is also handicapped by the law giving more weightage to direct evidence against expert opinion. Quite often scientific evidence may disprove the direct evidence but yet it does not receive its due importance.

A scientific piece of evidence by a well-qualified and trained Forensic Pathologist will always contribute positively in the solution of a crime.

Q. *Why do Post-mortem examinations fail inspite of the crime being well established?*

A. As stated earlier, this is because greater weightage is being given to direct evidence against expert opinion. Quite often the bodies are sent too late for post-mortem examination and putrification destroys vital evidence. In cases of deaths due to poisoning faulty preservation of viscera, delay in their analysis etc may hamper the investigation. Quite often the viscera is never collected by police for chemical analysis!

Q. *Why is a complainants doctor not allowed to be present during the post-mortem examination?*

A. Until recently there had been no provision for such facility under the Coroner's Act. However, after the historic ruling by Chief Justice R. N. Chandurkar and Justice Pendse of Bombay High Court in Krishankan Rajan case where I was allowed to be present as an independent pathologist, the Coroner's Office has issued a circular permitting independent doctor to remain present if so desired.

In the U.S.A. and U.K. an accused has a right to ask for a pathologist of his choice to reamin present during the post-mortem. He can even ask for a second post-mortem to be performed. In fact, here too there is a greater need to have not only independent pathologist but also to have independent Forensic Science laboratory to carry out parallel scientific investigation to avoid the possibility of any miscarriage of justice from occuring.

Q. *The incidence of medical negligence is very high and yet the malpractice suits brought against the doctors are few. Why?*

A. The main reason for this is that the burden of proof lies on the patient or his relative and there are very few doctors who are willing to testify against their professional collegues even when they are guilty. Also there are many cases which are settled outside the court. This practice is followed by many self-styled medicolegal experts who are infact touting for insurance companies which are eager to settle such claims in preference to litigation as a cost saving device and save time. The doctors who settle the claims in such manner do not realise that it amounts to admitting their guilt.

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ADAALAT ANTICS

Rubber Stamp Justice

The Supreme Court, as we all know, has repeatedly condemned the practice of the Bombay High Court in rejecting Petitions in its truly feudal style with the monosyllable "Rejected". But our Lady Judge Sujata Manohar is the wisest of them all. She has her own delightful standardised variation. "No case for interference under Article 226, hence rejected". Perhaps she could spare herself a lot of trouble by having a rubber stamp made and ask her obliging Court clerk to stick it on? And perhaps the Supreme Court may accept this local variation as "reasons" for rejecting.

A more intelligent rejection

And while on the subject of the Bombay High Court, here is yet another example of a dressing down by the Supreme Court. "We are quite unhappy with the order of the Bombay High Court against which this appeal is filed. The grounds urged in support of the Writ Petition are fallacious, the reasons given by the learned single Judge were faulty and the order of dismissal of the appeal **in limine** *passed by the Division Bench exhibits indifference". The Judgement appears to be a very strained one and it is unfortunate that the learned single Judge committed an error in being carried away. (putting it in the words of the learned Judge) the 'very neat and intelligent question of law' raised by Counsel for the Petitioner in the Writ Petition. The learned judge failed to evince awareness of the incalculable public prejudice that was likely to be caused by the acceptance of the said fallacious contention to notice that the case called for close and thorough consideration. The summary dismissal of the appeal which deserved to be allowed is equally lamentable to say the least" (1986) 2. S.C.C. 382. Do the 'learned Judges' read S.C.C.? We mean Supreme Court Cases?*

Another interesting question, can they be sued for misconduct in these circumstances? And what would you say to a judge who screams "Yes, yes, I know all about that judgement. Go to the Supreme Court if thats what you want". Another good question, would such a Judge be guilty of contempt? Only a hypothetical question. Think about it.

Here is a suggestion, Court proceedings should be tape recorded. Judges would automatically stop saying half the things they now say.

Air-Conditioned Justice

Browsing through the Budget estimates of the State of Tamil Nadu for the year 1986-87, under the heading "Expansion Programme" for Law and Judiciary, we found that expansion was limited to a couple of hundred Rupees for repairs of the ladies toilets and Rs. 1.77 lakhs for air-conditioning the chambers of the Chief Justice, High Court. Surprising that nothing else found a place on the expanding horizons of the administration. What intrigues and annoys members of the Bench and the Bar is why only the chamber of the Chief Justice should be air-conditioned, leaving all other "Brother" Judges to swelter in the heat. The temperature, we presume, in all the chambers is equal.

Glamour Selections

The dull and drab game of law could do with an extra bit of glamour. Here is some good news. Indian Airlines has Jaya Bhadhuri on the Selection Committee for recruiting Airhostesses. She has been nominated to be on the Committee by the Managing Director. Such are the incidental benefits of being an M.P.'s wife.

And what if a selection was challenged on the ground that it violated Article 14, 15 and 16? We would have the "expert" opinion of the politician's wife on whether or not the hostess was glamorous enough to be recruited. The judge would naturally enough accept the "expert" opinion against his better judgement on the merits or demerits, shall we say of the case.

Hang on A.G.

When Chief Minister S.B. Chavan took over after Nilangerkar's exit in disgrace, he naturally wanted to meet the Advocate General, Arvind Savant who figures prominently in the marks scandal case. According to some reports, Arvind Savant had the last laugh. He told the Chief Minister that the Chief Justice wished to see him and told the Chief Justice that the Chief Minister wanted to see him. The three are reported to have met guess where? At the residence of the A.G.! Thats what you call killing two birds with one stone. A smooth continuation as A.G. was assured. Chief Ministers may come and go, Chancellors and Vice Chancellors may come and go, but the A.G. has the know how on how to hang on.

Palkhivala for free

Good News for the Bhopal Gas victims. N.A. Palkhivala India's one and only star attraction and 'eminent jurist' will be appearing for them free of charge in Bhopal. In an affidavit filed in the US District Court, he states that well known lawyers have been known to appear free of charge of their clients. Which lawyers and what clients? Like Palkhivala for the princes in the Privy Purses case? Mr. Palkhivala's stunning statement made with some 'dignity' was in aid of the motion to dismiss filed by Union Carbide Corporation. Did he give expert evidence on behalf of UCC free of charge? We wonder whether Mr. Palkhivala was paid his professional fees for his giving expert evidence. UCC is one of the world largest corporations. The fees must have been handsome indeed in keeping with his pricy charges. But never mind all that. His generous offer of appealing free still stands. We have no doubt that he will stand by the gas victims and do his national duty when called upon to do so. Imagine how the arguments would in court, "But my lord how these dirty and filthy slum dwellers have no right to reside around UCIL in the first place. Serves them right. They have only themselves to blame". The claims of the victims are indeed safe in the hands of eminent jurists.

Devil's Advocate

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