JULY 1986 RS.5

FROM

THE LAWYERS

COLLECTIVE

DEATH IN PRISON

PUNISHING THE INNOCENT

INTER-COUNTRY ADOPTION

ENVIRONMENTAL POLLUTION

JUSTICE MASODKAR'S LONG JUMP

EDITORIAL

On Appointments and Transfers

Looks like we are entering yet another era of litigation by the Judges for the Judges and of the Judges. It will be a boring period indeed – the issues, appointments and transfers of High Court Judges, have been done to death.

The policy of the Government of India has been announced long ago, namely that the Chief Justice and at least one third of the Judges of the High Court should be from outside the State. One can legitimately demand that the policy be uniformly implemented and not in a way which amounts to picking and choosing.

But recent event indicates that judges and lawyers can be tenacious in resisting transfers and agitated over "supersessions". Lawyers in Orissa are quarrelling over the transfer of Justice Mishra to Allahabad. Lawyers in Delhi are squabbling over the "supersession" of District Judge N.C. Kochar. One gets the distinct impression that they are neither fighting their own issues, nor those of the litigants, but those of the Judges themselves.

Chief Justice P.N. Bhagwati has confirmed that the transfer of Justice Mishra was effected on his recommendation as part of the policy of having at least one third of the Judges from outside the State. According to the Orissa lawyers, Union Law Minister, A.K. Sen, told them that the transfer was at the "instance" of Chief Justice P.N. Bhagwati because of some litigation concerning the Judge pending in Orissa. The two versions clearly don't tally. There is a mischief-maker somewhere in the corridors of power.

What comes through clearly is that a combination of lawyers and judges are bent upon opposing the policy of transfer of judges and appointment of the Chief Justice from outside the State. So far as "supersessions" are concerned, appointments,neither to the High Court,nor to the Supreme Court have been on the basis of seniority alone. As judges never tire of telling us, it can only be one, among several factors to be considered for selection. If this is true for other senior posts, why not for Judges? What requires debate is the criteria for selection to the post of Judges of the higher Judiciary. Surprisingly nobody seems interested in that question.

Dodging the Press

A shocking event which surprisingly passed off without much media comment was the dramatic resignation of Justice B.A. Masodkar, followed in quick succession, by his nomination on a Congress (I) ticket for election to the Rajya Sabha. It is crystal clear that the negotiations for the Congress (I) ticket took place whilst Mr. Masodkar was still a sitting judge.

Elsewhere in this issue, we examine the implications of this event on the separation of the judiciary from the executive. Before doing so, we thought it appropriate to present Mr. Masodkar's point of view. Accordingly, our reporter sought an interview with him, who agreed to be interviewed and gave an appointment for Thursday the 26the June, 1986. Subsequently, however, he cancelled the appointment. He tried to re-assure our reporter that he was not refusing to be interviewed but that "he was too busy with the elections". On learning that the interview would be taped Mr. Masodkar insisted that he would only give written answers to written questions. Clearly, Mr. Masodkar was unwilling to face a timely and genuine interview.

A sitting judge who opts for a nomination to contest on a Congress (I) ticket must at least have the courage of his convictions to speak to the press. His refusal only confirms our point, that while still a judge, he was busy negotiating for a ticket prior to his resignation.

Indira Jaising

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Editor ***Indira Jaising***

Cover Photo *Dhananjay Moray*

LETTERS

Administrative Tribunals Act

Under the Administrative Tribunals Act, access to justice has been made more difficult for the Civil Servants. If the Act was passed to give relief to Civil Servants, the powers to give such reliefs could have been given to one Civil Judge in every District of India. But under the Act, if a person sitting in Jammu wants to challenge the stoppage of his increments he will have to go to Delhi. Similar problems will be faced by Civil Servant all over India. For the poor employees, litigation has become extremely expensive and the Act indirectly destroys the rights of the Civil Servants.

The Administrative Tribunals Act is the first Act of its kind which makes access to Courts very difficult for the employees.

All other Acts dealing with service conditions of the employees, set up Tribunals which are in close proximity to the place of employment. For instance, under the provisions of Payment of Wages Act, 1936, every Principal Court of a District in India has been vested with the powers to grant reliefs. Likewise Shops Act, Provident Fund Act, Employees State Insurance Act, Minimum Wages Act, Industrial Employment Standing Orders Act, Contract Labour (Regulation & Abolition) Act and numerous other laws pertaining to the services of employees, embody provisions vesting powers in the local Courts. Departure from this trend in the above Act, has brought unaccountable misery for the Civil Servants and in fact, viewed from any point of view, it has thrown the status of Civil Servants to the period existing prior to 1935 when no security of service existed.

N.K. Garg, Advocate
Kothi No. 5, Model Town, Bhatinda, Punjab.

Ed - By a recent judgement, Justice R.A. Jahagirdar of the Bombay High Court in Writ Petitions No. 800 of 1985 and No. 623 of 1985 has held that Administrative Tribunals must be located near the seat of the High Court.

Industrial Disputes Act Amendment

I want to draw your attention to the amended definition of "retrenchment" under Section 2(oo) of the Industrial Disputes Act. With effect from 21.8.84, the Central Government has inserted Sub-section (bb) to Section 2(oo). This Sub-section is brought in as one of the exceptions to the definition of retrenchment. It excludes from the purview of retrenchment any termination of service brought about by the expiry of a contract of employment which is of a "fixed term".

This exceptional sub-clause is anti-worker, unconstitutional and discriminatory. Every management will try to take advantage of this by appointing employees for a specific period mentioned in the appointment letter. The contract of employment will then be renewed from time to time. In such cases, if the contract of employment is terminated, it will not amount to retrenchment, the employee will lose his security of employment and be deprived of all his benefits.

In Ahmednagar, Kinetic Engineering Co. Ltd. has started issuing letters of appointment with dates of termination mentioned in the appointment letter itself. A number of cases concerning these employees are pending in the Ahmednagar Labour Court. However, the Company is taking advantage of Section 2(oo)(bb).

Prakash Raole
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Shramik, Tilak Road, Ahmednagar.

Parliament's (Non)-Response to Female Foeticide

Following the story on Amniocentesis or female foeticide (***The Lawyers*** - March, 1986) two questions were raised in the Lok Sabha. The relevant excerpt of one of these questions, submitted by Dr. G. Vijaya Rama Rao, M.P. (Telegu Desam) on 17.4.86 is:

"(a) Whether the Government is aware that Amniocentesis has become widespread now in the country and, if so, about the estimated number of clinics where this facility is available in the country, Statewise (***The Lawyers*** - March 1986),

(b) Whether sex-determination is being widely misused to abort the female of the species?"

Though the question was addressed to the Ministry of Law and Justice, it was transferred to the Health Ministry. The question itself was also mutilated to suit the convenience of the Government and in its distorted state read as follows:

"Will the Minister of Health and Family Welfare be pleased to state the estimated number of clinics where Amniocentesis facility is available in the country, Statewise?"

It would be clear even to a layman that there is a world of difference between what the M.P. wanted to know and the question as actually framed by the Lok Sabha Secretariat.

The reply given on 17th April 1986 was dismissive. It stated that the information regarding private clinics was not available and information regarding the availability of Amniocentesis facility with the Government Institutions was being collected and would be laid on the table of Lok Sabha. Shri Manik Reddy, also an M.P. from Telegu Desam, sought to raise some interrelated issues with the Ministry of Health on 17.4.86. He asked for the details of cases of wrong results of tests for sex-determination and the corrective steps taken. He also asked whether any R & D was being conducted by bodies such as the ICMR in the efficiency or dangers of sex-determination tests.

For reasons best known to the Lok Sabha Secretariat and the Ministry of Health, the above question has not yet found a place in the questions admitted. *Was this a case of abortion of female rights?*

This calls for the concerted attempt from the activists in women's causes to take steps to fill this void of lack of communication in order to enlist support in Parliament for this issue.

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COVER STORY

Punishing the Innocent

On 19th March, 1983, a young undertrial prisoner, Ghanshyam Rajaram Jadhav, was found dead by the inmates in Barrack No. 3 of Bombay's Arthur Road Jail. A post-mortem revealed that death had resulted due to haemorrhage and shock caused by 9 fractured ribs, a pierced left lung, and an injured kidney.

Three years later on April 29, 1986 Rammurthi Subbiah, a life convict of the same jail leaped to his death from a fifth floor window of a Sessions courtroom. He had been tried and held guilty for causing the death of Ghanshyam.

Between these two tragic events, a bizarre and unbelievable tale was unfolded in the investigation and trial following the death of Ghanshyam. A tale in which sex, drugs, offical callousness and police misconduct followed by a cover up, all played their own insidious roles. Strangely however, the conviction and abrupt suicide of Rammurthi has not drawn the curtains on this sordid tale. In fact, while old questions remain unanswered new ones have been raised during and after the trial and it seems that there will not be any answers to them.

An Investigation by Suresh Chandrashekar and Indira Jaising.

Ghanshyam Rajaram Jadhav, an ordinary middle class person, was employed in the Municipal Corporation of Greater Bombay in its press at Carnac Bunder. By all accounts he was a law abiding citizen and one of the main bread earners of his family. One of Ghanshyam's brother, Madhusudan, an artist, however, was mentally disturbed and was undergoing treatment. Ghanshyam often took his brother to Nair hospital for treatment. The family lived in a one room tenement in a dilapidated chawl at Rukmini Bhavan, Khadilkar Road at Girgaum, Bombay.

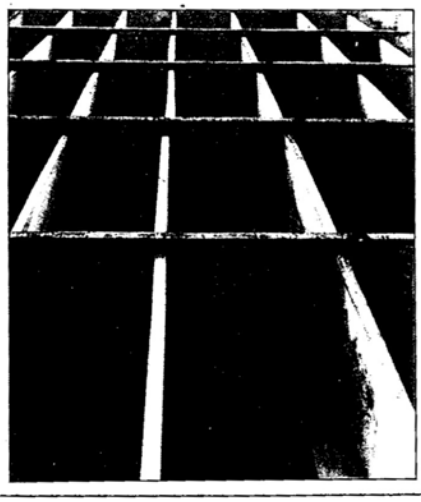
Arrest

On the 17th April, 1983 in the early hours of the morning, Ghanshyam allegedly assaulted his neighbour. It appears that the neighbour reported this incident to the police. A few hours later Sub-Inspector Ahmedullah Fateh Khan of the V.P. Road Police Station went to the residence of Ghanshyam to arrest him. In the presence of his family members he slapped him and generally threw his weight around. Ghanshyam's elder brother, Chandrakant Jadhav, terrified by the entry of the police into his room, requested his brother not to resist arrest and told him that he would shortly make arrangements for his release on bail.

On the same day, i.e. 17th April, 1983, and that too on a Sunday, Ghanshyam was produced before the Magistrate for remand to judicial custody. According to Sub-Inspector Khan, as it was a Sunday, the Magistrate did not remand Ghanshyam to judicial custody. He was remanded to police custody for one day. He was again produced before the Magistrate on the 18th April when he was remanded to judicial custody and sent to Arthur Road Jail.

In Khan's own words: "On the same day he was produced for remand in the Court. Since his police custody was not necessary, I requested the Court to remand him for judicial custody. However, being a Sunday, he was not sent in jail custody and he was granted one day police custody. On 18.4.83, being a remand day, he was again produced for remand in Court of Honour Judge M.M. the 4th Court, Girgaum, when he was remanded to jail custody".

The fall from the 5th floor



Dhananjay Morey

Death

Nobody knows what happened to Ghanshyam in jail. However, in a trial later, the prosecution alleged that on the night of the 18th April, between 11.30 to midnight, Rammurthi Subbiah, a life convict who was one of the warders of the barrack, went to a sleeping Ghanshyam and whispered something in his ear. Immediately Ghanshyam got up and went towards the toilet block followed by Rammurthi. Soon shouts and the sounds of fist and baton blows were heard from the direction of the toilets, and two other inmates, Ramchandra Changya Koli and Palaniappa Narayan Kavli also went into the toilet block. Some time later, Ghanshyam and the three persons, including Rammurthi, later accused of murdering Ghanshyam, emerged from the toilet block one after the other. A feeble attempt was made by the prosecution to put forth the theory that Ghanshyam was the victim of sodomy or attempted sodomy. However, no charge of sodomy was framed.

The further case of the prosecution was that on the day following Ghanshyam's entry in the prison, that is on the 19th April, 1983, he was forced to smoke charas by another prisoner in-

mate, Shekhar Pundalik Ambole. When Ghanshyam resisted, he was beaten on the head and shoulders with a baton and forced to smoke the charas but he was not allowed to exhale the smoke. Thereafter, the four accused stripped Ghanshyam and after poking fun at him for some time, left him to put on his clothes. A few hours later at about 3.55 p.m. that day, Ghanshyam Jadhav was found dead in the barracks where he had been lodged.

The Accident Story

The jail authorities immediately informed the N.M. Joshi Marg Police Station about the death of Ghanshyam and investigations began. Post-mortem revealed that death resulted due to haemorrhage and shock caused by 9 rib fractures, a pierced left lung and an injured kidney. In a signed written statement, to specific queries, given to the N.M. Joshi Marg Police Station, Dr. R. B. Khade, who performed the post mortem said that "such type of injuries are possible with a fall whilst walking." He also said that the injuries were sustained between a few hours and a maximum of 3 days before the death.

It appears that the police also recorded statements of various other witnesses. One of them was the brother of Ghanshyam, Chandrakant Jadhav. The statement of Chandrakant which is recorded in English, a language which Chandrakant neither reads nor writes, includes the following:

"On 17.4.83 at 5.30 p.m. or so he woke up from the bed and took out one iron bar and assaulted one Millind Laxman Karadkar, aged 30 years over no reason. When I asked him the reason, he informed me that he was in a dream and in his dream he was told to assault the neighbour. I further say that he was behaving sometimes like a mentally deranged man and murmuring something."

Suresh Ramlal Sharma, yet another witness is alleged to have told the N.M.Joshi Marg Police Station: "Yesterday he tried to break the lock of Girgaum Court premises cell and he was somewhat mentally deranged person"

This statement also is recorded in English but signed in Marathi. These two statements indicate that already a systematic attempt was being made to show that Ghanshyam was mentally deranged. A third witness, Bharat Shankar Shivtare, is alleged to have said that Ghanshyam fell in jail. Shivtare was in the V.P. Road Police Station lock up on 17.4.83 and on the 18th he too was sent to the Arthur Road Jail.

The N.M Joshi Marg Police station closed the case as being one of accidental death. The haste with which the case was closed is inexplicable. In fact, one could almost say that it was a non-investigation, if not a mis-directed investigation. For example, how could the police have accepted the statement of the doctor that the deceased could have sustained 9 rib fractures, a punctured lung and a damaged kidney in a single fall? Why were they so anxious to build up a case that Ghanshyam was mentally disturbed? What was the evidence to indicate that Ghanshyam was mentally disturbed?

The Jail Authorities also conducted an internal enquiry.Sunil K. Patil and Baliram Shankar Ayodhya, two convicts, made a positive statement that Ghanshyam was not assaulted by anybody. Hence the jail authorities also treated the case as one of accidental death.

Questions in the Assembly

Thus, the accident theory gained credence until a few months later, when two legislators of the State Assembly raised the issue on the floor of the House. **The two MLAs, Mr. Jagannath Jadhav and Mr. Nihal Ahmed, questioned the Government whether the death in jail custody of Ghanshyam Rajaram Jadhav was due to a police assault, and whether the Doctor's certificate showed that the death was caused due to an assault.**

Peeved at the charges levelled against the administration, the Government directed the DCB, CID to take over the investigation of the case.

Ghanshyam Jadhav

Statements Changed

This time round, the same witnesses who had earlier corroborated the accident theory changed their statements and deposed that Ghanshyam had been assaulted by the four accused.

Another witness, Prakash Hiraman Londhe, son of a Head Constable attached to the N.M. Joshi Marg Police Station who had been an undertrial at the jail, was interrogated and he too corroborated the assault story. Shivtare would have been the most crucial witness as he was with Ghanshyam in the lock up. It is anybody's guess why he was not interrogated by the DCB-CID.

Mentally De ranged?

Sub-Inpector Khan also made a statement before DCB, CID: **"After recording his (Ghanshyam's) statement before putting him in the lock up, when searched, a medical treatment card of Nair Hospital, Bombay, of 12.1.83 was found with other papers on his person."** Further on, he states that, **"on going through the medical treatment card of Nair Hospital found on the person of Ghanshyam Jadhav I came to know that the accused Ghanshyam was taking treatment for some mental problem."**

Yet another intriguing aspect of the DCB, CID inquiry is the dramatic reversal by Dr. Khade of his expert opinion. He told the DCB, CID that, **"these injuries could not be caused due to some fall on the ground i.e. merely coming in contact with a surface of the floor but I have stated earlier that this could be caused due to forceful impact."**

Originally sodomy was sought to be made out as the immediate provocation of the assault. No attempt was made to establish any motive for the alleged murder. Was it then a motiveless crime? The case of the prosecution was left limping on one foot.

Dr Khade's turn-about

Dr. Khade's statement before the N.M. Joshi Marg Police Station viz. that the injuries sustained by Ghashyam could be due to a fall was made on 6.7.83. On that date Dr. Khade had already received the chemical analysis report and he had before him the post mortem notes on the basis of which he made a statement to the N.M. Joshi Marg Police Station, that the injuries could be due to a fall. Yet in his evidence before the Sessions Court he stated..."A single fall on hard substance will not cause all these internal or external injuries. No injuries could be caused by a single fall on the ground or any hard or rough substance."

In cross-examination he was confronted with his earlier statement made to the N.M. Joshi Marg Police Station to which he replied: "I am now shown my opinion in question and answer form which I have signed. I accept that answers have been given correctly by me".

One would imagine that the contradiction between the opinion of Dr. Khade given to the N.M. Joshi Marg Police Station and his statement on oath in the Sessions Court was too glaring to be ignored. Which of the two statements was correct? That the injuries could be caused by a single fall, or that they could not? Were both statements tailored to suit the needs of the situation: the earlier to support the accidental fall theory to help the N.M. Joshi Marg Police Station close the case, and the later that the injuries could not be sustained by a single fall, to support the theory of murderous sexual assault, to help frame trumped up charges against the four inmates.

Crucial witness ignored

On the medical condition of Ghanshyam, the obvious and most crucial witness could have been Dr. Gajbiye who was the RMO on duty on that date in Authur Road jail. Ghanshyam was admitted in jail on the evening of 18th April, 1983. Dr. Gajbiye, as a matter of routine, must have examined him then, or at the very latest, on the morning of 19th. His evidence, together with jail records, would show whether Ghanshyam, when he was admitted on the evening of 18th April, was fit and whether a murderous sexual assault was made on him on the night of 18th April, 1983. That Dr. Gajbiye did in fact examine Ghanshyam is not in dispute. But what is surprising is that the prosecution did not care to examine him or produce the jail medical records.

The Verdict and Suicide

On the 29th April, 1986 the Sessions Judge, M.S. Sombalkar, who tried the four accused, acquitted three of the accused but convicted Rammurthi Subbiah under Section 304(Part II) IPC. Rammurthi was called to the dock and asked what he had to say on the sentence, to which he replied *"Saab, app kya sochte hain ke ek aadmi aisa kar sakta hain kya". (Sir, do you think one person alone can do such a thing?)* He pleaded not guilty. After signing his plea he asked the interpreter *"Ho gaya kya? (Is it over?)* She replied *"Yes"*.

Ramurthi turned a round from the witness box and jumped out of the window to his death. The court room was on the 5th Floor of the City Civil and Sessions Court. It was obvious that any one who jumps from the window of the 5th floor would know that he was jumping to his death. The police raised a hue and cry, stating that Rammurthi attempted to escape. Not knowing that the accused had already died, the Judge issued a warrant of arrest for escaping from police custody.

We asked Mr. P.S. Paradkar who was defending Rammurthi whether this, was a case of attempted escape . A categorical 'certainly not' was his answer. "He was not a person who belonged to an organized gang. An attempted escape requires a back up. There was no waiting car or van for him. No chance of escaping. I am convinced this is a case of suicide," Mr. Paradkar opined.

Madhusudhan Jadav, Ghanshyam's brother

We met Ghanshyam's brother, Chandrakant Jadhav. Within a year of Ghanshyam's death his mother died of shock and grief.

Chandrakant said that though he suspected foul play in the lock up, he was terrified of getting on the wrong side of the police. He had to live in the same locality and did not have the courage to make a complaint for which he was certain to be victimised. In fact, we were shown a copy of the request by Ghanshyam's sister proposed to be made to the Coroner to investigate the case as they suspected foul play but

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Chandrakant never made the complaint out of fear of the police.

By far the most bizarre aspect of the case was our meeting with Ghanshyam's brother Madhusudan who was in the stairway. **Chandrakant informed us that his brother was a mentally disturbed person and had been undergoing medical treatment at Nair Hospital for the last 6 years. He said that it was Madhusudan's medical papers that were found on Ghanshyam's body.** These were the very papers that were used in an attempt to support the theory that Ghanshyam was mentally disturbed and that Ghanshyam was a weakling who was assaulted and sodomised by the four accused.

Scapegoat

Ghanshyam was normal healthy man when he was taken into police custody on 17th April, 1983. He was the victim of police assault in the lock up. Fearing the worst, and because they did not want a death on their hands, Sub-Inspector Khan asked for judicial custody. If Ghanshyam had to die, better that he died in jail. Dr. Khade's statement to the N.M. Joshi Marg Police Station of the injuries being caused by "a single fall" was tailored to fit in with the theory of "accidental death". Chandrakant's statement to the effect that his brother was a mentally deranged person was falsely recorded by the N.M. Joshi Marg Police Station. In fact Chandrakant said so in his evidence in Court. Since questions were asked in the Assembly, something had to be done. Rammurthi was the scapegoat Dr. Khade's subsequent statement to the DCB-CID that the injuries could not result from a single fall was also tailored to suit the need to frame charges against the four accused. But Rammurthi had the last laugh or shall we say, the last cry. He decided to beat the law before sentence could be pronounced. Judge Sombalkar, when informed that Rammurthi had died, recorded that sentence had abated. A posthumous appeal can be filed against a conviction, but there is no one to appeal on behalf of Rammurthi.

NEWS

No Remand to Police Custody beyond 15 days

In a landmark judgement delivered by the Supreme Court on 8th May, 1986 in *Chaganti Satyanarayan's* [(1986) 3SCC 141] case, the Court laid down that no person can be detained in police custody beyond the total period of 15 days.

One of the major complaints of the workers, activists and other poor people has been their detention in police custody for indefinite periods. The unhygienic conditions, over crowding coupled with the third degree methods used by police have made stay in police lock ups a nightmare for detenues. Given a choice, the detenues have always opted to be remanded to judicial (jail) custody in preference to police custody. The normal method used by the police is to produce the detenue before the Magistrate, get a remand to police custody for 14 days, produce him again after 14 days, get the remand to police custody extended by further 14 days and so on.

The present judgement seeks to limit this obnoxious practice. Placing reliance on Section 167(2) of the Criminal Procedure Code, the Supreme Court held that a detenue can be remanded to police custody for a maximum period of 15 days on the whole. Any further remand could be made only to the judicial custody and not to the police custody.

This judgement is likely to go a long way in helping the victimised poor to ward off abhorrent police practices.

Equal Rights for Hindu Women.

On 20th May, 1986, the President, granted assent to the Hindu Succession (Andhra Pradesh Amendment) Bill.

Though applicable only to Andhra Pradesh the Act,is pathbreaking as it is the first Act granting equal property rights to women within a Hindu Undivided Family (HUF).

Since independence Hindu women have been receipients of many favourable changes in personal laws. However, many discriminatory facets have continued to remain. The most crucial one being the exclusion of women from coparcenary property, resulting in Hindu women not being able to claim partition of the corparcenary property. The Andhra Pradesh Amendment Act does away with this distinction.

The statement of objects and reasons of this Amendment Act mentions that tha aim of this Act is to eradicate the dowry system and simultaneously to ameliorate the situation of women.

Bhopal Information Group launched

Some activists who have all along been making efforts to help the Bhopal victims have recently launched a group called "Bhopal Group for Information and Action".

A number of voluntary organisations have been working towards helping Bhopal victims. Many organisations are also collecting data and conducting research to ensure that "Bhopal" is not repeated. However, there is not much co-ordination between these well-meaning groups, leading to repetition of work and lack of information. To tide over these hurdles "The Bhopal Group for Information and Action" has been set up.

The aims and objectives of this group are to collect and document information on the gas disaster and related issues. The group intends to set up a documentation centre with the help of students. It is planning to commission and conduct surveys and studies on the issues of rehabilitation, health and compensation. The group is also moving towards disseminating all this information to concerned individuals and groups. It is also planning to start a monthly newsletter. The contact address of the group is c/o. E-1/208, Arera Colony, Bhopal, 462 016. M.P. India.

SPECIAL REPORT

Heads, you are a terrorist Tails, you are a Naxalite

Between the 16th of April and 1st May 1986, the police arrested no less than 19 political activists in the Chandrapur District of Maharashtra. The partern of repression that emerges has become so repetitive that it reads almost like a pre-written standardised script. The activist — organizer is invariably branded a 'Naxalite' and kept in detention indefinitely all according to "procedure established by law" Susan Abraham, an activist of the Committee for the Protection of Democratic Rights (CPDR), was arrested on May 1986 and kept an undertrial for 1½ months. What follows are her impressions of repeated detention in lock-up and jail.

Chandrapur District in Maharashtra is one of the most backward and underdeveloped in the State. It is however, rich in forest and mineral wealth attracting large unorganised and underpaid work force into the depths of its mines and the stillness of its forests. Those who do not find employment with the unscrupulous forest contractor or callous mine

owner seek work in the neighbouring district of Gadchiroli, at a distance of about 25 kms from the Employment Guarantee Scheme works. Voluntary organizations have been making efforts to organise these victims of under-

Arrest

It was the centenary year for the May Day celebrations. As a CPDR activist, I was to address the May Day meeting. On 1st May 1986 I, along with Krishna Reddy, an advocate, was picked up while proceeding to the meeting. We were not told that we were under arrest. They said we were being picked up only for questioning. At about 9 p.m. at Rajpura police station, we were told that we were under arrest. No arrest warrant was shown or given to us. We were not informed of the charges against us. Much later we learnt that we were implicated in case No. 106 of 84 on charges of sedition. That was the beginning of the long loss of liberty, one month and 24 days. Then followed charges of theft, dacoity, attempted murder and yet again sedition in case No. 136 of 1985 registered by the Ramnagar Police Staion.

Charges of theft, dacoity, attempted murder and last but not the least sedition (See 124-A) follow in due course one upon another. A series of arrests, not necessarily within the jurisdiction of the same police station are made, making it impossible to be set at liberty. If you are out on bail for one alleged offence, you can be arrested for another. The prime intention is to ensure continued detention under colour of law.

I had in the past occasion to encounter the brute power of the police when I attempted to organise the workers of *Indian Express* where I was employed as a journalist. But for the first time, I encountered the fangs of the Judiciary as an accused.

Lock up

Krishna Reddy and I, after having spent the night in the police lock up were produced before the Magistrate on 2nd May 1984. The police applied for remand into custody. Our lawyer was not given a copy of the remand application. Bail was refused. Our homes were searched or rather ransacked. I was shocked about the invasion of my privacy. Every letter, no matter how personal was read and tossed around by the police. I demanded that a panchnama should be made of my confiscated belongings. This was not done. Till this day I have not been given a copy of any panchnama and yet the sole evidence of charges so serious as sedition rests only on literature allegedly recovered from my home.

On the 5th May 1986 we were produced at the residence of the Magistrate after court working hours. We demanded to know why we were not being produced in Court. The police said there was no need for this. Once again remand to police custody was granted. This time we were taken away to the Bhadrawati police station, a distance of about 18 kilometers from Chandrapur city police station. I can only conclude that this was done to distance us from our friends, relatives and lawyers. On the 12th May we were again produced in Court. Our lawyer argued for bail. Several Supreme Court judgements were referred to in support of the application. Chief Judicial Magistrate Barde made a startling remark: "Your arguments are correct, but it is not the practice of this Court to grant bail in such cases". The only

blessing was that this time he granted us judicial custody. From that day onwards we were in Chandrapur District Jail.

Jail

Once again, our lawyers applied for bail to the Sessions Court. He refused remarking, that "judicial notice has to be taken of the pernicious activities of Naxalities".

We appealed against the judgement to the Nagpur High Court. On the 17th June 1986, Justice Dev granted bail but on the most dreadfully harsh conditions. We have now been externed from Chandarpur for one month. We have to report every day to the police station at Bombay and we were required to provide two sureties of Rs. 5000 each. It was only on 24th June that we finaly managed to complete the formalities.

What was it like being in police lock up and then in jail? What were the attitudes of the police, the judiciary and the jail authorities? What kind of people did we meet in Jail? These are questions that have often been asked of me.

The lock-up was filthy. There was no seperate toilet. We had to sleep on a floor which was wet with urine and shit. Only after we protested was any effort made to clean up the room. There was no water to bathe for 5 days. No change of clothes for me. The interrogation was intense and psychologically tiring. DSP Raj Khilnani would think nothing of dropping in at 2 a.m. and "interrogating" me. We were threatened. "We will keep you in police custody for one year." There were other threats. "You know how we treat women". Two other women activists were harassed. The psychological pressure was intense, with rumours that we would be sent of to Andhra Pradesh to be "dealt with". The worst of it was not knowing what was happening outside.

Jail is a different world altogether. The writ of the legal world does not run there. Undertrials are made to labour. Women rot without even knowing how to get out. The concept of legal aid is unheard of. The food, apart from being insufficient, was often putrid. We would find lizards, rat shit and worms in the food. On one occasion we all vomitted and had to be hospitalised in Chandarpur General Hospital. This was treated as a joke. "Other men don't complain, why should you", they said. We were seen as instigators. After a while, there was a definite attempt to instigate the other prisoners against us. As a result, my male colleagues were kept in a separate cell from the other male prisoners. The object was to prevent us from telling them to protest against the treatment they were getting.

Other women

I met Lata, 18 years of age, in for petty theft. She was an undertrial for 6 months. There was nobody to get her out. As a consequence she had almost decided to admit to being guilty, not because she was but to be able to get out and for want of legal aid.

I met Jaya for the first time in jail on the 23rd of May. She was picked up on the 16th April at Ramnagar on charges of theft. Later these charges were dropped and she was charged with sedition and we too were implicated in that case. I had never seen her before. She was in bad physical shape. She was suffering from fits, but the police put out a false story that she had come to Ramnagar for an abortion. The intention was to malign her character. During interogation she was humiliated, insulted and tortured. "Why are you pretending to be modest?" they asked. They wanted to give the impression that all 'Naxalite' women were "loose" She had to be hospitalised 5 times.

I met Maya, who was only 20 years old. She was charged with being involved in an assault. It was a family quarrel over three rupees. The police were bribed to arrest and implicated her. She was from Gadhchiroli and had been in jail for two months. She had no lawyer, was too poor to afford one and had never heard of legal aid.

I met Rita, 18 years of age. She was charged with having abducted her niece. Her husband was having an affair with her elder sister and wanted her out of the way. She had been in jail for three months. Rita was bright and intelligent. She had no visitors, was very poor and could not afford a lawyer. She too did not know that there was such a thing as legal aid. Rita was so sick and tired of her situation that she had decided to admit to guilt though she was not guilty, only to get out fast. But, she said, the judge did not even have the time to look at her. On occasion only she was just taken to Court and brought back .

Mopi, 40 years of age, was in jail for 9 months. No one knew her background. She was picked up on charges of selling children. According to jail authorities, she lost her son and went mad. In jail she was getting worse. Nobody knew what to do with her. One day she was taken to Court and released. Nobody knew where she would go. Her belongings were still in jail, She never came back.

In jail, I found some distraction from my own problems and tried to help the women I came in contact with, encouraging them to fight for their freedom. But the atmosphere was fatalistic. Jail officials brain wash inmates into admitting guilt. They do so as the way of getting their liberty.

Today I am a qualified lawyer. But what a way to start my career. My experience in the police lock up and then jail has only made me more determined in my resolve to fight against the repression let loose on groups of activists and voluntary workers who identify with the problems of the working class and the poor.

Unanswered Questions

There are so many unanswered questions in my mind.

* Is it a crime to organize a May Day meeting?
* Why was I not informed of the charges against me when I was arrested?
* Why was I not shown the warrant of arrest?
* Why was I not shown the remand application?
* Why was I not granted bail?
* Why do so many women have to stay in prison simply because they can not afford a lawyer?
* Do inmates not have the right to properly cooked and edible food?
* Are judges blind to violations of law.

Maybe, someday as a lawyer, I will stumble by the answers.

Compiled by Indira Jaising on the basis of reports by Susan Abraham.

NOTICE BOARD

Maharashtra Departmental Inquiries Act, 1986

(as passed by the Legislative Assembly and Council)

L.A. BILL No. XXXIV OF 1986.

A BILL

to provide for the enforcement of attendance of witnesses and production of documents in departmental inquiries and for matters connected therewith or incidental thereto.

WHEREAS it is expedient to provide for the enforcement of attendance of witnesses and production of documents in departmental inquiries and for matters connected therewith or incidental thereto; It is hereby enacted in the Thirty-seventh Year of the Republic of India as follows:-

1. Short title and extent.

(1) This Act may be called the Maharashtra Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1986.

(2) It extends to the whole of the State of Maharashtra.

2. Departmental Inquiries to which Act shall apply.

The provisions of Act shall apply to every departmental inquiry made in relation to—

(a) persons appointed to public services or posts in connection with the affairs of the State of Maharshtra.

(b) persons who, having been appointed to any public service or post in connection with the affairs of the State of Maharashtra, are in service or pay of—

(i) any local authorty in the State of Maharashtra;

(ii) any corporation (other than a local authority) established by or under any law for the time being in force and owned or controlled by the State Government;

(iii) any Government company within the meaning of section 617 of the Companies Act, 1956, in which not less than fifty-one per cent of the paid-up share capital is held by the State Government or any company which is a subsidiary of such Government company;

(iv) any society registered under the Societies Registration Act, 1860, in its application to the State of Maharashtra, which is subject to the control of the State Government.

3. Definitions

In this Act, unless the context otherwise requires,—

(a) "departmental inquiry" means an inquiry held under and in accordance with,—

(i) any law made by the State Legislature or any rule made thereunder; or

(ii) any rule made under the proviso to Article 309, or continued under Article 313 of the Constitution of India,

into any allegation of lack of integrity against any person to whom this Act applies;

(b) "Inquiring Authority" means an officer or authority appointed by the State Government or by an officer or authority subordinate to that Government to hold a departmental inquiry and includes any officer or authority who is empowered by or under any law or rule for the time being in force to hold such inquiry;

(c) "lack of integrity" includes bribery or corruption, and *mala fide* act of ommission or commission;

(d) "prescribed" means prescribed by rules made under this Act.

4. Authorisation of Inquiring Authority to exercise power specified in section 5.

Where in any departmental inquiry, it is necessary to summon as witness, or call for any document from, any person or a class or category of persons,the Inquiring Authority may exercise power specified in section 5 in relation to any such person or a person within such class or category, at any stage of the departmental inquiry, if he is authorised, by order in writing in this behalf, by such officer not below the rank of a Secretary to Government as the State Government may, by notification in the *Official Gazette,* designate; and different such officers may be designated for different class or classes of departmental inquiries or for different local areas of the State.

5. Power of authorised Inquiring Authority to enforce attendance of witnesses and production of documents.

(1) Every Inquiring Authority authorised under section 4 (hereinafter referred to as "the authorised Inquiring Authority") shall have same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely :-

(a) summoning and enforcing the attendance of any person examining him on oath;

(b) requiring the discovery and production of any document or other material which is producible as evidence;

(c) receiving evidence on affidavits;

(d) requisitioning of any public record or copy thereof from any Court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), the authorised Inquiring Authority shall not be entitled—

(i) to compel the Lokayukta or Upa-Lokayukta or any member of their staff to appear before him to give any evidence relating to any information obtained by them in the course of, or for the purpose of, any investigation under the Maharashtra Lokayukta and Upa-Lokayuktas Act, 1971, or to produce the evidence recorded or collected by them in connection with such information;

(ii) to compel the Reserve Bank of India, the State Bank of India, any subsidiary bank as defined in clause (k) of section 2 of the State Bank of India (Subsidiary Banks) Act, 1959 or any other corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 or the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980—

(a) to produce any books of account or other documents which the Reserve Bank of India, the State Bank of India, the subsidiary bank or the corresponding new bank claims to be of a confidential nature; or

(b) to make any such books or documents a part of the records of the proceedings of the departmental inquiry; or

NOTICE BOARD

(c) to give inspection of any such books or documents, if produced, to any party before it or to any other person;

(iii) to compel such officer or authority as the State Government may, by notification in the *Official Gazette* specify, to appear before him to give any evidence relating to any information obtained by it in the course of or for the purposes of any of the duties or functions of such authority under any law for the time being in force, which under such a law is required to be treated as confidential, or to produce the evidence recorded or collected by it in connection with such information.

(3) Without prejudice to the relevant provisions of Order V and Order XVI of the Code of Civil Procedure, 1908 regarding service of summons, every summons to witness to be served by the authorised Inquiring Authority upon any person shall be deemed to be served—

(a) where a person to be served is a company, the service is effected in accordance with the provisions of section 51 of the Companies Act, 1956;

(b) where the person to be served is a firm, if the summons is addressed to the firm at its principal place of business, identifying it by the name and style under which its business carried on, and is either—

(i) sent under a certificate of posting or by registered post; or

(ii) left at the said place of business;

(c) where the person to be served is a statutory public body or a corporation or a society or other body, if the summons is addressed to the Secretary, Treasurer or other head officer of that body, corporation or society at its principal office, and is either,—
(i) sent under a certificate of posting or by registered post; or
(ii) left at that office;
(d) in any other case, if the summons is addressed to the person to be served and,—
(i) is given or tendered to him; or
(ii) if such person cannot be found, is affixed on some conspicuous part of his last known place of residence or business; or

(iii) is sent under a certificate of posting or by registered post to that person.

(4) Any process issued by an authorised Inquiring Authority for the attendance of any witness or for the production of any documents may, if found necessary, be served and executed in Greater Bombay through the Chief Judge, Court of Small Causes, Bombay and elsewhere, through the District Judge within the local limits of whose jurisdiction the witness or other person, on whom the process is to be served or executed, voluntarily resides or carries on business or personally works for gain, and, for the purposes of taking any action for the disobedience of any such process, evey such process shall be deemed to be process issued by the Chief Judge, Court of Small Causes, Bombay, or as the case may be , the District Judge.

(5) Every authorised Inquiriing Authority making any departmental inquiry shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973.

(6) Any proceeding before every authorised Inquiring Authority making any departmental inquiry shall be deemed to be a judicial proceeding within the meaning of section 193 of the Indian Penal Code.

6. Territorial limits in which powers specified in section 5 may be exercised. For the purpose of ex ercising the powers specified in section 5, the teritorial jurisdiction of every authorised Inquiring Authority shall extend to the whole of the State of Maharashtra.

7. Power to make rules. (1) The State Goverment may, by notification in the *Offical Gazette,* make rules for the purposes of giving effect to the provisions of this Act. Such rules may provide for the levy of fees for any of the purposes of this Act and for the refund of any such fees or any part thereof.

(2) All rules made under this Act shall be subject to the condition of previous publication except when such rules are made for the first time.

(3) Every rule made under this section shall be laid, as soon as may be, after it is made, before each House of the State Legislature, while it is in session for a total period of thirty days, which may be comprised in one session or in two or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the sucessive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, and notify such decision in the *Official Gazette,* the rule shall from the date of publication of such notification have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done or omitted to be done under that rule.

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LAW AND PRACTICE

Inter-Country Adoptions

Adoption of Indian children by foreign parents has been a subject matter of controversy in the recent past. The Supreme Court in **Laxmi Kant Pande's** *case laid down guidelines for such adoptions. The author explains the guidelines.*

Nirmala Pandit

"Adoption is an act of affiliation by which, the relation of paternity is legally established between persons, not related by nature." Ursekar R. S.: *"Legislation Supporting Adoption"* in The Journal of Social Work, July, 1976: Volume XXXVII, No. 2)

Adoption of children is not a new phenomenon in India, especially among the Hindus. It dates back to the ancient times when male children were adopted into families. These were recognised as natural children. This practice was motivated then by certain specific considerations like old age protection, perpetuation of the family name, security of family property and for solemnisation of last rites of the adoptive parents. This idea of adoption originated through the proprietory rights of a father. It was believed that the father had the right over the child, as a person has over any chattel. The interests of adoptive parents were of prime consideration.

New Trends

Today, childlessness of parents is no doubt a major consideration for adoption. However, in the recent past, parents with one or more biological children are also interested in adoption. In addition to the desire to have a child, there is an awareness among young parents of the need to provide a home for abandoned or destitute children. The number of such children who are awaiting adoption is more than the Indian parents who desire to adopt them. The high rate of infertility in some of the European countries, liberal outlook towards the children born out of wedlock, developed socio-economic structure, affluence and the desire to help the underdeveloped third-world countries have all given rise to the concept of inter-country adoption.

There is, however, a need for regulating the formalities which are to be met before and during the adoption, the prime consideration being to ensure that there is no trafficking in children and that utmost care is taken in ensuring that a child is properly selected for the parents proposing to adopt.

The United Nations,[1], The Hague Conference - On Private Internation Law, [2] and the International Council On Social Welfare, [3] have formulated certain guidelines. These guidelines take into account the interests of all the parties involved in an adoption, with special consideration for the well-being of the child. On the basis of these guidelines, several sending and receiving states have deliberated upon and formulated specific guidelines.[4]

Indian Situation

In India, however, the Indian legislature has not been successful so far in bringing about a uniform Act regarding adoption of children in India. This is due to religious and other political considerations.

Except among Hindus, no other religious community permits adoption in strict legal terms. Hence today, parents who wish to adopt Indian children apply to be appointed as guardians under the Guardianship and Wards Act, 1980.

The prospective adoptive parent is appointed as a guardian on the condition that the child will be adopted in the country of origin of the persons adopting.

The guardianship order gives them the legal permission to take the child away to their country. The child is then legally adopted, according to the law of that country. This situation may appear to be simple, but is not a fool-proof arrangement, considering the interest of the child.

In such a situation, the possibility of coercion or monetary temptation may lead a poor parent to relinquish the child. This may give rise to a class of touts, who may scout for children in the poor localities. This can become an industry, where children will be exported for monetary considerations.

Supreme Court Guidelines

The Supreme Court of India, on realising this inherent possibility, has laid down certain guidelines. *(Laxmi Kant Pande v/s. Union of India* AIR 1984 SC 469,(1984) I SCC 144)

The Court has restricted the scope of the guidelines to cases of adoption where the children are not living with their biological parents and the children to be taken in adoption are destitute, abandoned or are living in social or child welfare centres. As against this, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. The guidelines are as follows:

1. Draft Resolution XVII, Draft Declaration on Social and Permanent Bureau of the Conference XIII-Convention and Welfare of Children, with Special Reference To Foster Placement and Adoption, Nationality and Internationally - Doc. A/36/792 English, Page 55.
2. Collection of Conventions, 1951-1980, edited by the Permanent Bureau of the Conference XIII-Convention on Jurisdiction, application of Law and Recognition of decress relating to adoptions (concluded Nov. 15, 1965) P.65
3. Draft Guidelines of Procedures Concerning Inter-country Adoption, Proceedings of the Workshop held at Brighton, U.K. on the 4th September, 1982.
4. Following are some of the States:
   Belgium, Australia, United Kingdom, West Germany, India, Indonesia, Norway, Thailand, Phillipines, Ethiopia, Columbia, Korea, France, United States, Netherlands, Sweden and Switzerland.

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

Agency

The foreigners wishing to take a child in adoption must be sponsored by a social or child-welfare agency recognised by the Government of the country in which the foreigner is a resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India.

This would no doubt restrict the occasion of extracting exorbitant amounts from the foreigners who are anxious to secure the child for adoption. Further, this would give the Court an opportunity to satisfy itself about the suitability of the family for a child and vice-versa. This arrangement will facilitate the holding of the foreign agency responsible for supervising the progress of the child and to ensure security, warmth and affection to the child.

Application

Every application by a foreigner for taking a child in adoption must be accompanied by a home-study report, recent photograph of the family, marriage certificate of the foreigner and his or her spouse, declaration of their health and medical fitness by a doctor, a declaration regarding their financial status along with the supporting documents, and a declaration stating their willingness to be appointed as guardian and desire to adopt the child in their country.

The application must also be accompanied by a Power of Attorney in favour of an officer of a social or a child-welfare agency in India. The Indian agency has to ascertain whether the foreigner is able to adopt a child according to the law of his or her country.

The documents, declarations and certificates should be duly notarised by a Notary Public, whose signature should be attested either by an officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner, or by an officer in the Indian Embassy or Consulate in that country.

Reports

The social and child-welfare agency sponsoring the application, must also agree to send to the social or child-welfare agency in India, progress reports in regard to the child, quarterly during the first year and half-yearly for the subsequent years until the adoption is effected.

It is true that on the completion of the adoption formalities, the child acquires the same rights as any other national. So it is believed that it is protected under the law of that country. However, because of the peculiar nature of adoption in another country even at the cost of inconvenience to the adoptive parents, it is suggested that a procedure has to be established in order to trace the progress and whereabouts of the child till it completes the age of 18 years. The social or the child-welfare agencies in that foreign country should continue to send the progress reports to the Indian Embassy or Consulate in that country.

Disruption

Many a time a situation may arise of disruption of a family either before or after the adoption formalities are completed. The Court considered this grave situation and provided for certain protective measures. **If the disruption of the family is effected before the adoption is completed, then an alternative arrangement will have to be provided with the approval of the concerned social welfare agency in India, along with the report to the Court and to the Secretary, Ministry of Social Welfare, Government of India.** Further, such information will have to be sent to the Indian Embassy in that country. This would facilitate tracing the whereabouts of the child. **However, the Court expressed its helplessness if the disruption of the family is effected after the adoption is completed.** In such a situation, the Court regarded that there was nothing which the Social or the Welfare Agency sponsoring an adoption can do. On completion of adoption the child becomes a national of the country of its adoptive parents. It is entitled to all the rights of the nationals of that country. However, it does not seem wise that the child shoulld be left at the mercy of its fate, if there was to be a disruption in the family after the adoption is completed. Inspite of the legal equality, a child, due to its very special relation, must be provided with extra protection, especially on the disruption of the family where the child faces psychological turmoil similar to which it faced in its early life before adoption. At least, reports regarding the whereabouts and progress of such children should be maintained at the Indian Embassy or Consulate in the country concerned with the help of the concerned Social or Child-welfare agency in that country.

Anonymity of parents

In regard to biological parents, the Court insists on maintaining their anonymity. This is considered essential with a view to preventing the blackmailing of such parents in future.

Assistance

The biological parents or parent must be assisted in making a decision about relinquishing the child for adoption by the institution to which the child is surrendered.

The parents should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be made to take a decision under any kind of duress. **Even after the parents have taken a decision to relinquish the child, they should be given a period of 3 months to reconsider their decision. But, if on reconsideration, after three months, no change in the decision is made, the relinquishment is considered as irrecovable.** Thereafter, there can be no question of once again consulting the biological parents. The expenses incurred on the child after the prospective adoptive parents having approved of a child cannot at this stage be claimed by the biological parents. This obviates mischief that may be played by the biological parents on the institutions which are incurring expenses on account of that child. It is therefore necessary that the biological parents at the expiration of the period of reconsideration, tender a document of surrender, duly signed and attested by responsible persons.

Orphans

If the child is an orphan, destitute or abandoned and its parents are not known, then the institution to whose care the child has come, must try to trace the biological parents of the child. If they could not be traced, then the procedure mentioned earlier has to be followed. **However, the abandoned child should not be regarded free for adoption, unless some of the formalities are fulfilled,** such as, producing the child

before the Juvenile Court, attempt to trace the biological parents, the child being referred to the Social Welfare Department, etc. All such formalities must be completed within the period of three months from the time the child is found. It is only after the Juvenile Court or the Social Welfare Department regards the child as abandoned or destitute, that such a child can be given in adoption.

Preference for Indian Parents

Once the child is considered free for adoption, **the Court insists that utmost attempt must be made to find Indian adoptive parents. However, with a well-established network of social welfare agencies, the time for tracing Indian adoptive parents should not take more than one month. On the expiration of this one month, if no Indian adoptive parents are found for the child, the child is considered free for inter-country adoption.**

Recognised Agency

An application from a foreigner for taking a child in adoption should be processed only through a Social or a Child-welfare Agency recognised by the government of India or the Government of the State in which such agency is operating. It is believed that such an arrangement will stop all private adoptions conducted by unauthorised individuals or agencies. **Inter-country adoption must be looked upon not as an independent activity by itself, but as a part of a child-welfare programme so that it may not degenerate into trading.**

Once the decision is taken by the prospective parents regarding inter-country adoption, **the Court insists that a scrutinising agency should assist the Court in coming to a decision regarding the appointment of a foreigner as a guardian of the child. The scrutinisiing agency should be distinct from the placement agency. It should trace and match the child with the foreign adoptive parents.** The reason for such an arrangement is to avoid the conflict of interest between a placement and a scrutinising agency. The scrutinising agency is not to find out who the biological parents are, or if they are willing to relinquish the child for adoption or not, unless the Court asks the scrutinising agency to do so.

Expenses

The Court had to deal with a doubt that was raised viz., whether the social or the child-welfare agency, which looks after the child should be entitled to receive from the foreigner wishing to take the child in adoption, any amount in respect of the maintenance of the child or its medical expenses. **It was brought to the notice of the Court that on many occasions, exorbitant amounts were demanded by the so-called social or child-welfare agencies under the label of maintenance charges and medical expenses supposed to have been incurred for the child.** This practice is really nothing short of trafficking in children. The Court considered that it is absolutely necessary to put an end to it by introducing adequate safeguards. **However, it would not be fair to suggest that such special or child-welfare agency should not be entitled to receive any amount from the prospective adoptive parents,** when the maintenance and medical expenses are really incurred by such social or child-welfare agency. **Such agencies may, therefore, legitimately receive from the prospective parents maintenance expenses at a rate not exceeding Rs. 60/- per day from the date of selection of the child by them, until the date the child leaves for its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such agency for the child.** These expenses have to be forwarded by the adoptive parents only through the recognised social or child-welfare agencies.

Inter-State transfers

There are instances when the children from one State are transferred to another in order to facilitate foreign adoption. Many of the agencies involved, shared the view that such kind of transfer of children may lead to scouting of children of poor Indians by offering monetary inducement. The Court was of the opinion that the other procedural guidelines would protect a child from trafficking. **Such transfer would be permitted only if there is no child or social-welfare agency in that State, where the child is found or where the child was relinqhished for adoption by the biological parents.**

Deposits

On several occasions the Court insists upon some deposit being made by way of security from the prospective adoptive parents for enabling the child to be repatriated to India, should it become necessary. Sometimes, instead of a deposit, the Court may insist upon a mere bond by the foreigner or his representative.

If a bond is executed by a foreign adoptive parent, then the difficulty in its enforcement cannot be ignored. Therefore, a bond executed byanIndian representative of the foreign adoptive parents is a better solution to the problem **or the maximum protection of the child's interests, a bilateral agreement entered into between the governmental authorities would be the best arrangement.** Here, the sending and the receiving countries enter into an agreement and thus protect the interests of the children. **Such an arrangement has been entered into between India and Sweden.**

Surroundings

The Court also considers it essential that the adoptive parents should come to India and take the child away with them. In this way, they come and see the background and the surroundings of the child. They will thereby be able to understand the child better.

Conclusion:

We are aware of the arguments against inter-country adoption which are mainly based on the ground of strong nationalism. In view of the fear of trafficking in children and the possibility that the child may not be able to adapt to an alien culture, the Court has decided that Indian adoptions are to be preferred to foreign adoptions. Adoption, however, is considered a better option than putting a child in an institution. The need and desire of a child to associate and identify with a home and family cannot be provided in any institution.

There is a need to do research on how children of Indian origin have adapted to the country to which they have been sent.

If a proper socio-legal framework is established based on an indepth research and study, there is no reason why inter-country adoption should be opposed as one of the alternative modes to ensure the welfare of the child.

Ms Nirmala Pandit is a lecturer at law at Pune.
The views of the author do not reflect the views of the publisher or the editor.

LAW AND PRACTICE

Environmental Pollution

The turmoil and confusion following the Bhopal tragedy has brought into sharp focus the Government's total lack of concern over the environment. It is only after Bhopal and the ensuing publicity that the public has become aware of "environmental pollution" and its devastating effects and the fact that it is every citizen's right to live in a pollution-free and healthy environment.

Various Acts and Bills exist with regard to these rights but for the most part they are unknown and unimplemented. Recently, an Act called the Environment (Protection) Act, 1986 was passed, which it is hoped, will fill the gap. In this article we focus on available civil and criminal reredies for preventing environmental pollution.

Mihir Desai

Constitutional Mandate

Article 47 of the Constitution states that improvement of public health is one of the primary duties of the State. Article 48A inserted by the 42nd Amendment (1976) provides that, "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". These Directive Principles, though not enforceable in a Court, mandate the State to enact legislation and frame policies towards attaining these goals.

General Laws

Statutes dealing with environmental pollution include the Water Pollution Act, 1974, the Air Pollution Act, 1981 and now the Environment (Protection) Act, 1986. Apart from these Acts there are many other legal provisions dealing with environmental pollution scattered in various statutes as well as in the uncodified "common law".

The Indian Penal Code

Section 277 of the Indian Penal Code provides that whoever voluntarily corrupts or fouls the water of a public spring or reser voir so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment upto 3 months or with fine upto Rs. 500/- or both. This provision is very limited in its scope as 'public spring' has been held not to include a river or a canal or other running water. Section 278 provides that whoever voluntarily vitiates the atmosphere so as to make it noxious to the health of persons shall be punsished with fine upto Rs. 500/. Section 269 of the Code prescribes punishment for a negligent act likely to spread dangerous diseases to life. Section 290 provides that "whoever commits a public nuisance in any case if not otherwise punishable by the Code shall be punished with fine which may extend to Rs. 200/ ". Public nuisance is defined as causing any common injury, danger or annoyance to the public. Section 426 provides that whoever commits mischief shall be punished with imprisonment of upto 3 months or fine or both. Mischief is defined to mean causing destruction of any property or any such change in any property or in its situation as destroys or diminishes its value or utility or affects it injuriously.

Hardly any prosecutions have been launched under the Indian Penal Code to bring to book people who foul up the environment. In any case, the punishment provided is so meagre that prosecution would not matter much to such a defaulter. Apart from this, decisions like *Babulal Vls Ghanshyamdas Birla* of the Madhya Pradesh High Court (unreported), which held that the directors and other officials of a company could only be prosecuted if a specific act or omission is attributed to them, or there is an overt act done by them and also a clear motive is established on their part, would definitely prevent any enthusiasm to prosecute under the Indian Penal Code.

Criminal Procedure Code

Section 133 of the Criminal Procedure Code empowers Magistrates to direct the removal of unlawful obstruction or nuisance from any place which is lawfully used by the public. This section also empowers the Magistrate to prohibit or regulate any trade or occupation if it is injurious to the health or physical comfort of the community. This section has been constructively used in the *Ratlam Municipality* cse (AIR 1980 SC p. 1680) where the Municipality was directed to remove the nuisance.

Civil Procedure Code

Section 91 of the Civil Procedure Code, 1908, allows the Advocate General, or with the leave of the Court, any two persons to file a suit for obtaining an injunction preventing a public nuisance. These persons may file a suit even if they have not suffered any special damage.

Factories Act

The Factories Act, 1948, through Section 12, provides that Factories have to make "effective arrangements" for disposal of waste and effluents. The punishment for violation of this Section is imprisonment upto 3 months, or fine upto Rs. 500/ . Various States have made rules under this section. For instance, in Tamil Nadu and Karnataka, a rule has been framed which states that in case of a factory where there are rivers or fisheries or other water sources in the vicinity, and these water sources are likely to be affected by the arrangements made for the disposal of trade waste and effluents, prior approval of the Director of Fisheries or other appointed authority has to be obtained. Similarly, the Rules in Bihar provide for treatment, purification and disposal of trade waste and effluents, the Scheme for which has to be prepared in detail, and approved by the Director of Health Services or the Chief Inspector. Similarly, the Uttar Pradesh Factories Rules provide for the disposal of effluents with the approval of the Effluent Board, constituted

by the State Government. The Factories Act also provides for regulating the environment at the work place.

Municipal Acts

Many Municipal enactments contain provisions dealing with pollution. For instance, the Delhi Muncipal Corporation Act, 1957 provides extensive controls against water pollution. Similarly, the Bombay Municipal Corporation Act, 1888 makes it obligatory upon the Corporation to ensure collection and removal of excrementitious and polluted matter.

Apart from this, there are other Acts, like the Northern India Canal and Drainage Act, 1873 and the River Boards Act, 1956, which make it obligatory upon the State to prevent pollution of river waters.

The Merchants Shipping Act, 1958 regulates the discharge of oil by ships. Similarly, the Atomic Energy Act, 1962 regulates the manufacture, transport and use of radioactive substances.

Torts

Noxious Substances

The famous rule of *Rylands Vls Fletcher* [(1868) LR 3 HC 330] lays down that a "person who for his own purpose brings on his own land, collects and keeps there anything likely to do mischief, if it escapes, must keep it at his own peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." Such a person is absolutely responsible to the injured person who can get damages as well as an injunction restraining the person from causing such a nuisance or mischief.

Negligence

If a persons acts negligently i.e. without taking reasonable care in whatever he is doing and as a result injures someone, he is liable to pay damages.

Nuisance

Nuisance is an "unlawful interference with a person's use of enjoyment of land or some right over, or in connection with, it." It is possible to prevent harmful effect to the environment by filing a suit alleging nuisance.

However, these remedies are private remedies, where actual damage has to be proved and the source of injury very clearly identified.

Response of the Courts

In the past 6 years, the Supreme Court has been taking an active interest in environmental issues. Three landmark cases need be noted, viz., the *Ratlam Municipality* case (ibid) the *Lime Quarries* case (AIR 1985 SC 652) and the *Shri Ram Mills* case [(1986) 2 SCC 176.]

In the *Ratlam Municipality* case, the residents of a local community complained to the Court, under Section 133 of the Criminal Procedure Code that the Ratlam Municipality did not do its statutory duty of removing the nuisance complained of. The Court directed the Ratlam Municipality to take immediate steps to make certain areas free from effluents. It also directed the Municipality to take immediate action to stop the effluents flowing from an Alcohol plant into the street, remarking that, "Industries cannot make profits at the expense of public health". The Court also directed the Municipality to construct within six months a sufficient number of public latrines, and provide water supply and scavenging service. The State Government was directed to give special instructions to the Malaria Eradication Wing to stop mosquito breeding in one of the Wards. The Municipality was also directed to fill up the cesspools and other pits of filth and use its sanitary staff to keep the place free from accumulation of filth. Lastly, it ordered that if these directions were not complied with, the Sub-Divisional Magistrate should prosecute the officers concerned.

In the *Lime Quarries* case, the Supreme Court directed certain lime quarries in Uttar Pradesh to be closed down immediately as they were proving hazardous to the health of workers and persons staying in the surrounding areas. The Supreme Court, while expressing concern over the hardship this would cause to the owners, observed that, "it is a price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal disturbance to ecological balance and without avoidable hazard to them and their cattle, homes and agricultural land and undue affectation of air, water and environment.". The Supreme Court also directed that in the afforestation and soil-conservation programmes, the workers displaced by the closing of the quarries should be given first priority for employment.

In the *Shri Ram Mills* case, owing to an oleum gas leak from the factory of Shri Ram Food and Fertilisers at Delhi leading to a death,the entire factory was ordered to be closed down by the Muncipal Corporation of Delhi. A public interest petition was filed. The Supreme Court allowed reopening on certain conditions. A committee was to inspect the plant at least once a fortnight for a complete check from design and materials to experimentation at site. The Company was ordered to deposit Rs. 30,000/- in the Court to meet the expenses of the committee. The Chief Inspector of Factories was directed to make surprise checks at least once a week and report to the Court as well as to the Labour Commissioner. The trade unions were empowered to report on any default or negligence to the management and if the management did not take heed of their opinion, to make a report to the Labour Commissioner. Adequate training was to be given to the workers' representatives. The Central Board for Water Pollution was directed to make surprise checks at least once a week and report to the Court. The Chairman and Managing Director were made to give undertakings holding themselves personally responsible to pay compensation for any death or injury in case of the escape of chlorine gas. The Company was directed to deposit Rs. 20,00,000/- as security for satisfying compensation claims against the Company for leakage of oleum gas. The Company was also directed to give a bank guarantee of Rs. 15,00,000/- to be encashed by the Registrar in case of an escape of chlorine gas resulting in death or injury.

In both the *Lime Quarries* case and the *Shri Ram Mills* case the petitioners had relied on Article 21 of the Constitution (Right to life and personal liberty). The Supreme Court accepted the position that the right to live in an environment free from pollution is a part of the fundamental right to life.

Pollution Control Acts

The Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981, are the two Central Acts dealing directly with pollution. The Acts set up Central and State Boards. These Boards are to lay down standards of emission of various pollutants. Before any industry commences its operations, it is necessary to obtain

approval letters (commonly known as consent orders) from the Boards which specify the emission standards. The Air Pollution Act applies to industries which are specified in the Schedule to the Act. The punishment for contravening emission standards or other provisions of the Water Pollution Act is a minimum of six months imprisonment which may extend upto six years and fine. Under the Air Pollution Act, the punishment is three months imprisonment or fine of Rs. 20,000/. However, the erring industries can be prosecuted only by the Boards or with the sanction of the Boards. While granting permission to industries, the Boards may lay down conditions specifying the control equipment to be installed. If there are any technological improvements which can lead to better control of pollution, the Board may call upon the industries to change their equipment. A third Act, viz., Water (Prevention and Control of Pollution) Cess Act 1977, provides for cess to be levied upon industries consuming water. If any industry, liable to pay cess, instals a plant for the treatment of sewage or trade effluent, it is entitled to a rebate of 70% of the cess payable.

Environment Protection Act, 1986.

The Environment Protection Act is an addition to the existing legislation. The Central Government is empowered to take all measures for protecting and improving the environment and for preventing and controlling pollution. For this purpose, the Central Government is empowered to lay down standards for emission and discharge of environmental pollutants from all sources except ships or aircraft. Different standards of emission may be laid down for different sources, having regard to the quality or composition of the emission or discharge of pollutants.

Another power given to the Central Government is to make rules laying down standards of quality of air, water or soil for various areas and purposes and to specify maximum allowance limits of concentration of pollutants, including noise.

The Central Government also has the power to lay down restrictions regarding areas in which industries, operations or classes of industries or processes may not be carried out.

The Central Government is also empowered to issue directions to close, regulate or prohibit any industry or process or to stop or regulate supply of water or electricity or any other services.

All persons are prohibited from carrying on any industry, operation or process discharging or emitting a pollutant in excess of prescribed standards or handling hazardous substances except in accordance with the prescribed procedure. The penalty for contravention of the provisions of the Act is 5 years imprisonment or fine upto Rs. 1 lakh.

The Central Government may establish authorities to perform its functions. The authorities are empowered to enter any premises, take search and inspection of any plants, records, registers, documents, etc., as also to seize any of these objects The authorities are also empowered to take for analyses samples of air, water, soil or other substances.

Prosecution against violation of the Act can be initiated by filing a complaint in the Magistrate's Court. Such a complaint can be filed by the Government or by an individual. However, an individual can file complaint only after giving 60 days notice to the Government. However, the individuals's complaint will be disregarded if during these 60 days the Government itself files a complaint or writes back to the individual refusing to file a complaint . Thus, an individual's complaint will be considered only if during the period of 60 days the Government does not itself take any action and also does not send a written communication refusing to take action.

Evaluation

The Environment Act is the first Act dealing with the issue of environment as a composite whole. The earlier Acts - Water and Air Pollution Acts, confined themselves to either air or water pollution while the Environment Act, for the first time, takes a comprehensive view of pollution - dealing simultaneously with air, water and noise pollution as also regulating the treatment of hazardous materials.

Earlier, a one-to-one equation between a pollutant and air or water was considered satisfactory. For the first time, under the Environment Act, there is recognition of a much more complex relationship between the pollutants and the environment. A particular pollutant by itself may not be very harmful, but if it is combined with other pollutants, it may have harmful effects. In such cases, under the Environment Act, the Government may lay down strict standards, even in respect to pollutants which are not very harmful on their own, or which otherwise can be dischared in higher proportion.

Another positive feature of the Environment Act is that it is applicable to the whole of India and to all persons. In contrast, the Air Pollution Act is applicable only to industries notified as "scheduled industries". Under the Environment Act, the Central Government has power to issued directions to close, regulate or prohibit any industry or process or stop or regulate the supply of water, electricity or other services. This is an extremely important power. Under the earlier Acts, none of the authorities had such a power.

The weaknesses in the Pollution Acts continue in the Environment Act also. Under the Pollution Acts there was no machinery to ensure their implementation. Workers and citizens were neither given access to information nor the right to monitor or sue any industry without the permission of the Board.

One of the surest ways of controlling and monitoring pollution would be to give powers to workers to stop a plant if emission levels cross the prescribed limits. The Clean Air Act of USA provides for this. The US Act also provides that no worker raising the issue of pollution or calling for stoppage of work due to apprehension of excessive emission shall be discharged or discriminated against. Swedish Law allows workers to strike work in the event of flouting of environment regulations by management. Far from trying to solve this problem, the Environment Act refuses to even address itself to this question.

Industries under the Pollution Acts are accountable only if the Pollution Board officials decide to book them. Lack of infrastructure, political pressure and corruption have resulted in the Boards allowing the industries to go scot free. The Environment Act doet not solve any of these problems.

The individual does not stand on a better footing. If during the 60 days notice period the Government files a complaint against the industry or communicates to the individual its decision not to file a complaint, the individual cannot proceed with his complaint. Thus, individuals are virtually given no rights to launch proceedings against defaulting industries. This section has been partly borrowed from S. 7604 of the American Clean Air Act. Under the U.S. Act 60 days notice has to be given. However, if the Government communicates its refusal to file a

complaint, the individual can proceed with his own case. An individual will be stopped only if "the State has commenced and is diligently prosecuting an action in Court."Even in such cases, any individual can intervene as a matter of right. Under our Act, citizens, workers and environmental groups are neither given access to any data nor any right to commence independent action. This is a major flaw in the Act.

Another short-coming is that in cases of offences committed by a Company, a director, manager or other officer is liable to be proceeded against only if it is proved that the offence is committed with the consent or connivance of such a person or is attributable to any neglect on the part of such an officer. This gives an easy way out to such officers by shifting the blame to an employee lower down in the rung.

The Act does not take away an individual's right to sue a defaulter for damages. An individual also has the constitutional remedy of invoking fundamental rights in case of excessive emission of pollutants. However, as individuals cannot move the Courts independently, the implementation of the Environment Act will totally depend on the whims and fancies of the officials. The history of similar Acts does not provide us with an optimistic outlook.

Bonded Labour System (Abolition) Act, 1976

There exists still in different parts of India a system of usury under which the debtors or his descendants or dependants have to work for the creditor without wages or for nominal wages in order to extinguish the debt. This is known as bonded labour.

The fourth point in the Twenty Point Programme declared in 1975, reads, 'Bonded labour, where ever it exists, will be declared illegal'. To implement this point, the Bonded Labour System (Abolition) Ordinance, 1975 was passed which was replaced by the Bonded Labour System (Abolition) Act, 1976. The 1976 Act is the first All India measure abolishing the pernicious system of debt-bondage. All other Acts prior to the 1976 Act were local Acts and were restricted to certain states like Orissa, Bihar, Rajasthan etc.

Manjari Dingwaney

The problem was identified in the year 1951 itself but it took the Central Government about 25 years to pass the law. The Annual Report of the Commissioner for Scheduled Castes & Scheduled Tribes for the year 1975-1977 stated that if the recommendations of the Commissioner had been accepted earlier and prompt action taken thereon, thousands of Bonded Labourers who died as slaves even after independence, could have had the satisfaction at least of dying as free men in a free country. (26th Report (1978-79) of the Commissioner of SC/ ST)

Further, out of 31 States and Union Terriories in the Country, 20 States and Union Territories have denied the existence of Bonded Labour in their jurisdictions. However, in some of these states, preliminary surveys and inquiries have indicated that the Bonded Labour System is still prevalent. (24th Report of the Commissioner of SC/ST)

Definition

Section 2(9) of the Act defines the Bonded Labour System as a system of forced labour or partly forced labour under an agreement between the Creditor (sahukar/mahajan/ employer/landlord) and the Debtor (Bonded Labour) written or unwritten, entered or presumed to have been entered: to the effect that either

* in consideration of an advance and interest, if any, in cash or kind or cash and kind, with document or without document or
* in pursuance of customary or social obligation; or
* in pursuance of obligation by succession; or
* for economic consideration; or
* by reason of birth in a particular caste or community.

The Debtor shall, -

* himself or through any member of his family render labour or services to the Creditor without wages or for nominal wage; or
* forfeit freedom of employment; or
* forfeit freedom of movement; or
* forfeit rights to sell at market value his property or product of his labour or those of any member of the family.

The above clauses require further clarification

In pursuance of customary or social obligation and by reason of his birth in particular caste or community involves an element of force in extracting labour or service from the people born in a particular caste or community owing to the traditional age-old customs. We continue to come across social oppression, particularly of scheduled castes and scheduled tribes. Even today in many of the villages in India, Harijans are forced to perform certain customary services for the upper castes e.g. carrying dead animals and flaying them, beating drums during births/funerals and so on.

In pursuance of obligation by succession implies the continuance of bondage for generations. Mohammad Kasum, one of the 32 bandhuas (bonded labourers) owned by Taramoni Singh of village Solay under Patan Police Station says. "My father once borrowed Rs.10/- or Rs.15/- from Jagga Singh, Taramoni's father. He died after 45 years of bondage. I have

been a bandhua 32 years. Between father and son, we have given 77 years of our lives, yet the debt remains unpaid" (Statesman, 8.5.84).

For economic consideration implies working on land leased in from the master or living on the homestead land owned by the master.

Forfeit right to sell at market value, his property or product of his labour or those of any member of his family implies that the bonded labour is not free to sell the product of his labour at market value. To illustrate, fishermen (who are indebted to the intermediaries) are not free to sell the product of their labour i.e. their catch. They are forced to sell their catch to the creditor at a much lower rate than the prevalent market price in consideration of the loan advanced to them by the creditor.

The definition of the bonded labour system has been a source of constant debate. The Courts have expanded the scope of the definition.

In *PUDR vs Union of India* (AIR 1982 SC 1980) the Supreme Court explained that, "Where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words 'forced labour' under Article 23.

Further, in *Bandhua Mukti Morcha vs Union of India* (AIR 1984 SC 803), the Supreme Court pointed out that, "Whenever it is shown that a labourer is made to provide forced labour, the Court would raise the presumption that he is required to do so in consideration of an advance or other economic consideration received by him and he is therefore a bonded labourer."

Section 2 (b) of the Act lists 31 traditional categories of forced labour all over the country in which an agreement between debtor and creditor is ordinarily presumed. These are:-

ADIYAMAR, BARAMASTUA, BASAHYA, BETHU, BHAGELA, CHERUMAR, GARRU-GALU, HALI, HARI, HARWAI, HOLYA, JANA, JEETHA, KAMIYA, KHUNDIT-MUNDIT, KUTHIA, LAKHARI, MUNJHI, MAT, MUNISH SYSTEM, NIT-MAJOOR, PALERU, PADIYAL, PANNAIYAL, SAGRI, SANJHI, SANJAWAT, SEWAK, SEWAKIA, SERI, VETTI;

Prohibition of certain practices

The Act prohibits the following practices:-

* Making any advance under or in pursuance of the bonded labour system
* Compelling any person to render any bonded labour or Other form of forced labour (Section 4) other provisions benefitting bonded labourers are:-
* * All agreements, by virtue of which, any person or any member of his family is required to do any work as a bonded labourer, are void; (Section 5)
* Liability to pay bonded debt stands extinguished (Section 6)
* Property of bonded labour is to be freed from mortgage (Section 7)
* Freed bonded labourer will not be evicted from homestead (Section 8)
* Creditor is not to accept payment against extinguished debt (Section 9)

Burden of Proof

Whenever a bonded labourer or Vigiilance Committee claims that a certain debt is a bonded debt, the burden of proof, that such a debt is not a bonded debt, will lie on the creditor (Section 15)

Implementing Authorities

District Magistrate's

Section 10 of the Act allows the State Governement confer such powers or impose duties on the District Magistrates to ensure that the provisions of the Act are properly carried out. The District Magistrate may further specify an officer, subordinate to him, to exercise all or any of the said powers and perform all or any of the said duties.

The District Magistrate is required to take steps to eradicate the bonded labour system and to promote the welfare of freed bonded labourers; inquire whether any bonded labour system or any other form of forced labour is being enforced by or on behalf of any person within the local limits of his jurisdiction.

Vigilance Committee

Every State Government is expected to set up Vigilance Committees at the District and Sub-divisional levels to assist the District or Sub-Divisional Magistrates in the release and rehabilitation of bonded Labourers. The Vigilance Committee is to consist of:-

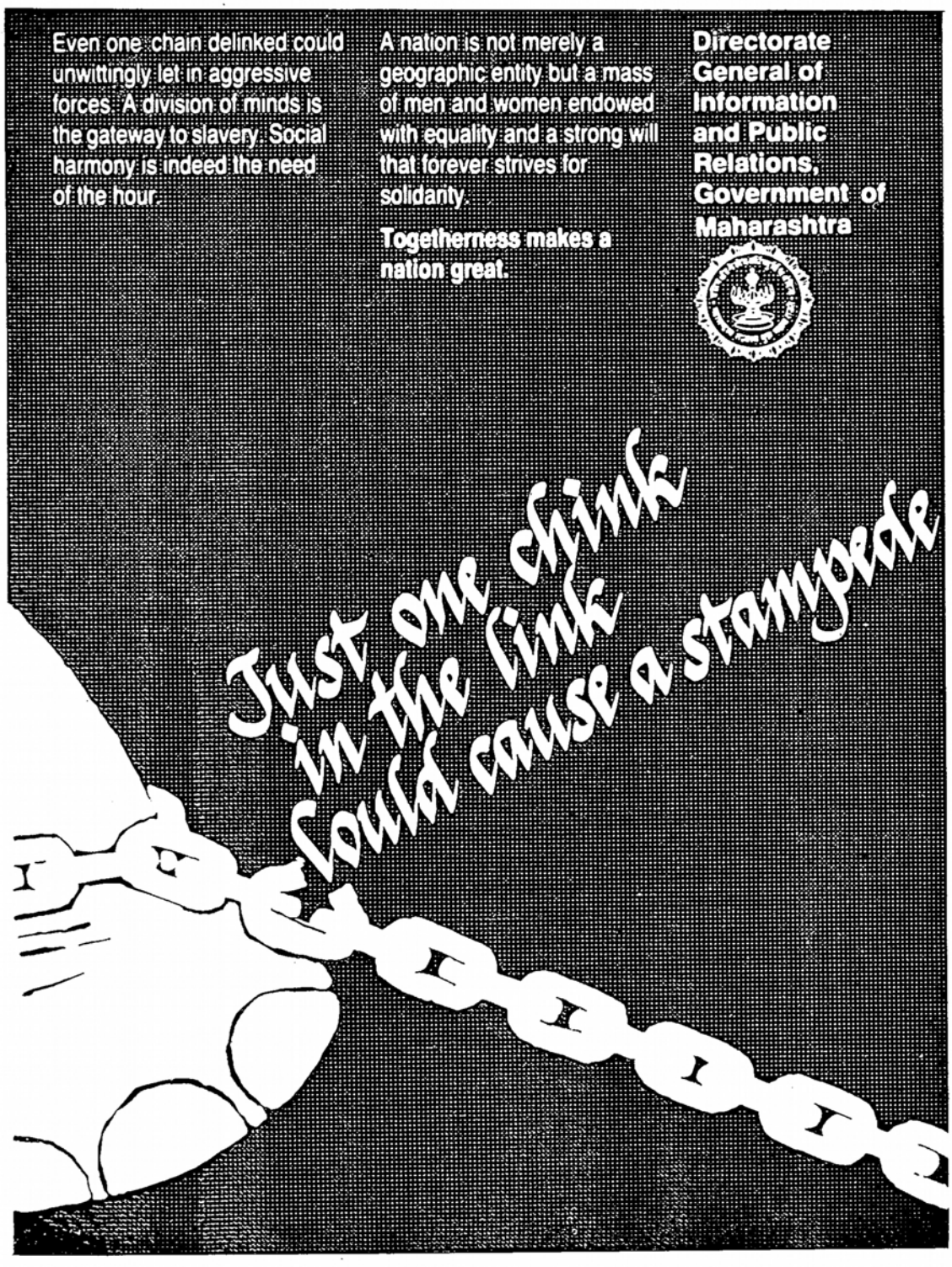
* The District Magistrate or his nominee as Chairman.
* 3 SC/ST representatives nominated by the Magistrate.
* 3 Nominated social workers.
* 3 Representatives of the Government or non-government agencies connected with rural development.
* One representative of the financial and credit institutions in the District (Section 13).

The functions of the Vigilance Committee under Section 14 of the Act, are:-

* advise the District Magistrate to effectively implement the Act
* provide for the economic and social rehabilitation of freed bonded labourers;
* canalise adequate credit to the freed bonded labourers through rural banks and cooperative societies;
* maintain records and follow-up the cases in which cognizance of the offence has been taken;
* conduct surveys to detect cases of bonded labourers;
* defend any suit instituted against a freed bonded labourer (or a member of his family or any other person dependant on him) for the recovery of any bonded debt claimed by a creditor;
* maintain registers containing the address of freed bonded labourers, their occupation, income and means of livelihood. Section 13 provides for constitution of Vigilance Committees in each District and each sub-division of a District

The Supreme Court in the Bandhua Mukti Morcha case held that, "Vigilance Committees are required by Section 13 to be constituted, because the function of the Vigilance Committee is to identify bonded labourers, if there are any, and to free and rehabilitate them and it would not be right for the State Government not to constitute Vigilance Committees on the assumption that there are no bonded labourers at all".

To be continued in the next isssue.


Even one chain delinked could unwittingly let in aggressive forces. A division of minds is the gateway to slavery. Social harmony is indeed the need of the hour.
A nation is not merely a geographic entity but a mass of men and women endowed with equality and a strong will that forever strives for solidarity.
Togetherness makes a nation great.
Directorate General of Information and Public Relations, Government of Maharashtra
Just one chink in the link could cause a stampede

Lecturing the Judges

Rabindra Hazari

"You must have chaos in you to give birth to a dancing star". Thus spake Nietschze, and thus speak the judges of the Supreme Court of India. Critics of the Supreme Court (SC) fall into three broad categories. First,are the Government - wallas who accuse the judiciary of trespassing into the exclusive preserve of the Executive. Second, is the conservative bastion of the Bar, appalled at the consideration shown to labour and the under-privileged. Third, come the "progressives", exasperated by the convulsions of a bickering Bench, yet hailing the hesitant steps that widened public access to the Courts.

In this book, Baxi, the progressive's doyen, returns to his favourite calling, that of the all knowing headmaster who must rap the errant and pat the promising amongst a flock of wayward pupils who are the judges of the Supreme Court. Disdaining to take sides in the factional fighting that is endemic amongst S.C. judges, Baxi has preferred to cane them all impartially.

Based on the Setalvad lectures delivered by the author, the first lecture analyzes the content and context of judicial activism in India. Baxi accuses the Supreme Court and the Supreme Executive of arriving at a series of tacit understandings which he labels the "unwritten" constitution. This "unwritten" constitution prescribes that the function of the courts is to create an appearance of accountability of even the Supreme Executive power, while masking the reality of centralized state power. (p.12) Such a system depends on "committed" judges who ensure that the Supreme Judiciary is ready to endorse, in vital matters, the Supreme Executive. This cosy club is disrupted by the arrival of the activist judge who, from the view point of the ruling elites, is perceived to be spouting counter-ideologies. Thus it is the activist judge who forges new judicial tools to help the undertrials of Bihar, the blinded of Bhagalpur and the victims of custodial rape. Baxi sees the spread and legitimation of the ideology of judicial activism as in itself a momentous political development in India today. Moreover, judicial activism has created a new jurisprudence forcing the State to acknowledge the varieties of its lawless ways (p.19).

Baxi acknowledges but is unable to explain how judges and courts, vital parts of the repressive apparatus of state, become worthwhile avenues for combating the lawlessness of the state. The lack of a theoretical construct to explain such contradictory phenomena is Baxi's major problem. Thus while Baxi admits that judges are carefully selected to weed-out undesirable elements, he dodges the question as to how that freak - the activist judge is appointed, by casually attributing it to "contradictions in ideology and cohesion of the ruling groups" (p.6-7)

The second lecture dissects that popular cry - "the independence of the judiciary". Baxi spotlights issues excluded from discussions on the independence of the judiciary but which are really integral to it. The despotic and feudal behaviour of appellate judges towards subordinate colleagues. The "son-stroke" phenomena whereby close relatives of a judge practise in the same court earning astronomical fees disproportionate to their real worth. The spectacle of judges accepting special favours from the Executive like Maruti cars or flats in a housing scheme. The sight of retired justices and chief justices of High Courts arguing before the Supreme Court on the very first day or week after their retirement, indicating their briefing while still in office. Even the Bar, the creature of a few senior counsel, is actively engaged in Bench - fixing practices and in brow - beating the justices.

Along comes the white knight of SAL to liberate our justices from their twin crutches. Through SAL, the Supreme Court inter-acts directly with victim-groups by-passing both the Executive and the Bar. An outraged Bar therefore sees SAL as a great encroachment on their natural right to control and direct the thrust of Supreme Court decisions. It is therefore these groups who cry out in frustration that the independence of the judiciary is in danger."

Hence, Baxi sees judicial independence as a myth necessary to mask the functionally dependent nature of the judiciary from the people. If the masses learnt how dependent the Judiciary is on the Executive and the Bar, they may also demand similar leverage.

In the concluding lecture, Baxi identifies the Supreme Court as the only court in the world to exercise judicial review over Constitutional amendments. An analysis of Supreme Court decisions from *Golak Nath* to *Kesavananda* and onwards to *Minerva Mills* and *Waman Rao,* reveal greater recognition of vast amendatory powers possessed by Parliament, which are accompanied by the extension of judicial invigilation of Constitutional amendments. However, the argument that the "Basic Structure" debate represents the judicial assertion of constituent power of peoples' struggles within the law, is rather obtuse, lacking the cut and thrust of the preceding lectures.

Baxi has exaggerated the advent of SAL in the Supreme Court by mistaking scout parties for the main armies, skirmishes for final victory. The limits of judicial intervention remain unstated. Yet Baxi has produced a bold book extensively documented that does not shrink from naming names, incidents and cases, written with a panache that is the author's trademark. Scholarly withoutbeing pendantic, humorous and yet not flippant, Baxi takes revealing snapshots of a confused court quavering on the brink of change.

COURAGE CRAFT AND CONTENTION
The Indian Supreme Court in the Eighties
UPENDRA BAXI
N.M. Tripathi Pvt. Ltd. Bombay 1985
Rs. 75/-

COMMENT

Discharge Simplicitor

The provision of Discharge Simplicitor in the Model Standing Orders allows the employers to dismiss employees particularly active trade unionists, without assigning reasons. Discharge Simplicitor thus allows for the arbitrary exercise of power. In this article the author examines the possibility of challenging this power after the decision of the Supreme Court in the Central Inland Water Transport Corporation case.

P.D. Kamerkar

What is *discharge simplicitor?* In the vintage phraseology of the law of master and servant it means a mere parting between the two, without any adjunct about a misdeamenour by the employee, his physical or mental incapacity to continue to work or his trustworthiness. It is not calculated to cast any stigma on the employee discharged. In plain language, an employer says to an employee, "I find no fault with you but I don't want you". It is defended as a benevolent act of giving a clean chit to an unwanted person. The justification trotted out is that it is a necessary concomitant of the right to associate.

Lethal Instrument

In practice it is a lethal instrument of tyranny in the hands of employers, which they utilise to annihilate active and *bona fide* trade unionists. One has only to obtain appropriate complaints from the ever obliging black legs and proceed to discharge the employee concerned. It is then easy to obtain a certificate from an industrial adjudicator that the employer had the option between taking disciplinary proceedings and effecting discharge simplicitor and that in fairness he has opted for the latter so that the future career of the workman was not jeopardised.

Whereas some Courts have condemned this power as an anachronism having no legitimate place in modern industrial relations, some others have declared that this right of the employer has been buried many fathoms deep by the sustained struggle of organised labour for security of service. However, its exercise has been judicially set aside only when it has been a cloak for victimisation with *mala fide* intentions or a subterfuge for avoiding an inquiry when the employer was conscious that his charges aginst an employee could not be proved. Some other Courts have gone to the extent of saying that when an employee is accused of misconduct, it is open for his employer either to afford him an opportunity to defend himself and show cause why action should not be taken against him or to proceed to simply discharge him without any such confrontation. This latter view is based on the contract of employment embodied in the Standing Orders.

Standing Orders

The Standing Orders of all industrial undertakings provide that the employment of a permanent workman may be terminated by giving him one month's notice or on payment of one month's wages in lieu thereof. This has been standardised by the **Model Standing Orders** promulgated by State Governments exercising powers conferred under Item (b) of Section 15(2) of the Industrial Employment (Standing Orders) Act, 1946. The Standing Orders constitute a statutory contract between the parties.

For the last quarter of a century, organised labour has fought innumerable cases of victimisation of its activists by employers in their efforts to fortify their absolute reigns within their small world. But challenging the very rule of the Standing Orders has not occured to many. The consequence is that organised associations of employers and professionals, holding themselves out as 'labour advisors,' have been maintaining black-lists of trade unionists for the purpose of terminating them on the ground of *discharge simplicitor.*

It is, therefore, necessary for trade unions to strike at the very source of this menace and demand deletion or amendment of the provisions in the Model Standing Orders and Certified Standing Orders as regards termination of employment being Item 9 of the Schedule to the Industrial Employment (Standing Orders) Act, 1946.

The Act lays down an elaborate procedure for the purpose of amending Certified Standing Orders but with the strict limitation that no amendment which provides for deletion or omission of any rule in the Model Standing Orders relating to any matter set out in its Schedule shall be submitted under this section. It is, therefore, necessary that the Model Standing Orders promulgated by the various Governments in excercise of powers conferred under the Act be challenged on the grounds *inter alia* that they provide the source for the 'Adhesion Contract' imposed by all employers on their employees who have no bargaining capacity. At the same time trade unions must take proceedings under the Act for such modification of Certified Standing Orders applicable to each industrial undertaing as will shear them of their absolute and arbitrary character.

One way would be to lay down expressly that the said power shall not be exercised except when there is grave and immediate threat to life, and that it shall never be exercised in the case of a workman protected under sub-section (3) of Section 33 of the Industrial Disputes Act, 1947, or any other legislation applicable to the employer. It will have to expressly provide that the circumstances leading to the apprehension of such danger will be stated in the order of termination of service and that the issue whether such apprehension was justified or not will be decided by an industrial adjudicator upon the demand for such adjudication being made by the workman concerned.

COMMENT

Central Inland Water Case

The Supreme Court had the occasion to examine the legality of a similar provision in Civil Appeals Nos. 4412 and 4413 of 1985 in the Central Inland Water Transport Corporation Ltd. Two Officers of the State undrtaking had obtained an order of the Calcutta High Court striking down its Discipline and Appeal Rule 9(1) which provided for such discharge without asigning reasons. The Supreme Court upheld the High Court's order pointing out several infirmities of the rule.

Article 14

It held that the rule conferred absolute and arbitrary powers upon the Corporation, not even stating who on behalf of the corporate body is to exercise that power. Reasserting the famous dictum of Lord Acton that, "Power tends to corrupt and absolute power corrupts absolutely," the Supreme Court rejected the plea of the employer that its Board of Directors consisted of responsible persons who would not act arbitrarily and capriciously. The Court noted that Rule 9(1) did not state in what circumstances the power was to be exercised and that there was no guidance anywhere in the impugned regulation for such exercise. The Court, therefore, held that the impugned rule placed untrammelled power in the hands of the authorities. Consequently, it held that it violates one of the two great rules of natural justice - the *audi alterum partem rule* - (opportunity of hearing) and thereby Article 14 of the Constitution of India. The Court held that the said rule was also discriminatory for it enabled the Corporation to discriminate between two employees in the same circumstances.

Unconscionable Contract

The Court then considered whether Rule 9(1) had the inviolability of a contract between the parties and held that is was opposed to public policy because it was "wholly unconscionable, for such a clause affecting a large section of the public is harmful and injurious to public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good". The Court said that,"it is not possible to equate employees with goods which can be bought and sold. It is equally not possible to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and weak employee."The Court added that, "the public policy which the Court is implementing is not some 19th Century economic theory about the benefit to the geneal public of freedom of trade, but the protection of those, whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable".

The Supreme Court went to great lengths in enuciating that the Courts will not enforce and will, when called upon to do so, strike down an unfair or unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power.

The Court observed that the appellant Corporation could afford to dispense with the services of an Officer. "It will find hundred of others to take his place but an Officer cannot afford to lose his job because if he does so there are not hundreds of job waiting for him". The impugned rule was sought to be justified on the ground of mutuality, meaning it conferred equal rights on parties and that an employee could similarly quit by giving a notice without assigning reasons. The Court observed: "It is true that there is mutuality in clause 9(1) - the same mutuality as in a contract between the lion and the lamb that both will roam about in the jungle and each will be at liberty to devour the other".

The case provides the basis for challenge to the provision of *discharge simplicitor* in the Standing Orders Act. It is time for the Trade Unions to act and extend the principle of *Central Inland Water Corporation Case* to the Standing Orders.

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

COMMENT

The Loyalist Judge

Loyalists are normally located in the corridors of Mantralaya. But there are exceptions. A loyalist may emerge from any branch of the executive or legislature or even from the judiciary. The recent long jump of Justice B.A. Masodkar from the judicial bench to a political seat casts a shadow on the integrity of our judges.

By a Special Correspondent

If the judicial system ultimately borders on the brink of collapse, it would be due at least as much to the quality of people on the benches as to the accumulation of litigation on the shelves.

Mr. Masodkar will perhaps be best remembered for his notoriously close association with Mr. A.R.Antulay when the latter was the Chief Minister of Maharashtra and the former was a sitting judge of the Bombay High Court. He was one of the trustees of the now famous IGPP (Indira Gandhi Pratibha Pratisthan), a prestigious money making venture. Following a High Court judgement, A.R. Antulay resigned but Mr. Masodkar stayed on. True, he quit his job as a trustee when the glare of publicity became unbearable, but he continued as a judge and saw nothing injudicious about his conduct.

A petition calling for the resignation of Justice Masodkar was filed in the Bombay High Court on the ground that by becoming a trustee he had breached his oath of office of loyalty to the Constitution. Although Justice S.C. Pratap rejected the petition, he made certain stinging observations (AIR 1982 Bom 125) : "The principles and high conventions and standards in public offices applies to all the wings of the State but with greater rigour to its judicial wing. If justice must not only be done but must also appear to be done, the effect of a controversial trusteeship on the office of judgeship cannot be altogether ignored. Lending one's official prestige and with it, *albeit, sub-silentio* the high authority and dignity of the High Court to a politically controversial trust cannot but cause great anxiety to all concerned". Lesser men, including politicians, have been known to resign office when adverse comment has been made by judges against their offical authority.

According to some reports Justice Masodkar was tipped for a Lok Sabha ticket in the last general elections. Unfortunately Mr. Antulay's own political career was in jeopardy at that time and possibly the time was not then ripe. So the Lok Sabha plans appear to have been abandoned. But all the while and all the same, Mr. Masodkar continued to be a judge of the High Court. Subsequent events make one wonder whether he continued to be a politician of the Congress (I) variety in judge's clothing.

In June, 1986, when the Courts reopened after the long summer vacation, Mr. Masodkar was on leave. The announcement of the ruling party's candidates for the Rajya Sabha was on the anvil. While still on leave he tendered his resignation, simultaneously announcing his nomination for the Rajya Sabha seat on a Congress (I) ticket. The announcement that followed in the press, which may or may not be true, gave the impression that all candidates who were selected were being rewarded for their unflinching and continued loyalty to the ruling party. An innocuous announcement by itself but of insidious intent when applied to a man who for many years graced the bench of the Bombay High Court as an impartial man meting out justice apparently devoid of any ulterior considerations and without fear of favour.

The announcement ought to have made all people concerned about the independence of the judiciary think about its long term implications. The failure of the majority of the bar to voice their resentment on this count is not only lamentable but intriguing.

While law and politics are inseparable components of a larger social reality, the question here is distinctly different, viz. the existence of organisational links with a particular political party while a person is still a sitting judge of the High Court. Even a political innocent would tend to believe that the nomination on a Congress (I) ticket was negotiated while the judge was still in office. How then could Mr. Masodkar have hoped to inspire confidence in the unsuspecting petitioner in his Court where the party in power, which he today represents, was the most powerful Respondent appearing in the garb of the State? Given a situation in which the distinction between Party and State has virtually broken down, there is a need to strengthen and not erode the separation of the executive from the judiciary. Critics of the present system of appointment of judges, however, seem to have it both ways. On the one hand, they demand a more democratic method of appointment of judges with participation from different interest groups including the Bar. They reject the concept that a judge should be screened before appointment. They describe this as a gross interference with the "independence of the judiciary", a fluid concept capable of taking any convenient meaning. On the other hand they keep strangely silent and in fact felicitate Mr. Masodkar on his resignation, who in their system of values, would undoubtedly have tampered with the structural separation between the executive and the judiciary. How does one explain this conduct except to say that they selectively bait their chosen target and felicitate others. Their credentials, more than Mr. Masodkar's, stand exposed.

One can only hope that in the not too distant future Mr. Masodkar's metamorphosis becomes the occasion for a debate on the interaction between the executive and the judiciary.

WARRANTS ATTENTION

Legalising Child Exploitation

Some time ago, a voluntary organisation called "The Concerned for Working Children" proposed a Bill to legalise child labour. The justifiction offered was that in the prevailing context of poverty, child labour must be tolerated as a "necessary evil". The proposal would have merited little or no attention, were it not for the fact that the Government of India took it seriously and it is shortly proposing to do just that - pass a law legalising child labour! Discussion on the proposed new law was confined to a handful of individuals. The Ministry of Labour has prepared what it calls "a position paper for comprehensive legalisation on child labour." It has neither been made public nor is it comprehensive in any sense of the term. In this article we critically examine the position paper.

Anand Grover

The Ministry of Labour, in a position paper for comprehensive legislation on child labour, estimates that the number of working children between the ages of 5 and 14 on 1st March, 1985 was 17.36 million. What is even more disturbing is evidence of an upward trend in child labour, from 6% of the total working population in 1971 to 7% in 1981. And how does the Ministry propose to tackle the problem? By the introduction of what it cals a "comprehensive" law on child labour. The proposed new law virtually legalises child labour.

Main features of the Bill.

To conform with the ILO standards, the Bill proposes to ban employment of children below the age of 15 in factories, mines and hazardous employments. In other sectors, the minimum age of entry in the employment market is proposed to be fixed at 12 years, Unfortunately, there is no definition of "hazardous employment". Instead, a Technical Committee will be set up which will decide whether or not a particular employment is hazardous.

The Bill proposes to permit and "regulate" child labour for another 10 years. Minimum wages, (well below minimum wage payable to the adult worker), satisfactory and hygienic conditions of work, prohibition of overtime and night work, weekly offs, are all part of the package deal. Thrown in for social commitment are "inputs" like non-formal education, vocational training, and periodical medical check ups. An army of Child Labour Inspectors will be brought into existence, to add to the already existing enforcement personnel under existing labour laws The costs of administration will be met by a cess proposed to be imposed on industries known to employ children.

Child labour in agriculture and the unorganised sector (which together account for 90% of the total child labour force) will neither be banned nor regulated, as such a step would not be "practical".

Some of us who have worked with organised and unorganised labour are all familiar with regulatory legislation including the Factories Act, Shops and Establishments Act and the Minimum Wages Act. To us it is common knowledge that in the case of such laws, the only guarantee of their implementation is neither the laws in question nor the army of inspectors set up to monitor their implementation, but the organised and protracted struggles waged by workers for their rights. Surely the drafters of the Bill do not visualise the sudden springing into existence of organisations of children into trade unions, and even if they did will this be a healthy development? Who will be the employer? The Ministry of Labour recognises that employment is offered to a child on repeated requests from the parent or guardian of the child invisible enemy become the parent?

Constitutional Position

Article 24 forbids the employment of any child below 14 years in any factory or mine or other hazardous jobs.

Article 23 prohibits traffic in human beings, begar and other similar forms of forced labour. These two Articles, appear under the heading **"Rights against Exploitation"**. These then, are the only constitutionally recognised forms of exploitation and the prohibition against these forms of exploitation are Constitutionally guaranteed furdamental rights. Not only against the State but also against all persons including individual employers. It was Article 23 that gave birth to the now famous ***Asiad*** case, in which case,

WARRANTS ATTENTION

"forced labour" was interpreted to mean any labour offered for wages below the minimum wages. The logic of the judgement is that no person would offer himself or herself for labour below the minimum wage unless forced by the compulsion of economic circumstances. If this is true for the adult worker, is it not doubly true for the child? Child labour, by definition, is forced labour.

Consider the disparity in minimum wages to be fixed for identical employment for the adult worker and the child worker, the latter being much lower. The very fact that a child offers himself for work at a wage much lower than that paid to an adult, makes his labour forced labour. Why after all will an employer employ a child in place of an adult if not to save on labour costs? The "necessary evil" argument disappears as the entry of the child worker into the labour market will depress the wage of the adult. The family income will certainly not go up but down.

While child labour exists and none of us are blind to its existence, the question before us is: Should such exploitation be legalised or should our plans, policies and laws be formulated in a manner so as to make it unnecessary for the child to labour?

The Employment of Children Act, 1938, a colonial piece of legislation, forbids child labour in certain stated employments. It was amended from time to time, the last of such amendments being made in 1983 by which the construction industry was added to the list of prohibited employment. (See *The Lawyers*, June 1986, p.7) Under the Act, a child who is not fifteen year old cannot be permitted to work in occupations connected with the transport of goods or passengers by rail, construction in railways, or in ports. The Act also forbids the employmet of any child below the age of 14 in any workshop where the process of bidi making, carpet weaving, cement manufacture, including bagging of cement, cloth printing dyeing and weaving, manufacture of matches, explosives and fireworks, mica cutting and splitting, shelac manufacture, soap manufacture, tanning, wool cleaning are undertaken. The law considers these processes hazardous.

In theory at least, the adult worker offers himself for employment voluntarily, though this is far from true. The compulsion is almost always economic. The terms of the contract of employment are regulated by welfare legislation. This regulation is necessary as the law recognises the employer-employee relationship as being inherently unequal. Regulation is necessary to correct this imbalance. If this inequality is inbuilt into the wage-labour relationship, it does not require much imagination to realise its horrenduous consequences on the child worker. It is for this reason that the very act of employment is recognised by the Constitution as an act of exploitation. Is it then Constitutionally permissible to "regulate" such exploitation? The question is absurd, calling for no answer.

Regulating exploitation

While nobody is blind to the actual existence of child labour, the question still remains whether such labour should be tolerated as "an unavoidable socio-economic evil" or whether child labour should be banned. The proposed new law while recognising that the root cause of child labour has been "wide spread poverty" is premised on the acceptance of child exploitation as an "unavoidable socio-economic evil".

There seems to be no end to the "necessary evils" the Indian mind is capable of accepting - that is ofcourse, when it comes to somebody else's children.

The pernicious aspect of the proposed Bill is not just that it legalises child labour but that it does so in occupations hitherto considered hazardous such as the carpet making and the match stick industry. The Statement of Objects and Reasons, drafted by those concerned for the children offers no explanation for this. If children must be employed at all - why must they be employed in hazardous occupations? Not even a theory of tolerating "necessary evils" can justify such legalisation for exploitation.

The proposed Bill in its main provisions is clearly unconstitutional. We have national and international commitments to honour towards the child. India is a party to the ILO and has signed the Minimum Age of Employment Convention which prohibits employment of children below the age of 14 in any industry. This then must be considered the measure of reasonableness. Directive Principles of State Policy, in particular Article 39(f), require the State to direct its policy towards ensuring that children are given opportunities to develop in a healthy maner in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. We also have Article 45 which requires that "the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of 14 years".

If the Constitutional promise made to the child is to be redeemed at all, what we need is a Bill to ban child labour and free and compulsory education for all children below the age of 14. Our performance on this score is deplorable.

The Policy Paper on Education points out:

> "Inspite of the specific provision in the Constituion to endeavour to provide free and compulsory education upto the age of 14 by 1960, and several explicit commitments with regard to the achievement of Universal Elementary Education, progress in this sector is far from the target. In fact, the target itself has been moving further and further to accommodate the failures arising from inadequacy of resources or sheer lack of viable strategy." Further, where schools exist, 40% have no pucca building, 39.72% have no black boards, 50.50% have no drinking water, 35% schools have a single school teacher to teach in 4 different classes.".(p.36)

Night schools and week-end schools proposed for child labour and that too after a full day's labour are no substitute for the Constitutional promise of life with dignity and conditions of freedom in which to grow.

Once a canteen boy always a canteen boy is the irreversible logic built into the provisions of the proposed Bill - or is it - Doon School for some, Doom School for others?

INTERNATIONAL

A Dis-appointment

The recent nomination of Associate Justice William Rehnquist to the post of Chief Justice of the US Supreme Court underscores the concerted attempt of President Reagan to shape the US federal judiciary into his conservative mould. ***Jessica Hagen*** *reports on this significant appointment.*

President Reagan has just nominated William Rehnquist, currently an Associate Justice of the Supreme Court, to be its new Chief Justice following the resignation of Warren Burger. His nomination reflects the conservative trend the Court has taken under the Reagan administration. Rehnquist was orginally appointed by President Nixon in 1970, and along with Burger led in the narrowing of many of the seminal cases of the previous Warren Court, such as those dealing with Civil Rights and procedural rights of the accused. Although his appointment is still subject to approval by the Senate, no serious objections should exist.

Rarely has an Associate Justice of the Supreme Court been subsequently appointed Chief Justice, but this is mainly because the President prefers to choose his own person. In this instance, however, Rehnquist is the Justice whose views are most closely in line with those of the Reagan administration.

Reasons Unclear

The reasons behind Burger's resignation remain unclear since he is neither the oldest member of the Court nor ill. Most probably he was motivated by a combination of political and personal factors. Since President Reagan's terms ends in 1988, Burger probably wanted to resign in time to allow Reagan to appoint a new Chief Justice rather than risk a possible Democratic victory in 1988. In addition, Burger is heading the Committee planning the celebration of the 200th annivasary of the Constitution and he claims that he now wants to devote his energies towards that.

The impact of Rehnquist's nomination is significant although it may not be immediately apparent. Since he has already been on the Court for many years, his assumption of the role of Chief Justice should not create any sudden shift in the trend of the Court. The Chief Justice, however, can wield significant power through his administrative role in controlling the Court's scheduling, the time limits for the debate of the cases, and particularly through his power to select which justice shall write the opinion when he votes with the majority. This last power can be used not only to influence the breadth or narrowness of a decision, but also as a subtle form of control over the other justices, rewarding them with the writing of a significant opinion or punishing them with a series of minor matters.

Brightest Conservative

Rehnquist is commonly considered the brightest of the conservative justices, and also the most consistent. Although Burger is also a conservative, he is not considered as ideologically rigid as Rehnquist, often voting with the more liberal members of the Court on such issues as abortion. As a result, Burger did not wield a strong philosophical influence over the Court. Rehnquist will probably try to reverse this trend. He strongly advocates limiting the power of the judiciary and generally opposes judicial interference in governmental decisions. He also supports States' rights, a narrow reading of the Constitution, and restrictions of the rights of the accused. In the most recent Supreme Court decision on the death penalty, he wrote for the majority in upholding the right of the prosecutor to eliminate jurors on the basis of their opposition to the death penalty despite evidence indicating that the resulting juries were more predisposed to convict the accused.

Impact

Rehnquist's age also figures significantly in his appointment. He, along with Justice O'Connor, a Reagan appointee, are the two youngest members of the Court. Rehnquist, therefore, will most likely serve as Chief Justice for a minimum of fifteen years

Burger's decision to resign may also encourage the resignation of other members of the Court, thereby further allowing Reagan to reshape it in his conservative mould. Although the two remaining liberal members of the Court, William Brennan and Thurgood Marshall, are unlikely to resign, both William Powell, a Nixon appointee and Byron White, a Kennedy appointee, are quite old and may choose to retire.

In addition to his impact on the Supreme Court, Reagan has already changed the face of the federal judiciary through both the number and outlook of his appointees. By the end of his term in 1988 he will have appointed over one half of the federal judges. In addition, more than any other president in history, he has tried to shape the judiciary along certain ideological lines, screening applicants according to their views on such issues as abortion and Affirmative Action, both of which he vehemently opposes.

With Rehnquist's promotion, and the possibility of further Reagan appointments to the Supreme Court, Reagan has a unique chance of being able to shape the federal judicial structure for the next several decades.

Jessica Hagen is student of law at the Columbia Law School, New York.

HAAZIR HAI

Jack Greenberg

While in the Indian Constitution protective discrimination or affirmative action is written into the Constitution under Articles 14, 15 and 16, in America, Civil Liberties Groups have spent most of the post-war period fighting for just that. Jack Greenberg, now the Vice-Dean of the Columbia Law School, New York, has spent most of his life in that movement. We talked to him when he was in Bombay recently.

Q. *Could you tell us about your involvment in the American Civil Liberties movement?*

A. I went to work for the National Association for the Advancement of Coloured People (NAACP) Legal Defense Fund in 1949 after I graduated from Columbia Law School. I worked there until 1961, when my boss Thurgood Marshall left to become a judge and ultimately a justice of the US Supreme Court. In 1961 I became a Director of the Legal Defense Fund. The Fund is the principal organization fighting in the courts for the rights of American Blacks and indirectly for other racial minorities. We handle cases involving employment, the rights of prisoners, capital punishment, and all kinds of issues in America that are either directly racial or have an important racial impact.

Q. *What are some of your notable cases?*

A. Well, the most notable one was also the case in which I played the least part of all. I was shortly out of law school when I went to work on *Brown V. Board of Education* which the Court decided in 1952. I was the youngest member of the legal team at that time. It was a case that ended up in abolishing racial segregation in education, and ultimately all State imposed or State influenced racial segregation in the US.

In 1970, I was involved in *Alexander V. Holmes County Bd. of Education* which essentially completed an issue kept open in the *Brown* case. Brown declared the *deliberate speed doctrine.* That is, if you didn't have to abolish racial segregration all at once, it had to be abolished with all deliberate speed, and nobody knew what that meant but they know it meant rather slowly. In 1970 I persuaded the Supreme Court to abandon that doctrine. From that point on segregation had to be ended forthwith.

I was in another case involving employment discrimination, *Griggs V. Duke Power Co.*, which dealt with tests and qualifications for jobs. Many tests and qualifications for jobs are those which blacks cannot meet because they haven't graduated from High School and can't get an adequate grade in the examination, and many of those qualifications in no way have any relation to the ability to do the job. The *Griggs* case dealt with an IQ test to be a coal handler. Well, blacks couldn't pass the IQ test but they certainly could handle coal. The Court declared that if a test or qualification has a disparate racial impact, if it affects blacks or other racial groups disadvantageously, then it can be continued only if it tests the *ability* to do the job.

Another thing of great importance the Legal Defense Fund did was to represent the Civil Rights demonstrators in the 1970's. We represented Martin Luther King and most of the people engaged in the sit-in demonstrations. We were highly successful in that. We won almost all of the cases. This enabled the demonstrators to persuade the country to adopt a very comprehensive Civil Rights Act in 1964.

Q. *How would you assess the role of the NAACP in the 1960 s and today?*

A. I should make clear that I worked for the NAACP Legal Defense Fund which is a law office that was set up by the NAACP 40 years ago but has since then been quite independent of it. I would say that, now that I'm out of it, it was the single most important legal force for racial change. Without it, I guess, over decades the same things would have happened anyway but they would not have happened at the same time and in the same way because you had dedicated lawyers who knew what they were doing and were energetic, highly motivated and well funded. We got a lot done. The organization continues to be extremely influential even today in a great variety of ways.

Q. *But faced with the fact that the Warren Court was different from the Burger Court which will again be different from the Rehnquist Court, has the thrust of the NAACP changed during the tenure of these different Chief Justices of the US Supreme Court?*

A. Yes, it has changed very much. I started working there before the Warren Court with the Vincent Court. Then we were working with a Court which, while not hostile, was dispassionate about some of the issues we were involved with. It was willing to listen to an argument but it didn't have a commitment as, one would say, the Warren Court had. In all the courts we've worked before, the most important thing has been to be a good lawyer - as good a lawyer as you can be. In the Burger Court we had many successes. I told you of the case I argued which overruled the "all deliberate speed" doctrine, which said now integration

had to take place immediately. That was before the Burger Court, not the Warren Court. It was a unanimous opinion so Burger agreed with it.

In recent years the work has been more difficult and in a way, defensive. Not so much because the Court has changed, because I don't think it has changed that much, but because the government, that is the administration, which used to be our friend or neutral has become hostile. After all, the US Department of Justice is the most powerful law office in the world. If it is opposed to you, you have the most fearsome opposition imaginable. So the cases have been against the Justice Department or people supported by it and that way the work has changed because it has been that much more difficult being under a lot of pressure on many fronts.

Q. *What has been the effect of the cutbacks in funding of neighbourhood law centres or public interest law centres?*

A. Cutbacks have occured in many different ways. Funding has come from private sources, from the government and from the general public. Government is virtually not funding these kinds of things at all anymore. There is an enormous struggle within Congress because at least some people in Congress want government to fund these organizations so that this battle goes on all the while. Reagan is very adamantly opposed to public interest law because when he was Governor of California he tried to do many of the sorts of things he is doing now as President and the public interest law firms defeated him at every turn. He has now learnt his lesson. He didn't quite know what was happening. But he came into office as President with a determination to fight them very vigorously and he has been doing just that.

We, for example, would get money from something called the combined federal campaign. That is, government workers could indicate that they want a dollar taken off their pay and given to a charity of their choice, and we would get as much as $300,000 a year from federal workers, mostly black, who wanted some small amount of money to come to us. Cumulatively it added up. The Reagan administration has made that impossible. It has refused to allow federal workers to do that and there has been a big litigation over it. So far we've been losing the litigation on the ground that the government has the right to regulate the administration of the funds that are paid to workers. In every way that they possibly can, they have been trying to, as they have used the term, de-fund the left.

Q. *What are the major issues that you would identify as facing the Supreme Court right now or likely to face the Supreme Court in the next couple of years?*

A. Affirmative Action, what you would call preferential treatment of various sorts, which is in your Constitution but which we have to struggle for. The Reagan administration is violently opposed to it, so that is going to be a big fight. School integration. They're trying to roll back the clock on that. Voting rights. I think they've lost the battle on that and they know it because Congress, under the leadership of Robert Dole, who is the Republican majority leader, turned against the Reagan administration on that one. I would figure they're not going to try that again. I think all sorts of issues in which poor people, minorities and deprived are seeking some access to the system through the courts are going to be important because this administration is not only opposed to that sort of thing generally but is even more opposed to having the courts involved in these issues.

Q. *Would you agree with what is said in* ***The Brethren*** *about the two liberal justices, Brennan and Marshall, that they have been completely isolated within the Supreme Court and this has taken the tendency of an increasing stridency in their minority judgements which have in desperation amounted to flights of rhetoric?*

A. I really don't know if that's true. They say they have been increasingly isolated. That's hard to credit because they have been in the majority in a great many decisions involving social issues - for example the most recent abortion decision a few weeks ago. It was a 5-4 majority. In many of the Affirmative Action decisions they have been with the 5-4 majority or in the 5-4 minority.

Q. *Would you disagree with authors of* ***The Brethren*** *who portrayed T. Marshall as a well-meaning but somewhat lazy judge who gets many of his opinions written by his law clerks.?*

A. What goes on within the Court is secret and I don't know which of his opinions are written by his clerks, or if any of his opinions are written by his clerks. I think it is common practice for many, if not most, judges to have at least some parts of their opinions drafted by their clerk and whether he does that more or less than others, I am just not equipped to say.

Q. *You have had fairly close connections with India and our Chief Justice has visited Columbia. How do you assess the functioning of the Indian Supreme Court?*

A. I don't know a lot about it but I gather first of all it is enormously overworked. It has an incredibly large case load. I must say one thing in the Indian Supreme Court that I wish our courts were doing was your notion of public interest litigation. That is, taking jurisdication when in American law, we would say there is no standing. And for a perfectly good reason, that is, people who are poor, ignorant and in no position to assert their rights really won't have any rights unless somebody fights on their behalf and the Indian Courts and groups like yours have undertaken to do that. I think that is a great innovation your courts have brought about.

Q. *How do you see the relationship between law and politics. For instance, can you actually change or reform society to a substantial extent through the legal process?*

A. Often you can. It depends on what the issue is. Certainly in America we proved that we did with regard to abolishing racial segregation. Black people, as badly off as they are right now, are vastly better off than they were before this effort began. But lawyers' work cannot exist in isolation and you can't really swim against the tide indefinitely. What you do in order to be effective has to be in synchronism or somehow supported by other types of social development. The *Brown* case, which is such an important case in America, would never have been decided in isolation. It was decided because of many social and political developments in the US as well.

With Best Wishes

from

Hoechst Employees Unions

The Workers Own Union

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ADAALAT ANTICS

Media Black Out

Times of India started a new edition at Lucknow. Since this was an obvious expansion of business, it required prior permission under the Monopolies and Restrictive Trade Practices Act. Bennet Coleman and Co., the owners of the Times of India, refused to get permission contending that compulsion to do so was an interference with freedom of speech and expression. The smaller newspapers argued that with the entry of Times of India on the scene they would be driven out of business. Such a development, they said, far from being conducive to free speech and expression, would prevent dissemination of news.

Justice Pendse, who heard the case, agreed with Bennet Coleman & Co. He said that the right to free speech and expression was really for the benefit of the readers. The right of freedom of information of the reader was the real issue, he felt.

The judgement was historic and the first of its kind. At the very least, it required to be reported. The Times of India chose not to report it. In fact nobody reported it. There was a media black out. Any report on the highly controversial and questionable judgement would have attracted unwanted publicity on the issue. Expansion, which was going on, may have been affected. The Government of India also took its own time to file an appeal. Thus the rights of the reader to freedom of information, in whose name the judgement was given, were unceremoniously buried.

What an irony that a judgement given in the name of f ree speech and expression was never reported. Time for Justice Pendse to distinguish between free speech and free business. The sooner he learns to do so the better for all concerned.

A Running Commentry

After reading judgement of Acting Chief Justice Kania and Justice Shah, Patil Nilangekar must have been left wondering whether he was coming or going.

Justice Pendse's clear and categorical verdict was that a reasonable inference could be drawn that Chandrakala's marks were tampered with at the behest of the CM. This verdict was converted by the Learned Judges into a "comment".

We know of the distinction between the **ratio** *of a case and of* **obiter dicta.** *We have heard of* **recommendatory** *and* **episitliary** *jurisdiction. We have also heard of Chief Justice P.N. Bhagwati's "hope and trust" jurisdiction. But we now have a new category of* **commentative** *jurisdiction. Now with one more former Chief Ministry to try, we can look forward to some running commentries from Justice Shah for the next few years.*

A Very Special Marriage

A friend gave notice of marriage under the Special Marriages Act at Bandra. The marriage was to be solemnised at Shivaji Park. Came the day of the marriage, the Registrar, Bandra refused to come on the ground that Shivaji Park was not within his jurisdiction. The Registrar, Old Customs House, also refused on the ground that my friend resided at Vile Parle. The result, he had to get married under the Hindu Marriages Act. A good disincentive for marriage under secular laws, despite all our talk to encourage the voluntary application of secular laws.

More about Justice Shah

And the first comment that Justice Shah had to offer on his appointment to try Antulay was that he had bought a flat in a building constructed by the Hiranandanis, one of the donors to the IGPP. All concerned agreed that this was a matter of no consequence and that they had full faith and confidence in the judge's impartiality. The bonafides of the judge having been comfortably settled in place, the stage is now well set for the trial, with the right mix of people.

Believe or not

Did you know how much the State of Maharashtra spends on legal advisors and counsel?

Here are the figures:

1984 - 1985 - Rs. 1.41 crores
1985 - 1986 - Rs.1.73 crores
1986 - 1987 - Rs. 1.72 crores (estimate)

Who says Government laywers are poorly paid? Depending on your own scale of fees, you may or may not think Government lawyers are poorly paid. But one thing however is generally agreed upon. That their performance, in Court at least, is poor.

For all the money that is being spent on legal advisors and counsel - whatever that may include, do, we the people, not have a right to expect better legal services from Government Pleaders and Public Prosecutors.

The oft-repeated excuse that the poor performance is due to poor rates of payment cannot stand the scrutiny of the figures. And if rates of payment are all that bad, why the rush for the posts? Are there any spin-off benefits involved? A matter worth investigating.

Generous Drop

Ajit Kerkar, who was instrumental in making donations worth a crore of rupees by the Tata concerns to the Antulay concerns must have been delighted by the show of Jethmalani's generosity when the latter announced that he did not want charges framed against him.

The Supreme Court had just decided that, ***"it is prima facie difficult to accept the explanation offered by Ajit Kerkar. We do not think we would be injustified on the material on record to take a prima facie view that those of Rs. 26 lacs were also connected with negotiations, which took place on 26 March 1981 between Ajit Kerkar on the one hand and Gavai and the respondent on the other".***

Jethmalani is beginning to sound like our own Finance Ministers who periodically grant to black marketeers and racketeers in return for we don't know what. Let us wait and see what Justice Shah, who says that this is "just another case" for him will do.

Devil's Advocate

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