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IF A CHRISTIAN WOMAN MARRIES A HINDU SOLELY IN A HINDU CEREMONY OF MARRIAGE IS SHE ENTITLED TO AN ORDER FOR MAINTENANCE UNDER SECTION 488 OF THE CRIMINAL PROCEDURE CODE.

By

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This short article is a criticism of *Kushiraman Nair* v. *Annakutty*[1], the decision of a single Judge, Mr. Justice K. Sadasivan. There can be no doubt but that his judgment met the needs of justice. The woman, whose right to maintenance had been challenged by a man who had kept her as his wife for several years and who had begotten a child on her, and who had recognised her as his wife and his child as legitimate, was certainly morally entitled to be maintained by him, and the learned Judge, in upholding the Magistrate's order, did what any right-thinking man would have wished him to do. But technically the decision was wrong. And the Indian law should be reconsidered, so that a better state of affairs may be arrived at. If, as I contend, Sadasivan, J.'s, decision was incorrect in law, but right in morals, the case of Annakutty convicts the Indian law of error. Let us look into the matter.

Marriages between Christians and Hindus take place quite often. And it is of no use for upper-class Hindus, whether in Madras City or in New Delhi, to say that "such people ought not to exist, it is better that we ignore them". There are castes, of which the best known is that of the Nadars, amongst whom marriages between Christians and Hindus are common. Admittedly, the majority provide no practical problem, because one of the spouses is converted—though even there an attempt is made sometimes to contend that the conversion was not complete or effective in law. When Christians are converted to Hinduism for this purpose, and the union is accepted by the caste, the matter is not worth scrutiny, and in practice the sincerity of the conversion, and its relation to public policy, is not entered into.[2]. The fact that Pakistan might, in similar circumstances, take a very different view[3] is neither here nor there, for Pakistan is not a secular State.

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1. (1967) K.L.T. 24 : (1967) M.L.J. (Cri.) 160.

2. A recent and typical case is *Seethalakshmi* v. *Ponnuswamy*, I.L.R. (1966) 2 Mad. 373 : (1967) 2 M.L.J. 334 : 80 M.L.W. 15.

3. *Mhd. Mustafizur Rahman* v. *Mrs. Rina Khana*, P.L.D. 1967 Dacca 652. Compare *Mira Devi* v. *Aman Kumari*, A.I.R. 1962 M.P. 212 (profession of a religion is a formality) It permits a Christian and a non-Christian to marry in the forms prescribed by the Act itself In 1892 the Legislature believed that marriage between a Christian and a non-Christian was utterly outside scope of the Act of 1872. This is made abundantly clear by the provisions of the Marriage Validation Act II of 1892, which actually penalises any person licensed under section 9 of the Act if he performs any such marriage (section 6); *i.e.*, such marriages must be performed under Parts I and III of the Act of 1872, or not under the Act.

We are concerned here with marriages between Christians and Hindus in which neither spouse was converted prior to the marriage, and each retained his or her religious affiliation. I think most readers would agree that India being a secular State it is high time that if there is (asthere certainly is) a problem here there ought not to be one. As matters stand we have the personal law system, so that the Christian wife of a Hindu will have no rights against the Hindu at Hindu Law unless the Hindu Law itself recognises the marriage as valid. Alongside this particular situation there is the Indian Christian Marriage Act, 1872, which permits non-Christians to marry Christians; and there is the Special Marriage Act, 1954, which permits Indians of any religion or none to intermarry. The argument often heard is that since we have these two statutes there should be no problem, since the spouses can get their marriages registered under either of them, and if they are not intelligent enough to do this, they deserve no consideration. But what of their issue? Should they have been more intelligent in choosing their parents ? I am afraid the difficulties of the couple who actually marry under Hindu rites, one of them being at the time a Christian, must be investigated in their own interests and in the interests of their children.

I pointed out in my *Religion, Law and the State in India*[4], that the Hindu Marriage Act, 1955, left it completely uncertain whether Hindus who married Christians under Hindu rites and ceremonies would be governed in matrimonial matters and otherwise by the Hindu Law. I had made the same objection in my earlier book, *Hindu Law, Past and Present*, but the only reaction was that a reviewer duly noted the fact[5]. In my *Introduction to Modern Hindu Law* 1963[6], I dealt with the topic very briefly, but a reviewer somewhat nastily declared that I was completely wrong.[7] I fear he himself did not know the Hindu Law on the subject.

The position is that the Hindu Marriage Act provides for marriages between any two Hindus ; and since it does not contemplate marriages between Hindus and Christians the ' overriding ' section applies. The previous law is only abolished so far as the Act of 1955 makes provision, and the previous law remains in force so far as it is not inconsistent with the Act's provisions (section 4). From this it is evident that if a marriage between a Hindu and a Christian under Hindu rites was valid at Hindu Law before 1955, it remains so still. But the matrimonial regime will not necessarily be that laid down in the Hindu Marriage Act, except in so far as Justice, Equity and Good Conscience so provide, until (that is to say) the non-Hindu spouse is converted to Hinduism, whereupon (I apprehend) the matrimonial reliefs set out in the Hindu Marriage Act would be available to them. But the reader will object : what is the use of this supposition, since the Indian Christian Marriage Act in the clearest terms provides that a marriage between a Christian and a Hindu not registered in accordance with that Act is *void?* This requires careful scrutiny.

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4. London (Faber), 1968, page 342.
5. S. Varadachariar at *The Hindu*, Sunday, 23 February, 1958.
6. At para. 262.
7. S S. Nigam at *Law Quarterly Review*, April, 1965, page 315. I had never heard of Mr. S. S. Nigam until I read his detailed and curiously-pitched review of my book, and I have never heard of him since apart from two articles on the development of Hindu Law.

I think we should commence with the Indian Christian Marriage Act. The position revealed is exceedingly unsatisfactory. Section 4 of that Act provides that "every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void." If this were to be taken literally the position would be as described by Napier, J., in his order of reference to the Full Bench in In re, *Kolandaivelu*[8]:

> "If this section is not to be so read (*i.e.*, as not referring to marriages purporting to be solemnized in accordance with usage amongst Christians) it would follow that the Legislature in 1872 has declared void all marriages according to caste custom between a Hindu and a Christian, with the necessary result that the children are illegitimate and cannot acquire rights of property. I very much doubt whether the Legislature intended to interfere in this manner with Hindus among whom marriages are regulated by caste custom."

Sadasiva Ayyar, J., in the same order of reference[9] said:

> "If the word 'solemnize' as used in the Act merely means 'celebration' (including celebration with Hindu or Mussalman rites), the Act cannot be said not to violate the principle of religious neutrality followed almost without exception by the Indian Legislature; a violation which visits followers of religions other than the Christian with very severe criminal penalties for doing acts not prohibited by those other faiths. A construction which credits the Legislature with such violation should, if possible, be avoided. A Sunni Mussalman male and a male of one of several of the Shiah sects can validly marry according to his law in the permanent form and with Muhammadan rites a 'Kitabia'.....If section 68 of the Christian Marriage Act be interpreted as widely as has been done in *Queen Empress* v. *Yohan*[10] and *Queen Empress* v. *Paul*[11], a Khazi who performs a marriage between a Mussalman male and a Christian female according to Mussalman rites is liable to the punishment of transportation for ten years. Whereas a Christian minister or Marriage Registrar who performs a marriage with Christian rites or the declaration ceremonies mentioned in section 51 between a Mussalman male and a Christian female is not subjected to any such penalty and performs a perfectly lawful and pvid act. It may be said that when section 4 declares that a marriage 'solemnized' otherwise than in accordance with section 5 between two persons though one of them alone is a Christian is void, the Legislature does interfere with the Mussalman religion and the additional imposition of criminal penalties of a severe nature on such solemnization by the latter section 68 does not, in principle, carry the interference further."

In spite of these sensible remarks the decision of the Full Bench was that when a Hindu purohit solemnizes a marriage between a Hindu and a Christian (he of necessity could not be appointed a Marriage Registrar, not being a Christian) he is guilty of an offence under section 68 of the Indian Christian Marriage Act, 1872.

8. (1917) I L.R 40 Mad. 1030 at p. 1032-33 : 33 M.L J. 113 at 115.

9. *Ibid* at p. 1035.

10. (1892) I L R. 17 Mad. 391.

11. (1896) I.L.R. 20 Mad. 12. In fairness one should point also to the obiter remarks of Shephard, J., at *Queen Empress* v. *Fischer*, (1891) I.L.R 14 Mad 342, 361 : 1 M L J 458 and the opinion of the Legislative Council, expressed in the Bangalore Marriages Validating Act (XVI of 1936) (preamble).

The judgment of the Court included the words, 'Under that Act all marriages of Christians must be performed, *on pain of nullity*, in one of prescribed forms". The reasoning was that the whole history of the legislation, in England and then in India, was to prevent clandestine marriages. The reasoning is hardly sufficient to support that conclusion, which, though at first glance entirely supported by a literal interpretation of section 4, is *obiter* and was not required for the decision of the question, which was that of the purohit's guilt. To be weighed along with the Madras we have the Allahabad and Bombay views. They too do not deal with our question directly, and provide only sidelights upon it. But both in *Emperor* v. *Maha Ram*[12] and in *Saldanha* v. *Saldanha*[13], the learned Judges agreed with observations in Madras that the validity of marriages was not the chief concern of the Act of 1872, and opined further that the Act was not intended to operate to the prejudice of personal laws except as to matters of form. In the Allahabad case, the circumstances in which were not utterly dissimilar with those of the South Indian situations with which I am concerned now, the Judges expressed great doubts whether the Legislature could have intended to prohibit, or render void, marriages performed in a non-Christian form and valid by customary law. These are only opinions, though entitled to great weight, because common sense is behind them. In *Sm. Swapna Mukherjee* v. *Basanta Ranjan Mukherjee*[14], which was a bigamy prosecution, the husband was acquitted because the Court assumed that his alleged conversion to Hinduism was not valid and that therefore his marriage to a Hindu woman by Hindu rites was not a valid marriage, wherefrom he could not be guilty of bigamy. So strict an interpretation suited a criminal case of that description. But where their Lordships go on to say, without citation of authority, that a Christian cannot marry a Hindu under Hindu rites and ceremonies they take as established something which the law has not yet determined, and though not *obiter* this expression of opinion could conceivably be *per incuriam*. To make matters worse we shall see that when it comes to proof of celebration of marriage for the purposes of applying section 488 of the Criminal Procedure Code, the Courts have not insisted upon actual proof: thus it does not follow that the marriage is "void" if one cannot show that it has been performed with all due regard for the "prescribed forms" laid down in the Act. However, I must emphasise that the law had not (until our instant Kerala decision) gone so far as to dispense with proof of ceremonies conforming to the Act when there was proof that ceremonies inconsistent with the Act were actually performed: that is quite another matter.

Thus, taking into account the Madras Full Bench decision, and the equally *obiter* opinions in Allahabad and Bombay, and the unsupported judicial opinion in Calcutta in more recent times, the legal position in Malabar as left in In re, *Kolandaivelu*[15], in 1917 is this:—

(1) Irrespective of the validity of any marriage solemnized under the provisions of the Act of 1872; and

(2) irrespective of the validity of any marriage solemnized under non-Christian rites between two parties one of whom only is a Christian (an issue which was not thrashed out thoroughly in the Full Bench judgment);

12. (1918) I.L.R. 40 All. 393.
13. (1929) I.L.R. 54 Bom. 288.
14. A.I.R. 1955 Cal. 533.
15. (1917) I.L.R. 40 Mad. 1030 : 33 M.L.J. 113.

(3) it is a penal offence to celebrate a marriage ceremony purporting to marry a Christian and a non-Christian otherwise than in strict accordance with the Act (the severity of the penalty depending upon the gravity of the offence) ;

(4) but it remains not finally decided whether a customary marriage between a Hindu and a Christian under Hindu rites is valid as a marriage, the general inference left after reading In re *Kolandaivelu*[15-a] being that it is not. In an area of India governed by Madras authorities that inference *prima facie* rules until a decision to another effect is obtained from the High Court.

What does Hindu Law say upon all this? In *Mrs. Chandramani Dubey* v. *Ram Shankar Dubey*[16], the matter was gone into thoroughly and it was held that Hindu Law raised no objection to a marriage between a Hindu and a non-Hindu under Hindu rites. This need not be doubted. The *dharmasastra* rules do not contemplate a marriage between a Hindu and a non-Hindu of a sacramental, *samskara* type ; but it is clear that the *dharmasastra* never exhausted the whole Hindu Law of marriage, as even an elementary knowledge of legal history would confirm. In *Rajammal* v. *Mariyammal*[17], it was held, following the *Dubey case*[16], that there is no rule of Hindu Law which forbids the subsistance of a marriage one of the parties to which is a non-Hindu. The learned Judge pointed to the ideals of the secular State and, rightly, held that the marriage was vaild. In the *Dubey case*[16] the couple did marry under the Act of 1872, and the problem had been about the rights of inheritance of the issue.

At this point the reader may ask, why was the Indian Christian Marriage Act section 4, not referred to in the case of *Rajammal*[17]? The answer is simple. That Act was not introduced into Mysore State until 1st April, 1951, under the provisions of section 3 of the Part B States (Laws) Act, III of 1951. The marriage between the Hindu male and the Christian female, valid at Hindu Law, took place before that date.

Thus we are in this position, that marriages in parts of India where the Indian Christian Marriage Act was not in force (and is still not in force) at the relevant time the ceremonies we are discussing were not criminal offences and the marriages were (and are) valid if in accordance with caste usage and custom. But as soon as the Act was introduced (for in the greater part of India it has been introduced) the discrimination the learned Judges in Madras complained of actually came into effect. Yet, the fact that celebration of such a marriage will be a crime does not determine whether the marriage is really " void ". Such an anomalous situation is well known to all India. Several marriages (*e.g.*, child marriages) which it is a crime to procure or celebrate are unquestionably valid!

While I prefer the Allahabad view and deplore the decision in In re *Kolandaivelu*[15-a] as did the learned Editor of ihe Madras Weekly Notes at the time (1917 M.W.N. 184-185), I am bound to take note of it, and so are the judiciary in the Malabar area of Kerala. Perhaps one day the Supreme Court will iron out this tangle. May be the contemplated Code of Family Law will arrive sooner. Meanwhile we cannot expect the High Court of Kerala to proceed as if there were no problem when the case is between persons domiciled in the Malabar area, who were subject to the Act since 1872.

15-a (1917) I.L.R. 40 Mad. 1030: 33 M.L.J. 113.
16. A.I.R. 1951 All. 529 : (1950) All.L.J. 932.
17. A.I.R. 1954 Mys. 38.

Now in *Kunhiraman Nair* v. *Annakutty*[18], the wife applied under section 488 of the Criminal Procedure Code, and the husband denied the validity of the marriage. As we have seen, there were abundant materials which supported his previous belief that he was validly married to her. In June, 1960 the couple were married simply and solely with rites such as are recognizable as rites appropriate to the marriages of Nairs. The husband urged that the ceremony was void under the Indian Christian Marriage Act. He was entitled to do so, relying purely and simply (though dishonestly) upon the wording of section 4. He did this because he and his wife belonged to Malabar, were married at Calicut and had their matrimonial domicile in Malabar. The order petitioned against was that of the Munsiff-Magistrate of Manantoddy. Had the spouses belonged to the Cochin area or the Travancore area it would have been another story, since the Indian Christian Marriage Act was never introduced there[19]. The learned Judge said,[20]

> " We are not very much concerned in this case as to whether the marriage between the respondent and the revision-petitioner was solemnized under the provisions of the Indian Christain Marriage Act. For the purpose of section 488, Criminal Procedure Code, it is enough if the respondent satisfies the Court that she has been treated by the revision petitioner as his wife."

And the learned Judge refers to an Orissa case which does not entirely bear him out (it was between two Christians !), and to which we shall turn presently.

If this were to be correct (it is not) we should have in modern Indian law two standards by which to assessee matrimonial status. We have the validity of marriage as established by the personal, law of the spouses, or the personal laws of the two spouses where these differ (a matter of some doubt in this instance) ; and we have an *ad hoc* validity for the purpose of the Criminal Procedure Code. This cannot be right. The Criminal Procedure Code, cannot authorise the Magistrate to treat as married two spouses who do not have the capacity to marry ; where the marriage could not have taken place ; where any actual marriage *de facto* cannot have been valid *de jure;* or where it has actually been declared null and void! This last point, which is obvious had to be established in *Govindaswami Mudaliar* v. *Muthulakshmi Ammal*[21]: " Where there is a finding as to the status of the parties that there was no relationship of husband and wife between them, by a civil Court, it would obviously bar a criminal Court from entertaining a petition under section 488 of of the Code."

The law on these points, it is submitted, is as follows. The burden of proof of the subsistence of a valid marriage lies upon the applicant wife : *Manickam* v. *Poongavanammal*[22]; older uncontradicted authorities to the same effect : *Pwa Me* v. *San Hla*[23], *Wafoon* v. *Ma Then Tin*[24]. A definite finding that the applicant

18. (1967) K.L.T. 24 : (1967) M.L.J. (Crl.) 160.

19. The section reads "It extend to the whole of India (except the territories which, immediately before the 1st November, 1956 were comprised in the states of Travancore-Cochin, Manipur and Jammu and Kashmir). *See* Civil Court Manual (M.L.J.) Vol. 1 (1959), page 636. Manipur in fact has received the Act as a result of the Part C States (Laws) Act, XXX of 1950: The Miscellaneous Personal Laws (Extension) Act, XLVIII of 1959, did not extend the Indian Christian Marriage Act, 1872, to any territories.

20. (1967) K.L.T. 24, 25 : (1967) M.L.J. (Crl.) 160.

21. (1966) 1 M.L.J. 208 : (1966) M.L.J. (Crl.) 179.

22. A.I.R. 1934 Mad. 323 : 66 M.L.J. 543.

23. A.I.R. 1914 Low. Bur. 266.

24. A.I.R. 1914 Upp. Bur. 30.

is the husband's wife must be recorded if the validity of the relationship is challenged. Only legally married wives are entitled to maintenance, and the High Court will interfere if the Magistrate awards maintenance without justifying his action by a finding as to the relationship : *A. T. Lakshmi Ambalam* v. *Andiammal*[25]. In many such cases the man contends that the woman is only a concubine and that no valid ceremony ever took place. Such questions must be decided by the Magistrate in his own Court : *Mt. Mangli* v. *Ganda Singh*[1], *Mt. Ganga Devi* v. *Ram Sarup*[2], approved in *Mathura Bai* v. *Mt. Marachoo Kuer*[3]. If the question is whether the couple lived as man and wife or as a man with his concubine, and if no evidence as to the marriage is forthcoming, the Magistrate is not compelled, as a civil Court is in restitution cases, to demand strict proof of the marriage ceremony. The presumption raised by several years of open and continuous cohabitation, accepted by the community as a marriage, and confirmed by the birth of issue taken generally as legitimate, will suffice and the Magistrate may proceed upon that basis alone : *K.J.B. David* v. *Nilamoni Devi*[4], (a marriage between Christians in Orissa, purporting to have taken place in conformity with the Indian Christian Marriage Act may be proved from cohabitation and repute, for strict proof of the ceremony, *e.g.*, the qualifications of the minister, may be impossible and unreasonable) ; *Satish Chandra Sen Gupta* v. *Charu Bala*[5] ; *Bogis Mangati* v. *Applama*[6] ; *Parvathy Ammal* v. *Gopala Gounder*[7] (saptapadi omitted) ; *Veeraraghava Gramani* v. *Bommiammal* (presumption held)[8]; *Gopal* v. *Gopal* (presumption rebutted)[9].

Where the marriage is challenged by the husband upon a ground which is plainly intelligible to the Magistrate, or the High Court acting in revision of his order, there is no objection to the validity's being tried by him or by the High Court : *Manickam* v. *Poongavanammal*[10] (marriage between sub-castes valid at Hindu Law though unknown to custom)[11]. Where the marriage was irregular but not invalid, the order under section 488 must be made, even though the personal law shows that such marriages ought not to take place, and the Magistrate may take judicial notice of the difference between irregularity and nullity : *Maung Pathan* v. *Ma San*[12] ; *Conally* v. *Conally*[13].

Where, on the other hand, the husband contends that, though he lived with the applicant as his wife, they could not have been validly married because of some abstruse point of personal law, upon which rulings are not readily to hand (they were as in our instant case), the Magistrate may award maintenance, and his order may be terminated or vacated if and when the husband succeeds in a declaratory suit or a

25. A.I.R. 1938 Mad. 66 : (1937) 2 M.L.J. 885.
1. A.I.R. 1932 Lah. 301.
2. A.I.R. 1939 Lah. 24.
3. A.I.R. 1946 Pat. 176.
4. A.I.R. 1953 Orissa 10.
5. A.I.R. 1962 Tri. 61.
6. A.I.R. 1932 Cal. 866 : I.L.R. 59 Cal. 1257.
7. (1956) 2 M.L.J. 468.
8. A.I.R. 1955 Mad. 3194 (N.U.C.)
9. A.I.R. 1955 (Punj.) 1039 N.U.C.
10. 66 M.L.J. 543 : A.I.R. 1934 Mad. 323.
11. A.I.R. 1934 Mad 323 : 66 M.L.J. 543.
12. A.I.R. 1939 Rang. 207.
13. A I R. 1931 Pat. 213 : 133 I.C. 175. Where, however, the personal law or laws utterly forbid the marriage, as in *Claudia Jude* v. *Lancelot Jude*, I.L.R. (1945) 2 Cal. 462, marriage under the Act of 1872 is void, notwithstanding compliance with its forms.

petition for nullity in the civil Court : *E.S. Nath Das* v. *S. Dassi*[13-a] ; *Satish Chandra Sen Gupta* v. *Charu Bala*[14].

Now in many cases the personal law includes the right of divorce otherwise than by decree. It is notorious that a husband's divorce of his wife under Muhammadan Law operates to put an end to her rights under section 488, and he can exercise his right to divorce her even in his answer to her application. The Magistrate has no jurisdiction to ignore this divorce. Similarly, many castes have customary divorces, and the husbands claim that the wife has already been divorced. In one very strong case the High Court held that the Magistrate should have awarded maintenance under section 488 though at one time the wife was living with the husband's brother as if she were his wife and so had raised the presumption that she had been divorced. But it was not proved on the husband's behalf that he divorced her under Hindu customary law, nor that any panchayat had met to dissolve the marriage or to recognise its dissolution by him : *Babu Nandan* v. *Mt. Punia*[15].

In conclusion I am under the impression that in *Kunhiraman Nair's case*[16], the learned Judge should have taken notice of the invalidity of the marriage (since, whatever we think section 4 of the Indian Christian Marriage Act ought to mean, an authoritative opinion of the Madras High Court was available to him), and should have set aside the Magistrate's award—even though that would have been hard on the hapless reputed wife. If he believed that the law of Travancore-Cochin applied, he should have taken issue as to domicile, and the question would have been argued and recorded. It evidently did not apply, and the Act of 1872 went to the root (or must have appeared to go to the root) of the marriage. True, strict proof of marriage is not always required, but where the marriage is denied upon the ground that no prescribed ceremony took place, but rather that a non-prescribed ceremony took place, and this is not contested by the wife, the whole question of " marriage by repute " falls to the ground. It is well known that solemn taking of women as concubines is an institution of Hindu usage, with which the Anglo-Hindu Law has failed to cope adequately. On the whole section 488 of the Criminal Procedure Code, has enabled many second-class marriages to count as marriages for the summary protection of discarded women : and that is probably consistent with public policy. The best way, one would think, of teaching men not to take women in forms ostensibly matrimonial but actually and intentionally as initiatory of concubinage is to nail them under section 488. But this argument is not enough to rescue the decision of Sadasivan, J., from technical inaccuracy.

Had the learned Judge been properly served by Counsel he would, I surmise, have submitted the question to a Full Bench in the Kerala High Court. Had this been done the discrepancy between Malabar law and Travancore-Cochin law would have been ventilated, and some Kerala legislation would have resulted. The Kerala Legislature has tidied up so many corners of the confused personal laws of Kerala that this surmise seems quite reasonable.

Meanwhile let us devoutly hope that section 488 will not be allowed to create a new matrimonial status, called by a special name so that we have " Hindu marriages, Muslim, Jewish, Christian, Parsi, and Special marriages, and a final category ' Section 488, Criminal Procedure Code, marriages.'" That would really be intolerable.

13-*a*. (1937) 41 Cal.W.N. 898.
14. A.I.R. 1962 Trip. 61.
15. A.I.R. 1926 All. 426.
16. (1967) K.L.T. 24 : (1967) M.L.J. (Crl.) 160.

APPEALS IN RENT CONTROL CASES.

By

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IF the Madras Rent Control Act had originated from a benign feeling to ameliorate the tenants from the exploitation of landlords, as building accommodation became more and more scares in course of time, one would have thought that the working of the provisions in the Act would be compatible with equity, and parity with other enactments. That, it is not absolutely so, is best illustrated by the time limit prescribed for preferring appeals. That is to say, that whereas in almost under all other Acts of civil nature the time allowed for filing of appeals against the judgment in the original Courts is 30 days, in Rent Control cases it is only 15 days. It some times happens that if an aggrieved party—generally a tenant—as in the majority of cases it is only a proceeding for eviction by the landlord—by sheer inadvertence or lassitude believes that as in other civil cases the time for appeal available would be 30 days, he would have to rue for his ignorance, in howsoever good faith it might be. It seems to be a little bit strange, why when one wants to do real good to the tenants, as a class, by the Act, the effect of it is sought to be crippled by the cutting down of the time for appeal to only 15 days as against 30 days in other cases.

A valuable right of appeal ought not to be curtailed or stifled by restriction of time in rent control cases alone, more so as at the present juncture when the condition of tenant vis-a-vis landlord instead of becoming better has only worsened. The enlargement of appeal time to 30 days will serve the landlords also equally as well if they prefer. I hope the authorities concerned would rectify the defect.

THE LEGAL STATUS OF OUTER SPACE.

By

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THE impact of scientific and technological developments has considerably changed the thinking of the people of almost every nation. Some years ago, it was beyond the imagination of human mind that a day would come when men from earth might visit other planets. The credit goes to the Space scientists who have been constantly engaged in projects towards direct planetary activities. The nature of the recent developments and projects indicates shift towards such activities. The aim is to explore the Moon, Mars and Venus[1-2].

It is remarkable that expectation to land man on the Moon by the end of 1969 has been realised.

The Apollo-11 mission had a fitting climax on 24th July, 1969 when the men who left their mark on the Moon returned to the Earth in full view of a global television audience.

The fascinating arena of Outer Space has given birth to many problems in the relations of nations on the earth. The launching of earth satellites and space rockets has had its indirect effect on International Law. A new problem has come to existence, that is the Law as to interplanetary space.[3-4] According to Dr. C. W. Jenks[5] to determine the legal status of Outer Space is one of the immediate problems.

The present article is an attempt to study the problem to determine the legal status of Outer Space in its different aspects. The main questions in this regard are: what is the definition of Outer Space ? What is the legal status of Outer Space? Whether Outer Space, Moon and other planets are in the category of '*Res Nullius*' or '*Res Communis Omnium*', Whether there is a legal vacuum in regard to Outer Space, if not, what law is to apply to such field ?

The precise definition of Outer Space depends on the precise definition of Air Space on which a subjacent state extends its sovereignty. As an exact definition of 'Air Space' is not formulated and as yet the exact boundary between Air Space and Outer Space has not been determined by the States, difficulty to define Outer Space is a perplexing question to be solved.

But efforts are being made in this sphere. The Committee on the Peaceful Uses of Outer Space unanimously adopted to report to the General Assembly during its eleventh session held between 15-18th October, 1968. Regarding the future work of the Legal Sub-Committee, the Committee expressed the hope that

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1-2. *In re* Csabafi and Savita Rani, 'The Law of Celestial Bodies', 6. I.J.I.L. (1966), page 195.

3-4. G. Osnitskaya, 'Legal Aspects of the Conquest of Space'—Review of Contemporary Law, December, 1960, page 51.

5. 'Common Law of Mankind', page 388-401.

the Sub-Committee would be able to make more progress, and recommended that it should meet early in 1969 to complete its work on the completion of a convention on the liability for damage caused from launching objects into Outer Space and other subjects including questions relating to the definition of Outer Space and the utilization of Outer Space and Celestial Bodies.[6]

Although the Outer Space is a new-comer to legal terminology, nevertheless, it has drawn the attention of International Lawyers to the need to frame rules to regulate activities of States in Outer Space. So far as the definition of Outer Space is concerned, there is an urgent need but whatever definition may be set up it should be an agreed one. It may be submitted that Outer Space begins from the altitude where it is possible to place a satellite into orbit.

The question has been raised about the legal status of Outer Space and various theories have been proposed. Some argued that Outer Space, the Moon and other planets are in the category of '*Res Nullius*' which would permit appropriation by States through methods which might be those based on traditions established on earth or by new arrangements more suitable to space. Some have argued that appropriation of Space between heavenly bodies is impossible or at least improper. Some others urged that space and planets are in effect for perpetual use of all. Another group advocates that space and the heavenly bodies are not subject to appropriation or control by individual States. Yet another argument is that '*Res Communis Omnium*' or '*Res Extra Commercium*' must be subject to international control to prevent the misuse of the areas in question and danger and damage to other persons or nations.

As International Law regulates the conduct of States towards each other, it will continue to do so wherever intercourse between states occurs, whether on land, on the high seas, in the Air Space, or in Outer Space. The above principle was explicitly recognised by recent unanimous resolutions of the General Assembly stating that principles of the Charter of the United Nations and International Law will apply in Outer Space. The Resolution 1721 (XVI) commends to the States for their guidance in the exploration and uses of Outer Space, the following principles:[7]

(*a*) International Law including the Charter of United Nations applies to Outer Space and Celestial Bodies.

(*b*) The Outer Space and Celestial Bodies are free for exploration and use by all States in confirmity with International Law and are not subject to national appropriation.

Another important resolution has been adopted by the General Assembly known as 'the Declaration of Legal Principles' consisting of nine important paragraphs. It was adopted on 13th December, 1963. The principles enunciated in Resolution 1721 (XVI) have been re-affirmed with slight language modifications. In these principles, there are also provisions with respect to the liability of States for damage caused by their space vehicles.[8]

6. U. N. Monthly Chronicle, November 1968, pp. 27-28.

7. General Assembly Resolution 1721 (XVI), 20th December, 1961, Year Book of United Nations, 1961, pages 35-36.

8. U. N. Doc. A/Reso/1962 (XVIII), 13th December 1963. Year Book of United Nations, 1963, page 101.

The fact that the States do not claim sovereignty over Outer Space does not give rise to the existence of a legal vacuum, in the sense that there exists a gap in law concerning that area over which States do not claim sovereignty, as several representatives felt that there were as yet no legal norms in existence governing occurrences in Outer Space and that Outer Space was a judicial vacuum. This appears from the statements made by the representatives of Austria, Chile, Italy and Yugoslavia[9].

No doubt the situation is so novel and unprecedented that it would be fruitless to attempt to translate the whole *corpus* of International Law and to apply it mechanically to Outer Space, without any distillation or process of refinement. The applicable law may be difficult to formulate in precise detail, but it cannot be argued that law has no relevance at all in this context. The Netherlander Schurmann argued that the general principles of law recognised by civilized nations must be applicable even now to relations of nations in Space.[10]

All universally accepted rules of International Law, that is, inadmissibility of the use of force in solving international disputes, non-injury of foreign citizens and their property, Governmental responsibility for the activities of their representatives, etc., apply to the Cosmos as well. The presence or abence of separate specialized legal systems corresponding, for example, to International Maritime Control, cannot abolish the generally recognized principles of law prevailing in our time wherever peoples are active on land or sea or space.[11]

Mr. Zhukov also pointed out that undoubtedly it is on the basis of generally recognised principles of International Law and above all the principle of peaceful co-existence of States with different social and economic systems, that the new branch of law, the Space Law will be formed.[12]

According to Mr. Becker, the U. N. Charter provisions, specially for example, Articles 1 (4), 2 (4) and Article 51, etc., may be extended to Outer Space. In the same way the Statute of the I. C. J., juridical equality of access to the resources of Outer Space, respect for territorial sovereignty and integrity and the right of self-defence may be applied to Outer Space.[13]

On the same footing Osnitskaya pointed out that in the event of improper use of Cosmic Space, any State has a right to take the measures permitted by modern International Law, including in the event of armed attack through space, measures of individual or collective self-defence as provided for in Article 51 of the United Nations Charter.[14]

The freedom of Outer Space inevitably invites comparision with freedom of high seas by analogy to the principle of freedom of the open seas, which beyond the limit of territorial waters and special martitime zone do not belong to any one and are

9. U. N. Doc. A/C1/S. R. 982, pages 8-10, 989, page 5, 990 page 5.

10-U. N. Doc. A/C1/S. R. 987, page 2.

11. Korovin, ' International Status of Cosmic Space", Reprinted in ' Symposium' page 1070. (A Symposium was arranged for the use of Committee on Astronautical and Space Science (U. S. Senate) by Legislative Reference Service, March, 1961, hereinafter cited as ' Symposium ':

12. ' Conquest of Outer Space and some Legal Problems of International Relations International Affairs (Moscow, 1059) pages 18-19.

13. ' Major Aspects of the Problems of Outer Space,' Reprinted in 'Symposium' page 400.

14. ' International Law Problems of the Conquest of the Space '; Repr inted in ' Symposium, ' age 1072.

in general use by all nations; the upper atmosphere—can likewise be considered a zone of open air in general use by all nations.[15] This type of anology has been emphasised by earlier writers.

Dr, Jenks observed: "Space beyond the atmosphere of the earth presents a much closer analogy to the high seas than to the air space over the territory of a State.[16]"

The underlying principle determining both the status of high seas and Outer Space is that of '*Res Communis Omnium*.' If this analogy of seas is used prudently it can be a more useful depository for formulating the laws of Outer Space. A number of other analogies suitable for the development of a law of Outer Space includes the Antarctica Treaty and whole body of Air Law.[17]

According to Mr. Becker[18] Article 4 (2) of the Antarctica Treaty is relevant, which is as under:

"No acts or activities taking place while a treaty is in force shall constitute a basis for asserting, supporting or denying any rights of sovereignty in Antarctica. No new claim or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.[19]"

The above discussion suggests that the problem of determining the legal status of Outer Space has drawn the attention of International Lawyers of almost all countries. As Mr. Lincoln P. Bloomfield observed, "In Outer Space the problem is already before the Nations. It will become acute when the first man from the earth sets foot on the moon, predictably within this decade. What ground rules should govern the status of the Moon and the planets in the light of all this?"[20]

Several legal principles have been suggested by contemporary writers. Dr. Jenks defines space beyond the atmosphere as '*Res Extra Commercium*,' incapable of appropriation by projection of territorial sovereignty. He proposed that sovereignty over unoccupied territories beyond the earth as well as title to natural resources be vested in the United Nations.[21]

Mr. Bloomfield opines that the high seas analogy is a logical and useful one, but at the same time is more complex than it appears. Nevertheless the analogy is sound and should undoubtedly be applied to Outer Space as a whole.[22]

The concept that Space is '*Res Nullius*' and therefore is subject to acquisition was rejected by several U. N. spokesmen who termed the appropriation of space and heavenly bodies impossible or at least improper.[23] Other respresentatives seemed to insist that Space, the Moon and other celestial bodies were owned[24] or belonged[25]

15. Zodorozhnyi, 'The artificial Satellites and International Law,' Reprinted in 'Symposium' loc. cit., page 1049.
16. 'Common Law of Mankind,' page 388.
17. J. F. Mcmahon, 'Legal Aspects of Outer Space', B. Y. I. L. 1962, page 358.
18. 'Major Aspects of the Problems of Outer Space,' loc. cit., page 402.
19. Antarctica Treaty, signed in Washington, 1st December, 1959.
20. The Prospects for Law and Order, Outer Space : Prospects for Man and Society (1962), page 158.
21. Common Law of Mankind, page 388.
22. 'The Prospects for Law and Order', loc. cit., page 158.
23. Comments by the representatives of Australia, Philippines, U. N. Docs. A/C1/SR. 986, page 9, 991, page 6 and 992, page 3.
24. Venezula, U. N. Doc A/C1/SR. 990, page 2.
25. Iran U. N. Doc. A/C1/SR. 988, page 7.

or were the common domain[1] or the common property,[2] of the world or of all nations or of all peoples.

The Canadian representative suggested that the whole Outer Space might belong to the world as a whole, and that jurisdiction over space and its contents may properly vest in the United Nations.[3]

The view that control of Outer Space should be vested in the United Nations seems to hold good. Dr. Jenks observed : " It would be entirely fitting that the control of activities in space should be regarded as a world responsibility and every effort should be made to explore and apply such a solution of the problems from the earliest stages of development. Legislative authority over such activities might be regarded as vested in the General Assembly of the United Nations acting through or on the advice of somebody specially composed, on the analogy of the International Atomic Energy Agency to give an appropriate measure of influence to States in a position to make a positive contribution to the exploration of Space."[4] A similar view appears to have been taken by Mankiewicz also. Precisely on account of multifarious difficulties presented by the definition of rights in Outer Space many delegates both at the First Commission of the 13th session of the U. N. General Assembly and the *Ad. hoc* Committee, have advocated the creation of a U. N. Specialized Agency with exclusive powers to regulate and control all activities in Outer Space which would be placed under its absolute authority.[5]

The suggestions proposed above have, to some extent, been implemented by the Space Powers. Professor C. Q. Christol observed: " This has been portrayed in the Political legal policies of States possessing either space resources or space prospects. It has been the approach at the international decisional level, where since 1958, the United Nations has become the major instrumentality for the advancement of International Space Law principles and rules."[6]

It becomes, therefore, clear that Outer Space is not beyond the reach of law. It may, however, be submitted that the '*Res Commercium*' nature of Outer Space and Celestial Bodies has been the dominating international legal principle in this respect. Learned writers opine that this is the only legal principle to which both, the United States and the Soviet Union have officially committed themselves, because the principle expresses the common consent of the mankind.[7]

One may appreciate the provisions of Space Treaty[8] concluded in 1966. The proposed control of the General Assembly has, however, been recognized, as it provides that the nature, conduct, locations and the result of space activities should, to the greatest extent feasible and practicable, be made known to the Secretary-General of the United Nations for disseminating them and to the public and the International Community.[9]

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1. Greece, U. N. Doc. A/C1/SR, page 4.
2. E. I. Salvador, U. N. Doc. A/C1/SR, 992, page 3.
3. U. N. Doc. A/C1/SR, 989, page 9. *See also* Howard J. Taubenfeld, 'The United Nations Consideration of the Status of Outer Space' 53, A.J.I.L. 1959, pages 400-405.
4. 'Common Law of Mankind', pages 393-394.
5. R. H. Manklewicz, 'Legal Regime and Conditions for the use of Space Vehicles.' Review of Contemporary Law, December, 1960, page 49.
6. 'Space Stations : A lawyer's point of view' 4, I. J. I. L. (1964), page 488.
7. Imre Csabafi and Savita Rani, loc. cit., page 223.
8. 'Treaty Concerning the Exploration of the Moon and other Celestial Bodies', International Legal Material, Vol. V, November, 1966, pages 1109-1112.
9. American Reporter, 21st December, 1966, page 1.

To curb any aspirations on the part of any state which may be inclined to assert individual authority in Outer Space, the Treaty prohibits any type of national appropriation in Outer Space, a provision which makes Outer Space '*Res Communis Omnium*' unlike the air space over the territory of a State.[10]

The awareness among nations that space activities in a legal vacuum would lead to a gradual erosion of the above principles is manifested in the stipulation that activites in the exploration and use of Outer Space including the moon and other celestial bodies shall be carried out in accordance with International Law including the U.N. Charter.[11]

However, many principles of International Law as they are today, *e.g.*, those concerning appropriation of unclaimed territories, and provisions of U. N. Charter, *e.g.*, those concerning the use of force in certain exceptional circumstances like self-defence, cannot and should not be made applicable to Outer Space; on the other hand, an elaboration or clarification of the exact principles that are applicable to Outer Space would have been too premature and inadvisable in the present state of spaee technology, when many things about Outer Space still remain to be known. Suggestions to define those principles were made during deliberations but were not accepted.[12]

So one has only to conclude that what is applicable to Outer Space is not International Law and the U. N. Charter *in toto*, but only those principles and rules consistent with the principles embodied in the present treaty. Thus there remains no legal vacuum in Outer Space. The essential thread which runs through the fabric of the present treaty on the subject is, as envisaged in its various provisions, the idea of international co-operation in space activities.[13]

The treaty is a marked success in this field, nevertheless, it is proposed that a Specialized Agency should be established vesting powers in it to control activities in Outer Space and Celestial Bodies under the supervision of the General Assembly of the United Nations. The legislative powers should be regarded as vested in the General Assembly which may formulate rules and principles with the help of the Legal Sub-Committee on the Peaceful Uses of Outer Space.

The laws relating to Outer Space are under consideration and they are gradually taking shape. It would be proper to recall that a conference has been convened at Vienna between 14-27 August, 1968. The General Assembly on 20th December, 1968 unanimously commended the results of the conference on Exploration and Peaceful Uses of Outer Space, welcomed the decision of the Committee on the Peaceful Uses of Outer Space to examine various proposals for U. N. activities in this field, reaffirmed the common interest of mankind in further space exploration for peaceful purposes, welcomed the entry into force on 3rd December, 1968, of the agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space; approved the establishment by the Outer Space Committee of a working group to study and report on the technical feasibility of communication by direct broadcast from satellites; and endorsed the sending of

10. M. Chandra Shekharan, 'The Space Treaty', 7, I.J.I. L, Jan. 1967, page 63.
11. 'The Space Treaty' (1966), Article 3.
12. M. Chandra Shekharan, loc. cit., page 63.
13. *Ibid.*, page 62.

a group of scientists to Mar Chiquita, Argentina, to report on the eligibility of a station there for United Nations sponsorship.[14]

As the Committee began its debate on 17th December, 1968 the Chairman of the Committee declared that the second decade of Space Exploration had begun and within a few days men would be orbiting the moon. The permanent interest of United Nations lay in the peaceful utilization of the scientific and technical achievements in the exploration of Outer Space for the benefit of all mankind. It was with that purpose in mind that the United Nations had convened an International Conference in Vienna. The conference had examined the practical benefits of Space exploration and the opportunities available to non-space Powers for international co-operation, with special relevance to the needs of the developing countries.[15]

The USSR representative said that the agreement on the rescue and the return of astronauts was of great importance, as was the proposed convention on liability for damages which might be caused by objects launched into space. The Outer Space Committee should now make every effort to have the convention apply not only to damages on earth and in the air but also in Outer Space. The USSR had great interest in such items as the definition of the concept of Outer Space, the use of Outer Space and celestial bodies[16].

The United States believed that the liability convention must provide a way of resolving a dispute on a claim which both the claimant and the launching State were not able to resolve. A dissatisfied claimant State should be able to invoke the jurisdiction of a impartial tribunal with power to decide on an amount for which a launching State might be held liable. Such a provision was essential if the liability convention was to be successful.[17]

The Indian delegation hoped that the space Powers would accept reasonable solutions in the legitimate interests of the victims of damage, so that a meaningful convention on liability could be concluded.[18]

The above discussion shows that efforts are being made to formulate principles to meet future situations. It is expected that the legal Sub-committee would be able to define the concept of Outer Space.

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14. U. N. Monthly Chronicle, Jan. 1969, page 62.
15. *Ibid.*, page 62.
16. *Ibid.*, page 63.
17. *Ibid*, page 65.
18. *Ibid.*, page 66.

THE EXTENT OF 'UNDUE INFLUENCE' BY MINISTERS IN ELECTIONS

By

C. P. BARTHWAL.*

An attempt has been made in the present paper to study as to how far a Minister's participation in an election campaign to further the prospects of a candidate belonging to his party would amount to 'undue influence'. Minister's participation in an election campaign may take varied forms. He might address public meetings, make several promises to electorates for the redress of their grievances if they voted for his party's candidate, issue a whip to the members of his party to vote for the party nominee or issue an appeal, etc.

The Representation of the People Act, 1951, defines 'undue influence' in the following manner :

Section 123 (2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other persons with the free exercise of any electoral right :

Provided that—

(*a*) without prejudice to the generality of the provisions in this clause any such persons as referred to therein who—

(*i*) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested with injury of any kind including social ostracism and excommunication or expulsion from any caste or community ; or

(*ii*) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause ;

(*b*) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right shall not be deemed to be an interference within the meaning of this clause.

Undue influence, as defined in the above, clause, *i.e.*, clause (2) of section 123 is very wide in terms and includes four different forms of interference, *viz.*, direct interference, indirect interference, direct attempt to interfere and indirect attempt to interfere. It is nowhere laid down that such interference should be by the method of compulsion. It includes such interference or attempt to interfere by any method. It definitely includes the measure of inducement where there will be no compulsion at all, although the inducement must be of such a powerful type as to leave no free will to voter in the exercise of his choice. But even though the definition in clause (2) of section 123 is wide in terms it cannot take in mere canvassing in favour of a candidate at an election. If that were so, it would be impossible to run democratic elections.

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Sub-Clause (*a*) of Clause (2) shows what the nature of undue influence is, though it does not cut down the generality of the provisions contained in clause (2). Where any threat is held out to any candidate or any elector, or any person in whom a candidate or an elector is interested and the threat is of injury of any kind including social exclusion and excommunication or expulsion from caste or community, that would amount to interference or attempt at interference with the free exercise of an electoral right and would be undue influence. Again, where a person induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure, shall amount to interference or attempt at interference with the free exercise of an electoral right and would be undue influence. The above explanations are merely illustrative. It is difficult to lay down in general terms where mere canvassing ends and interference or attempt at interference with the free exercise of an electoral right begins. That is a matter to be determined in each case, but there can be no doubt that if what is done is mere canvassing, it would not be undue influence. As sub-clause (*b*) of clause (2) above shows that, a declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference so as to amount undue influence. Thus legitimate propaganda, explaining the party's manifesto and view point does not certainly constitute undue influence. All influence cannot be said to be undue as the law cannot strike at the existence of due influence. It is only the abuse of influence with which alone the law can deal. Influence cannot be said to be abuse because it exists and operates. Legitimate influence, for intstance, the influence of political party as a whole, cannot be called undue influence.

Reference may be made to the Presidential and Vice-Presidential Act, 1952, which also declares undue influence as a serious offence. The election of a candidate is liable to be set aside by the Supreme Court under section 18 (1) (*a*) of the said Act, if the Court is satisfied that " the offence of bribery or undue influence has been committed by the returned candidate or by any person with the connivance of the returned candidate." Sub-section (2) of section 18 lays down that ' undue influence' would have the same meaning as in the Indian Penal Code. The definition of ' undue influence ' as given in section 171-C of the Penal Code is more or less in the same language as in section 123 (2) of the Representation of the People Act, referred to above, except that the words " direct or indirect " have not been used in the former definition to indicate the nature of interference.

We shall now refer to cases under the election law and see how election tribunals and law Courts have looked at the matter while considering the scope of the words ' undue influence ' ;

In *Rai Bahadur S.N. Sinha* v. *Amulyadhone Roy*[1], the Election Tribunal was asked to determine whether by issuing a whip on the day of election, requesting members to cast their preferences in a particular order, the leader of a political party who also was the Chief Minister, could be said to have exercised undue influence. The Election Tribunal held that the leader of a party was entitled to use his influence as a leader and he could not be deprived of that right because he happened to be a Minister. The issue of a whip of that kind was thus held to be no more than canvassing in favour of the candidates of the party to which the leader or the Chief Minister belonged.

1. Sen, S.B. & Poddar, M.G.—' Indian Election Cases' (Bombay, 1951) page 188.

In *Linge Gowda* v. *Shivanamjappa*[2], it was alleged that the Chief Minister and and several Ministers toured extensively throughout a constituency and carried on election propaganda by means of speeches, holding out promises and threats and thereby brought undue influence to bear on the electorate to exercise their franchaise in favour of the respondent. The Election Tribunal rejected the allegation and held that a leader of a political party was entitled to declare to the public the policy of the party and ask the electorate to vote for his party without interfering with any electoral right and such declarations on his part would not amount to undue influence under the Representation of the People Act. The fact that such a leader happened to be a Minister or Chief Minister of a State would make no difference. It was further observed in that case that the law cannot strike at the root of due influence and under the law of election only undue influence is forbidden. The leaders of a party will be deemed to exercise their due influence if they asked the electorate to vote for their party candidate, even if they happened to be Ministers.

In *Amirchand* v. *Surendra Lal Jha*[3], it was held by the Election Tribunal that Ministers were prominent members of the party and in that capacity they were entitled to address meetings and to tell people what their party had done and what its programme was and to ask them to vote for the candidate set up by their party and such action of the Ministers could not be held to amount to exercising undue influence. It merely amounted to canvassing by the Ministers in favour of candidates belonging to their party. It was further added that there was no law in India prohibiting the State Ministers from taking part in canvassing votes for others. The State Ministers wielded considerable influence, and when they canvassed, they used that influence. But the influence could not be called undue influence for the law does not prohibit canvassing by Ministers and it was not illegal for them to use their influence.

In *Mast Ram* v. *S. Iqbal Singh & others*[4], it was held that the legitimate exercise of influence by a political party or an association should not be confused with undue influence. If a political party passed a resolution of support to a candidate and asked its members to vote for him, it would only be a legitimate exercise of influence. It was further held that Ministers in their capacity as members of their party were entitled to address meetings and to tell people what their party had done and what its programme was and to ask them to vote for the candidate set-up by their party. Such action of the Ministers cannot be held to amount to exercising undue influence. In *Radhakrishna Shukla* v. *Tara Chand Maheshwar*[5], the Election Tribunal held that even where Ministers conducting an electioneering campaign promised to the people, who put their grievances before them during the campaign, generally to redress their grievances, it could not be held that there was exercise of undue influence and their promise merely amounted to a promise of public action, which would not be for the benefit of merely those who voted for candidates of their party but for the public as a whole.

In *N. Sankara Reddi* v. *Yashoda Reddy*[6], it was held that the fact that the leader of a political party who was also the Chief Minister of the State, had written letters to the members of his party would not amount to undue influence. Further the

2. (1953) 6 E.L.R 288.
3. (1954) 10 E L R. 57.
4. (1955) 12 E L R. 34.
5. (1956) 12 E L R. 378.
6. (1957) 13 E L R 34.

Tribunal held that it was only where a Minister abused his position for furthering the prospects of the candidate belonging to his party that undue influence might arise. Where a leader merely used his influence in the form of canvassing for candidates of his party there would be no question of undue influence.

In *Dr. Y.S. Parmar* v. *Hira Singh*[7], the Judicial Commissioner of Himachal Pradesh held that a leader of a 'political party' was entitled to declare to the public the policy of the party, and ask the electorate to vote for his party without interfering with any electoral right and such declarations on his part would not amount to undue influence.

In *Trilokl Singh* v. *Shivrajwati Nehru & others*[8], the Election Tribunal was asked to determine whether a Minister's participation in election by way of canvassing or attending election meetings amounted to undue influence. The Tribunal held that the right to canvass must be conceded to him as the leader of the political party which had a majority in the Legislature and which had to maintain that majority in order to function effectively. If Ministers had a right to vote and stand as candidates they also had a right to canvass for themselves and for other candidates set up by their party. However high the status of a Minister might be and however great might be the influence which he commanded, if he only solicited votes and tried to persuade the electors to vote for a candidate in whom he was interested and asked them not to vote for any other candidate or to remain neutral and did nothing more, he could not be said to have interfered with the free exercise of the electoral right of the voters. In *Jayalakshmi Devama* v. *Janardhan Reddi*[9], the Andhra Pradesh High Court held that where candidates contested elections on the basis of their affiliation to a particular political party, there was nothing intrinsically wrong in Ministers canvassing support for their party candidates. This did not, however, mean that Ministers were entitled to use their official position in any manner for furtherance of the prospects of their party candidates or otherwise act in a manner not consistent with the Representation of the People Act. It was further held that a Minister merely by reason of his office did not suffer from any disability in this behalf; equally by virtue of his office, he did not enjoy any special privilege. He had the same rights and obligations as any other citizen. It was also held that in their capacity as leaders of their party, they had to explain to the electors the policies and programmes which they sought to enforce and one way of doing that was to ask the electors to vote for those who were pledged to support them and their policies. In *Baburao Patel* v. *Dr. Zakir Hussain*[10], delivering the judgment of the Supreme Court Wanchoo, C.J., observed that the Prime Minister was also one of the leaders of the Congress party. As a leader of that party the Prime Minister was entitled to ask the electors to vote for the candidate belonging to the Congress party and the fact that she was Prime Minister made no difference to her right to make an appeal of this nature. Further, it was held that a Minister who was also the Chief Whip of the party exercised due influence in writing letters to the members of his party to present themselves in a particular place on the day of election and to vote for their party's candidate. There was nothing improper in members of the party being told in course of canvassing that it would be better if they only marked their first preference and not any other

7. (1958) 16 E.L.R. 45.
8. (1958) 16 E.L.R. 234.
9. (1958) 17 E.L.R. 302.
10. (1968) 2 S.C.J. 490 : A.I.R. 1968 S.C. 904.

preference in a system where voting was by a system of single transferable Vote. Such request or advice in the opinion of the Court, did not interfere with the free exercise of the electoral rights, for the electors still were free to do whatever they desired inspite of the advice. Similarly, the visit of Ministers to State capitals to canvass for their party's candidate could not amount to undue influence. Finally, the Court said that there could be no objection if the leader of the party indicated to the members of his party how to vote in order to ensure that votes may not become invalid. Further if the leader of the party indicated to the members whom to vote for he was merely canvassing with his own party-men to support the candidate of the party. The mere fact that the person who canvassed was also a Chif Minister, did not mean that he was exercising undue influence. Once canvassing was permissible it followed that if a leader of the party asked members of his party for whom to vote he was merely canvassing. The voting was after all secret and every elector was free to vote for whosoever he liked, even though he might have been asked by leader to vote for a particular candidate.

Democracy presupposes the existence of political parties. Where there are political parties, each of them will try to capture every elective office in the system of Government. It, therefore, becomes the duty of every member of the party including Ministers, to canvass for a candidate set up by their party. Moreover, Ministers continue in office till they command the confidence of the majority of the house which is elected by the people, *i.e.*, House of the People at the Centre and, Legislative Assemblies in States. To keep themselves in majority they have to see that in elections a candidate belonging to their party is elected to the House. They, therefore, have to keep contact with the electorates and participate in elections for mustering support for their party's candidate. It is because of these reasons that there is no prohibition in India on Minister's participation in an election campaign. The decisions have, consistently, held that it is open to Ministers to canvass for candidates of their party standing for elections. Such canvassing does not amount to undue influence but is proper use of Minister's right to ask the public to support candidates belonging to the Minister's party. It is only where a Minister abuses his position as such and goes beyond merely asking for support for candidates of his party that the question of undue influence may arise. But so long as the Minister only asks the electors to vote for a particular candidate belonging to his party and puts forward before the public the merits of his candidate it cannot be said that by merely making such request to the electorate the Minister exercises undue influence. The fact that the Minister's request was addressed in the form of what is called a whip is also immaterial so long as it is clear that there is no compulsion on the electorate to vote in the manner indicated in that whip.

DELEGATED LEGISLATION : AN INTRODUCTION.

By

BRAHMA BHARADVAJA.

With the emergence of the Welfare state, the functions of a modern Government and Legislature have immensely increased. Legislation has become more complex and technical also. A consequence of this development is the growth of rules, regulations, bye-laws, schemes, and orders issued by various administrative departments under authority received from Parliament. This type of legislation is called 'delegated legislation' and its purpose is to supplement the parliamentary law. The Committee on Ministers' Powers has defined the term delegated legislation thus : "Delegated legislation may mean either the exercise by a subordinate authority, such as a Minister, of the legislative power delegated to him by Parliament, or the subsidiary laws themselves passed by Ministers in the shape of Departmental regulations and other statutory rules and orders[1]." This type of law-making power is delegated, and should be distinguished from the original[2]. The legislative authority under a constitutional law cannot be treated as delegated ; it is original. This power may be *plenipotentiary* though not sovereign. Hence laws enacted by the Indian Legislatures before 1950, or the bye-laws of a municipality are not examples of delegated legislation.

Willis has defined delegated legislation differently. According to him : In essence the laying down of a general rule is legislation and delegated legislation is the best name for the process when carried out by an inferior at the command of the superior[3]. This definition, therefore, implies that the delegate is inferior to the delegator, and that he acts at the command of the latter. It may, however, be noted here that the delegated power is subordinate to the original power of Parliament, but a delegate is not necessarily inferior to the delegater. For example, when Parliament delegates power to the Crown, the Crown cannot be held inferior to Parliament, though the delegated power of the Crown is inferior to that of Parliament. Further, delegation does not imply a command. In most of the cases it is discretionary and of an enabling nature.

Various reasons have contributed to the growth of delegated legislation. As noted above, consequent to welfare state, the legislative function of Parliament has increased. This increase has put a considerable pressure on the Parliamentary time. The Legislature has little time to discuss and enact bills in detail. It, therefore, has to resort to the practice of enacting skeleton legislation leaving the Government to provide the details. Further, the subject-matter of legislation to day is very often of such a technical nature as cannot be effectively discussed in Parliament. It is, therefore, considered proper to leave technical subjects to the discretion of the Government. Further, it is difficult for Parliament to provide for all contingencies

1. Report of the Committee on Ministers' Powers, page 15, para. 2.
2. Griffith, Constitutional Significance of Delegated Legislation, Michigan Law Review, Vol. 48, June, 1950, pages 1079, 1080.
3. Willis, Parliamentary Powers of the English Government Departments, page 49.

Delegated legislation permits a certain amount of flexibility and elasticity in the field of social legislation and facilitates adoption and adjustment of law to the new circumstances at the exigency of the hour, which may be difficult through the cumbersome parliamentary process.[4] To summarize, delegated legislation is justified where matters concerned require specialized, urgent or recurrent attention ; but where it goes beyond these matters, it loses its justification.[5]

Classification.

Delegation of legislative power may be classified as unconditional, conditional or contingent. In the case of unconditional delegation, the exercise of the delegated power is not subject to any conditions. Such delegation is often contained in the following phrase : " The Central Government " may, by notification in the official Gazette, make rules for carrying out the purposes of this Act[6]. On the other hand, in conditional delegation the exercise of the delegated power is subject to certain conditions or determination of some facts. Section 17 (2) (*xix*) of the Medicinal and Toilet Preparations (Excise Duties) Act, for example, authorises the Central Government to exempt any dutiable goods from the whole or any part of the duty levied under this Act where in the opinion of the Central Government it is necessary to grant such exemption in the interest of the trade or in the public interest.

A legislation is contingent if it provides controls and specifies that they are to go into effect only when a given administrative authority finds the existence of contingencies defined in the statute[7].

In this case the delegated discretion is limited to ascertain that the conditions and contingencies specified in the statute exist, and, on the basis of which, to bring the statute into operation. Section 3 (1) of the Railway Companies (Emergency Provisions) Act of 1951 is an example of contingent legislation; under section 4 the Central Government may apply the Act, if it is of opinion (*a*) that a situation has prejudicially affected the convenience of the persons using a railway administered by the company to which the Act is intended to apply, (*b*) that it has caused serious dislocation in any trade or industry using the railway, or (*c*) that it has caused serious unemployment amongst a section of the community. Further, it may apply the Act when in its opinion such a course is ' necessary in the national interest '. Under section 12 it may terminate the operation of the Act when its purpose is fulfilled.

The term 'delegated legislation' should be distinguished from subordinate legislation. Delegated legislation implies that the legislative power is delegated by Parliament, whereas the element of 'delegation' is not necessarily present in all subordinate legislation. Subordinate legislation may be issued under an Act of Parliament or under the Constitution. In the first case it is delegated legislation also but not in the second. Articles 98, 148 and 309, for example, authorize the President to issue rules. These rules being issued under the Constitution are not delegated legislation, but since they are subject to Parliamentary legislation, they

4. Reasons for justification have been analysed by various scholars; for example, Committee on Ministers' Powers, Section II, para 11, pages 51-53. Select Committee on Delegated Legislation, para 10; Allen Law in the making, page 521.

5. The arguments based on paucity of time of Parliament and technicality of subject-matter are often exaggerated, and it is, therefore, not desirable to apply them universally. Allen, Law in the making, footnote at page 551; Law and Orders page 181; Walkland, Parliamentary Control over Delegated Legislation in Northern Ireland, Public Administration, Autmn, 1955.

6. Section 16 (1) of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954.

7. Hart Administrative Law, page 154.

are subordinate. Hence 'subrdinate legislation is' a wider term than 'delegated legislation; all delegated legislation is subordinate, but all subordinate legislation is not delegated.

Forms of Delegated Legislation.

In Britain the term ' delegated Legislation ' excludes prerogative orders-in-Council and other forms of legislation under the royal prerogative, because such power to legislate is inherent in the crown. But, if an Act delegates legislative power to the crown, the legislation so made comes under the category of delegated legislation. [8] In India the ordinances issued by the President under Article 123 of the Constitution, and also the rules issued by him under Article 309 and some other articles, do not form part of delegated legislation. But the rules promulgated by the President under Acts of Parliament, such as section 12 of the Representation of People Act of 1950, section 38 of the Government of Part C State Act of 1951, (now repealed) or section 16 of the High Court Judges (Conditions of Service) Act of 1954, and other Acts, fall under the category of delegated legislation.

Ministerial or departmental legislation takes several forms such as rules, regulations, bye-laws, schemes, orders, directives or warrants. The terms 'rules' and 'regulations' are, however, sometimes used interchangeably. An 'order' is directed to an individual or to a body and contains a definite command, whereas a 'directive' carries illustrative instructions. Warrant, is the term used for the 'rules' which provide a code for payment of pensions of Armed Forces. It is also frequently used for a judicial order authorizing the arrest of a suspected criminal. There was previously no uniformity in the use of the terms 'rules' and 'regulations'. The Donoughmore Committee recommended that the expression 'regulation' should be used to describe an instrument by which the power to make substantive law is exercised the word 'rule' should be used to describe an instrument by which the power to make a rule of procedure is exercised; and the term 'order' may be used to describe an instrument issued in the exercise of an executive power and also of the power to make judicial and quasi-judicial decisions[9]. The expression 'regulations' is sometimes used for those instruments which relate to matters of general importance as, for example, the National Insurance Regulations ; whereas the term 'rules' is used for the instrument which deal with procedure.[10]

A 'scheme' relates to a welfare legislation such as the Employees' Provident Fund Scheme. A 'bye-law' is made by a local body. In the United Kingdom, the general expression for all these various kinds of delegated legislation is ' statutory instrument."[11]

Dangers in Delegation.

In spite of the necessity for delegation, a doubt exists in the minds of lawyers and publicists whether Parliament itself fully realizes that the practice of delegation has become so extensive that Parliament has surrendered its own functions in the process. The abuse of delegated powers has provoked many to criticize the system of delegated legislation, bitterly. The criticism is usually directed not against

8. Wade, Constitutional Law, page 570.
9. Report, para. 15 (J).
10. Wade, Constitutional Law, pages 576-577.
11. S. 1 of the Statutory Instrument Act, 1946 (Eng.)

delegation but rather against the volume and nature of delegated legislation, and also against the manner in which the power is abused by the recipients. Thus addressing the Manchester Luncheon Club, Sir Warren Fisher remarked, "There has been for some years a dangerous movement to diminish the House's effective say on legislation in the form of innumerable rules, regulations and orders having the force of law."[12] Lord Hewart dubbed this movement as a conspiracy to oust parliament and the Courts. "A mass of evidence establishes the fact that there is in existence a persistent and well contrived system intended to produce, and in practice producing a despotic power which at one and the same time places Government departments above the sovereignity of Parliament and beyond the jurisdiction of the Courts.[13]".

The following are in brief the dangers of the delegation of legislative powers. First, Acts of Parliament are often enacted in a a skeleton form, which contain only the bare principles. The Departments are thus left with a wide discretion not only to work out the details, but also to provide for matters of principle, and to regulate the matters which closely affect the rights and property of the subjects. Delegation is often made in loose phrases, such as 'to carry out the purposes of the Act', to give directions for 'the removal of doubts or difficulty', to grant exemptions from the operation of certain specified sections in whole or part of an Act, or to add to or omit a matter from a schedule to the Act. Such delegation is so extensive that it not only leads to a widespread suspicion and distrust of the machinery of the Government, but also endangers civic and personal liberties. Secondly, delegated powers may, by ousting jurisdiction of the Courts, deprive an individual of his right to seek redress through the judiciary. Thirdly, some Acts incorporate a *non-obstante* clause by which the departmental legislation has effect notwithstanding anything inconsistent contained in any other law. Thus delegated legislation under the clause encroaches upon the supremacy of Parliament. Not only this, subordinate legislation is sometimes permitted to amend the provisions of an Act. Fourthly, the opportunities for Parliament scrutiny and control over delegated legislation are inadequate, and there is a constant danger that the servant may become the master. Fifthly, provisions for publicity, previous publicity and consultation with the interests affected are most unsatisfactory. Sixthly, the privileged position of the State as against the subjects in legal proceedings. places the latter at a definite disadvantage in obtaining redress in the Courts for the illegal acts committed in pursuance of delegated legislation.[14]

It is for these considerations that those who have power are in need to exercise great vigilance. Those who entrust some with power should exercise no less vigilance over those in whom power is reposed. In modern Governments, the centre of gravity has shifted from legislation to administration. There are many who take a serious view of this growth of the bureaucracy. Explaning the type of new despotism, Lord Hewart observes that the old despotism which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an annaesthetic. "The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will or the caprice of the Executive unfettered and supreme."[15] Sir C.K. Allen also points out that "We have reached a juncture when we can no longer be content with self-congratu-

12. Quoted by Allen, Law and Orders, page 332.
13. The New Despotism, page 14.
14. *See* also Report of the Committee on Minister's Powers 1932, page 54.
15. The New Despotism, page 17.

lations but must overhaul some of the constitutional principles which we have been taught to think most fundamental".[16] He further states: "the civil service contains persons of extremely autocrative temper. I have known some who did not disguise their contempt for Parliament and all its works."[17]

Emergency Legislation in India.

Delegated legislation only enhances the danger of power being used tyrannically. It permits a delegate to exercise legislative power without the need to approach the the legitimate law givers and sometimes to evade Parliamentary supervision. The Defence of India Act of 1962 and the Rules framed under it are illustrative of the Executive 's craze for power. The Act and the Rules have been applied to many measures, some of which could be well regulated under the various existing Acts. They deal not necessarily with the problems arising out of emergency, but also with those which existed before and may exist after it.

The Defence of India Act of 1962 illustrates how elastic is the clause 'to carry out the purpose of the Act'. The power under it authorizes Government to order compulsory vaccination, inoculation, and isolation of persons suffering from infectious or contagious diseases; to require the prices of drugs to be displayed; to check unauthorized construction of buildings ; to empower police to deal with bad characters; to authorise the detention of a citizen; or to regulate the use of gold and supply of essential commodities. It may be noted, that each of the above matters can be controlled under one or the other existing statutes. To illustrate, the Drugs[17-a] (Display of Prices) Order[18] requires every chemist to display the retail prices of drugs. It also requires manufacturers and wholesale dealers to publish price lists showing retail and wholesale prices. The order is intended to check the rise in the price of drugs. Although the Order was issued under the Defence of India Act, it could have been issued under the Essential Commodities Act of 1955 also. The Central Government had been exercising power for such purpose under the Essential Commodities Act ; the Jute Licensing and Control Order of 1961 is one instance. Similarly, the Government could have regulated the supply of sugarcane to industries under the Commodities Act instead of inserting the new rule 125-B into the aforesaid Defence of India Rules. In certain cases, the exercise of emergency power overlaps the authority already conferred by some statute. Section 312 of the Delhi Corporation Act deals with unauthorized construction, and provides for a fine of Rs. 500 for its violation. But the Government found the section ineffective, and in order to remedy the defects, applied the Defence of India Rules. Similarly to check the crime wave, the Delhi Police extended the Rules (R. 30 in particular)to bad characters, though the Preventive Detention Act gave sufficient authority for the detention of a person liable to endanger peace and security of the society. Thus the authorities have wide discretion either to detain a person under the Preventive Detention Act and provide the detenu with the procedural safeguards provided in Article 22 of the Constitution, or to do so under rule 30 and withhold such safeguards. Rule 30 overlaps, but does not supersed and invalidatee, the Preventive Detention Act.

16. Bureaucracy Triumphant, page 1.
17. Law and Orders, page 331.
17-a. Wade, Constitutional Law, pages 576-577.
18. G.S.R. 91 of 1963.

The primary purpose of an emergency legislation is to empower the Government to meet the situation which arises out of the emergency and hampers the efforts to meet it. Under the Defence of India Act the delegated legislative power has been exercised for purposes which do not appear to be related to the defence efforts of the country. For example, regulation of building construction is not apparently related to the defence efforts. So is the case with the Gold Control Order. The purpose of the order, according to the then Finance Minister Morarji Desai was to reduce the demand for gold progressively not only for the duration of emergency but on an enduring basis."[19] "It is primarily brought" he told the Lok-Sabha, "to remove smuggling of gold which is hitting this country economically in a very bad way, and for several years past, and it is growing".[20] The order is the result of the Government's constant efforts after repeated failures to take away the lure of gold and to stop smuggling. Its aim was not in raise funds for the defence, as Mr. Desai clearly admitted in the Lok Sabha. He said, "I do not say that if I get all the gold I will defend my country better than without it. Even if I do not get any gold, I will certainly defend my country and with success. That is not the stake at issue."[21].

Means of Supervision.

Delegation presents a dilemma, that is, delegation of legislative powers is desirable and inevitable ; but it also presents serious threats to civic and personal liberties, because the Executive tends to act in a despotic manner. Delegation of legislative powers, therefore, places a high responsibility both on Parliament and on the Executive. Parliament, being the supreme law-making body to which the Government is responsible, has the duty to see that delegated legislation does not exceed its jurisdiction ; that it carries out the objects of an Act enacted by Parliament ; and that it does not abuse the power by ousting the jurisdiction of Courts, by giving retrospective effect to delegated legislation, by levying unauthorised fees, by providing penalties, by restricting fundamental rights, or by inserting ambiguous and complicated clauses.

The solution to the above dilemma appears in the presence of effective safeguards against the abuse of the authority. Herbert Morisson has said that "The principle of delegated legislation is, I think, right, but I must emphasize that it is well for Parliament to keep a watchful and even jealous eye on it at all stages."[22] The safeguards which exist today may broadly be classified as Parliamentary, executive, judicial, and lastly public opinion. Parliament influences delegated legislation by discussing the delegation clause in the bill and by clearly defining the scope of delegated power, by prescribing procedure to be followed in making rules, and by requiring the rules to be laid before its houses. When the rules are laid, Parliament many examine them in detail by appointing a scrutiny committee, modify the rules or annul them. Executive safeguard lies mainly in the review of delegated legislation by the Ministry of law, cabinet or its Committee. In India there is no

19. Broadcast to Nation on All India Radio, 9th January, 1963.

20. Lok-Sabha Debates, 6th March, 1963. It may be noted that the Gujrat High Court has recently held that the purpose of the Gold Order does not conflict with the purpose of the Defence of India Act.

21. *Ibid*, 6th March 1963 Col. 2636. It appears that the Government lays more emphasis on getting new laws enacted than on administering laws.

22. Government and Parliament, page 151.

independent executive agency for this purpose to compare with the Administrative section of the Conseil-Ed-Etat of France. Judicial safeguard consists in the power of judiciary to review delegated legislation and to declare it unconstitutional, or *ultra vires* when necessary. It is difficult to say in what particular form or at what specific stage public opinion influences the course of delegated legislation.

TAMIL NADU GENERAL PURCHASE TAX.

Ordinance 5 of 1969 dated 27th November, 1969 introducing section 7-A into the Tamil Nadu General Sales-tax Act, 1959 has far-reaching implications. The ostensible reason is to check evasion of tax. When under law there is no sale or purchase taking place within the State, tax is not payable on the transaction. The question of plugging loop-holes does not arise.

Section 7-A results in double taxation. The term "purchaser" is not defined in the Act. When there is in law no sale or purchase within the State, the dealer is called upon to pay tax on the alleged purchase turnover granting exemption to inter-State sales alone. No purchase turnover minimum is fixed and all are treated as registered dealers for the purchase. The section is vague and requires clarification.

1. The preamble is clear as to the applicability of the Act to a sale or purchase effected in this State. Sub-section (b) of section 7-A extends the levy of tax to purchase turnover when the goods are disposed of by a dealer in the State in any manner other than by way of sale. This is *ultra vires*.

2. The dealer in Tamil Nadu purchases goods from a dealer in the neighbouring State on payment of Central Sales-tax or without payment of tax when the article is exempt from tax. When he sells the article in this State he collects sales-tax and pays it to the Government. He cannot be called upon to pay tax on his purchase turnover by reason that the goods have not suffered tax under section 3, 4, or 5 of the Act because they can be valid in respect of sales within the State alone.

When the dealer on import from the neighbouring State despatches the article for sale on commission basis to a trader in another State, purchase turnover cannot be subject to tax once over as no sale or purchase is involved attracting sections 3, 4, 5 or 7-A of the Act and it does not have extra-territorial validity.

3. When a dealer sells|purchases goods in the State, the Act applies. When the ryot sells his produce, the Act does not apply and no sales tax is payable under section 3 or 4 of the Act. When purchase is made from the agriculturist simply because no tax is payable under section 3 or 4 of the Act, the purchase turnover at the hands of the bulk consumer|trader cannot be subjected to tax. Sub-section (a) of section 7-A is thus against the policy of the Act to grant exemption when an agriculturist sells his produce.

4. In case of transfer by a dealer in the neighbouring State to his branch in Tamil Nadu, the branch pays Tamil Nadu sales tax on sale of goods. There is no purchase turnover at the hands of the branch to warrant levy of tax under section 7-A.

5. When a manufacturer of oil, buys groundnut on which single point tax has been levied and manufactures oil which is transferred to a dealer, for commission in the neighbouring State, he cannot be assessed to tax under section 7-A, as it will be in conflict with section 15 of the Central Sales-tax Act.

6. (a) Cane Jaggery is liable to tax at the point of first purchase in the State. On its suffering single point purchase tax if the cane jaggery is sold to a dealer in the neighbouring State, section 6 (1-A) of the Central Sales-tax Act is applicable. If such cane jaggery is transferred to a dealer in the other State for

sale on commission basis sub-section (c) of section 7-A cannot apply as there is not involved any purchase in the State.

(b) "Section 6 (1-A) of the Central Sales-tax Act is applicable to a transaction in the course of inter-State sale or purchase and collection of the purchase tax on the goods under section 7-A of the Tamil Nadu General Sales-tax Act, 1959 will never be a ground for avoiding it in law. Sub-section (c) of section 7-A will render the goods not liable to purchase tax, in such cases. Any assurance that the dealer will not be liable to pay Central sales-tax if purchase tax has been paid will not help the dealer as under law, the inter-State nature of the transaction will attract the provision of section 6 (1-A) of the Central Sales-tax Act, 1956 and tax will be levied under the latter from the seller."

THE LATE SIR C. MADHAVAN NAIR

The death of Sir C. Madhavan Nair on the 5th March removes from our midst the last of the Judges appointed to the Madras High Court in the twenties of this century. His was indeed a memorable career. Born on January 12, 1879, at the time of his death he was past ninetyone. He was called to the Bar from the Middle Temple, London, and was enrolled as an Advocate in 1904. He married a daughter of Sir C. Sankaran Nair for whom he had unbounded admiration and who was a great influence in his life. At the time when Sir Madhavan Nair started practice at the Bar there was a galaxy of highly talented Advocates and intellectual giants at the Madras Bar who could hold their own with the best in India. Sir Madhavan Nair in course of time built up a decent practice climbing steadily and unobtrusively in the profession. His work was mostly from the North and South Malabar Districts. As an Advocate, though not spectacular or powerful, he was nevertheless effective in his presentation. He had held various offices as Law Reporter. Law Professor, Government Pleader and Advocate-General. As a Law Professor, he was listened to with respect and wrapt attention. The law of Contracts was his *forte*. His lectures were lucid, luminous and of a high order, attended by hundreds of students to their lasting benefit. He was elevated to the Bench in 1924 and served as a Judge till his retirement in 1939. As a Judge he was strong on facts and his judgments were characterised by a neat marshalling of facts and cogent reasoning. His deportment on the Bench was correct and dignified. After retiring from the High Court he became the President of the Railway Rates Tribunal until his appointment to the Judicial Committee of the Privy Council in 1941 while the Second World War was on and London was being subjected to heavy bombardment from the air. He served as a member of the Judicial Committee till 1950, and returning to India was spending a completely retired life. Sir Madhavan Nair was every inch of him a gentleman. He has died full of years and honours. We offer our sincere condolences to the members of his bereaved family.

REVENUE DEPT., GOVERNMENT OF TAMIL NADU

G. O. Ms 486 *dated* 14-2-70.

The following general instructions are issued for the guidance of the officers of the Commercial Taxes Department on the scope of section 7-A inserted in the Tamil Nadu General Sales-tax Act 1959 by the Tamil Nadu General Sales-tax (Fourth Amendment) Ordinance, 1969 (Tamil Nadu Ordinance No. 5 of 1969).

In order to attract tax under section 7-A, the following conditions should be satisfied, namely:—

the purchase should be effected within the State;

the goods which are the subject matter of purchase should be such of those goods as are liable to tax on sale or purchase under the Tamil Nadu General Sales-tax Act 1959;

if no tax has been levied earlier under section 3, 4 or 5 and if the goods are purchased by a dealer from a registered dealer or any other person in the course of business then such a dealer should pay tax on the turnover relating to the purchase aforesaid or purchase.

The expression 'any goods the sale of which is liable to tax under the Act' is only a descriptive expression and refers only to those goods which are liable to tax under the Sales-tax Act. In other words it would exclude goods which are already exempt from payment of tax under the Act, for example, by reason of the III schedule. The expression 'in circumstances in which no tax is payable' relates to circumstances like the one, where a dealer purchased his goods from an agriculturist who is not liable to pay tax under the Sales-tax Act. In the circumstances, in the case of single point goods, suppose, the tax has been paid at the stage of first sale by the selling dealer, the purchasing dealer at second or subsequent stage of sale will not be liable to tax under section 7-A.

In the light of the position stated above, in a case where a company uses the air-conditioning apparatus manufactured by them in their works contracts section 7-A is not attracted as the manufacturer and user are not incidents upon which sales or purchase tax can be imposed. If the company purchases raw materials for the manufacture of the air conditioning apparatus and when such raw materials have not been already subjected to tax under the Act then the purchase of the raw materials will be liable to purchase tax under section 7-A.

In a case where the manufacturer of goods (like groundnut oil) himself sells the goods in inter-State trade or commerce, or moves the goods on consignment basis no tax is exigible under section 7-A. If in any case it is proved that the consignment sale transaction was a camouflage and that there was really a despatch of goods involving transfer of title from the State of Tamil Nadu to another independent buyer in another State, then such a transaction will be liable to Central sales-tax if it is proved to be an inter-State sale.

Purchases in the course of inter-State trade or commerce do not attract the tax under section 7-A of the Act.

The question whether there is transfer of property involved in favour of the agent of agricultural principals and whether the agent acted in a dual capacity *viz.*, as agent of the agricultural principal and also as a purchaser (or) as a dealer should be dealt with in accordance with the orders issued in G. O. Ms. No. 281 Revenue, dated 12—2—1968 as modified by Government Memo. No. 72239 C.T. II (2) 68|14 Revenue, dated 10—12—1969.

Branch transfers by a dealer do not attract under section 7-A.

Purchases effected by a contractor within the State for being used in works contracts will be taxable under section 7-A provided no tax under section 3, 4 or 5 as the case may be has already been paid in respect of the goods.

Exemptions under section 17 of the Act can be—

(*a*) on the sale or purchase of any specified goods or class of goods at all points or at a specified point or points in the series of sales by successive dealers and

(*b*) in respect of any tax payable by any specified class of persons in regard to the whole or any part of their turnover.

In cases falling under category (*a*) the tax liability under section 7-A has to be decided, according to the nature of exemption.

In cases falling under category (*b*) if the purchase is by the exempted class of persons, then no liability under section 7-A will arise. In other cases, tax is payable under section 7-A, if no tax under section 3, 4 or 5, as the case may be, was paid already.

The Board of revenue is requested to issue necessary instructions to its subordinate officers in the light of the above instructions.

(SD.) P. K. NAMBIAR,
Secretary to Government.

[Note:—A critical article on Tamil Nadu Ordinance 5 of 1969, introducing section 7-A, in the Tamil Nadu General Sales-tax Act, 1959 contributed by the Tamil Nadu Food-grains Merchants Association Ltd. Madurai, was published in (1970) 1 M.L.J. (Journal) page 20. We are in receipt of a copy of G.O. Ms. No. 486, (Revenue Dept. Govt. of Tamil Nadu), whereunder General instructions are issued for the guidance of Commercial Tax Officers on the scope of section 7-A; the copy was sent to us by the said Association and we gladly publish the same for the edification of our readers. These instructions go a long way to meet the criticisms in the article aforesaid. Ed.]

THE KERALA LAND REFORMS (AMENDMENT) ACT (XXXV OF 1969). DIVESTING OF JURISDICTION OF CIVIL COURTS.

By

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The emasculation of the landholders begun by the Legislature about 40 years ago has been completed by the Kerala Land Reforms (Amendment) Act (XXXV of 1969). It is a revolutionary measure, containing drastic provisions which deprive land-owners of their rights of ownership and enjoyment and will throw them out of gear by upsetting their domestic economy. The new Amendment Act has abolished, overnight, the rights of ownership of all the landlords and intermediaries in the holdings outstanding in the possession of the cultivating tenants by vesting those rights in the Government with effect from 1st January, 1970 and providing for assigning those rights to the cultivating tenants for a nominal price—payable in sixteen easy annual instalments. The compensation provided to be paid to the ultimate landholders and intermediaries is most inadequate and illusory. On account of the vesting of the rights of ownership of the lands in the Government with effect from 1—1—1970, the landholders and the intermediaries are prevented from collecting the future rents of the properties accruing since that fateful day—1st January, 1970. This disability imposed by the Statute coupled with the absence of a provision for immediate payment of adequate compensation as the just equivalent of the rights of ownership and the provisions deferring the payment of compensation to a future date in sixteen annual instalments will immediately create a problem for the landholders and the intermediaries—they will be literally thrown into the streets. It is really a problem of existence for the large number of landholders in the State whose mainstay is the income that they have been getting from their lands. It is well to remember that there are only very few hereditary jenmies in the State. The fact is, but it is conveniently forgotten by the politicians who vie with one another in the matter of passing tenancy legislation, that the large majority of the landholders in the State belong to the middle class who have purchased properties with their h earned savings and they either leased those properties to tenants or purchased the properties outstanding in the possession of tenants at a time when leases were permitted by the law and when granting leases was considered as a normal mode of enjoyment of properties. On the face of it, therefore it was extremely cruel to tell these landholders and intermediaries one fine morning that from tomorrow onwards they will cease to be the owners of their properties and their rights of ownership stand transferred to the Government and those rights are proposed to be assigned to the tenants on easy terms, whether they want it or not. It is well known that the annual income from one acre of double crop land would now be about 250 paras of paddy, but "the fair rent" calculated according to the provisions of the new legislation would not come to more than 45 paras of paddy per acre. The tenant has to deposit only the price of 45 paras of paddy for one acre of double crop land annually for 16 years towards the purchase price and he can enjoy the remaining income. In the meanwhile, the ultimate jenmi and the intermediary will not get any rent from the tenants and they are faced with the prospect of starvation. This, in short, is the desparate predicament to which the landlords and intermediaries are reduced by the provisions of the Amendment Act. It is no wonder that the new Act has become a nightmare to all the landholders in the State.

One general observation falls to be made at this stage. And that is, that all that the cultivating tenants really wanted was fixity of tenure besides a small reduction in the contract rent. These reliefs have been secured to them by the provisions of the parent Act (I of 1964). There was therefore no need to thrust the jenm right on the cultivating tenants and to make provisions compelling them to purchase the jenm right from the Government—whether they want it or not. It is a matter of common knowledge and it is significant that, although the parent Act (I of 1964) contained provisions for enabling tenants to purchase the landlord's right through the Land Tribunals, very few tenants filed applications in that behalf.

For obvious reasons it is not possible to deal with all the drastic provisions of the new Act in this article. For the present, I am confining myself in this article to a criticism of the provisions in the new Act which seek to stultify the powers of the Civil Court in certain important matters and to transfer its jurisdiction to the Tahsildars and Land Tribunals.

In the guise of introducing measures of agrarian reform, several provisions have been enacted in the new Act which have absolutely no relation to land reforms and which are calculated to open the door wide for trespassers and to enable unscrupulous persons to trespass on other people's lands and to cultivate them and enjoy the rents and profits thereof without any obstruction being caused thereto by injunction orders granted and receiver appointments made by the civil Courts. The Amendment Act of 1969 seeks to effectually stultify the powers of the civil Courts by depriving them of their jurisdiction to try and decide important questions regarding the existence of the relationship of landlord and tenant between the parties—questions which are essentially matters to be tried and decided by the civil Courts, and investing the Tahsildars, the Revenue Divisional Officers and Land Tribunals with that jurisdiction. I am referring to new sections 26, 29-B and 125 and to the amended section 32 of the Act.

New section 26 takes away the jurisdiction of the civil Courts to entertain any claim for arrears of rent and invests the Land Tribunals with that jurisdiction. Be it noted that the Officers to be constituted Land Tribunals under the Act are judicial Officers of the rank of a Munsif or an Officer not below the rank of a Tahsildar. Even Subordinate Judge's Courts, whose pecuniary jurisdiction is unlimited, cannot entertain suits for arrears of rent or michavarom s er 1st January, 1970. It is a matter of common knowledge that difficult quest is of fact and law usually arise in suits for arrears of rent and michavarom. New section 29-B enacts that any person *claiming to be a cultivating tenant* of any land is entitled to apply to the Tahsildar for an order that he is entitled to cultivate the land, complaining that he is prevented or obstructed from cultivating that land and the Tahsildar shall *after making such enquiry as he deems necessary*, decide whether the applicant is entitled to cultivate that land and the Tahsildar is entitled to pass an order restoring the applicant to possession of that land and allowing him to cultivate it. Sub-section 3 of new section 29-B provides that if any suit is instituted by the opposite party relating to the said property after the date of the application to the Tahsildar, the Court shall not grant an injunction restraining the applicant from cultivating the land till the final decision in such suit. Section 32 has been amended by substituting the word "land" for the word "holding". These new provisions are calculated to give a license to mischievous persons—rather they amount to an invitation to them—to take the law into their hands and to trespass on other people's properties and wrongfully enjoy the rents and profits thereof during the pendency of the proceedings before the Tahsildars and the Land Tribunals without any fear of

their activities being interfered with by any injunctions granted or Receiver appointments being made by the civil Courts.

New section 125 which replaces old section 125 is in the following terms:—

"125. *Bar of Jurisdiction of civil Courts.*—(1). No civil Court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under this Act required to be settled, decided or dealt with or to be determined by the Land Board or the Government or an Officer of the Government:

Provided that nothing contained in the sub-section shall apply to proceedings in any Court at the commencement of the Kerala Land Reforms (Amendment) Act, 1969.

(2). No order of the Land Tribunal or the appellate authority or the Land Board or the Government or an Officer of the Government made under this Act shall be questioned in any civil Court, except as provided in this Act.

(3). If in any suit or other proceeding any question regarding rights of a tenant or of a kudikidappukaran (including a question as to whether a person is a tenant or a kudikidappukaran) arises, the civil Court shall stay the suit or other proceeding and refer such question to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate together with the relevant records for the decision of that question only.

(4). The Land Tribunal shall decide the question referred to it under sub-section (3) and return the records together with its decision to the civil Court.

(5). The civil Court shall then proceed to decide the suit or other proceedings accepting the decision of the Land Tribunal on the question referred to it.

(6). The decision of the Land Tribunal on the question referred to it shall, for the purposes of appeal, be deemed to be part of the finding of the civil Court.

(7). No civil Court shall have power to grant injunction in any suit or other proceeding referred to in sub-section (3) restraining any person from entering into or occupying or cultivating any land or kudikidappu or to appoint a receiver for any property in respect of which a question referred to in that sub-section has arisen, till such question is decided by the Land Tribunal and any such injunction granted or appointment made before the commencement of the Kerala Land Reforms (Amendment) Act, 1969 or before such question has arisen, shall stand cancelled."

This is one of the most mischievous and dangerous sections introduced by the so called Amendment Act. The effect of sub-sections 3 to 7 is that if in a suit for injunction or recovery of possession on the strength of plaintiff's title as against a trespasser, the defendant-trespasser simply puts forward a false and dishonest plea that he is a tenant of the properties, the civil Court is bound to stay the suit and refer the question regarding the existence of the alleged tenancy to the Land Tribunal for decision and the civil Court is bound to await the decision of the Land Tribunal and to give *imprimatur* to the decision of the Land Tribunal on the question referred to it and to pass a decree accepting the decision of the Land Tribunal—although the civil Court is satisfied that the decision of the Tribunal is *prima facie* wrong and perverse or contrary to law. And till the Land Tribunal decides the question regarding the existence of the alleged tenancy referred to it under sub-section 3, the civil Court is prohibited from exercising its jurisdiction to grant an injunction or appoint a receiver to

protect the plaintiff's possession and to secure the rents and profits of the properties in the interval (Vide the first part of sub-section 7). If a person in possession is wrongfully ousted from possession by a trespasser or if his peaceful possession is illegally threatened by another or if a person commits or threatens to commit waste on his property by cutting trees or demolishing buildings or otherwise, the person in possession should certainly be entitled under the general law to protect his possession by suing in ejectment or for an injunction on the strength of his possessory title. Such a person can always say that his possession cannot be disturbed and he is entitled to invoke the jurisdiction of the civil Court to issue an interim injunction or to appoint a receiver to help him to maintain his possession or to secure the rents and profits of the properties pending suit. This is a fundamental right of the person who is in possession on the strength of his possessory title.

Section 125 is a dangerous provision which will lead to disastrous consequences, opening as it does, a wide door for persons to take the law into their hands and molest and disturb persons in peaceful possession of their properties. What is the remedy of the person who was in possession of the property, if the person who trespassed on his property claiming tenancy right is ultimately found to be an imposter, having absolutely no tenancy right or possession or right to possession of the property? He is obliged to submit to the trespass and to look on helplessly with folded hands when the trespasser harvests and takes away the crops raised by him and commits waste and cultivates his land and enjoys the rents and profits thereof, until such time as the Land Tribunal decides the question of the existence of the tenancy against the trespasser. And then it will be too late to grant the preventive relief of injunction, as by that time the trespass will have been completed and the plaintiff would be put to heavy and irreparable loss and difficulties.

Now, a dispute as to the existence of the relationship of landlord and tenant is an important matter and often raises difficult questions of fact and law. The question whether the defendant in a suit for injunction or for possession on the strength of plaintiff's title is a trespasser or is in lawful possession on tenancy right, is as his Lordship Chief Justice Raman Nair points out in a recent case *Kunchan Kumaran* v. *V. Ramachandra Iyer*[1] essentially a question for the civil Court to decide. Besides rank trespassers, persons claiming to be in possession under leases granted in contravention of section 74 of the Act and persons who may have obtained leases from the Urallers of a Devaswom to which the properties do not belong—just as in the case in *Narayanan Nambiar* v. *Raman Chettiar*[2] and persons claiming to be "deemed tenants" under sections 4 to 11 of the Act may claim tenancy rights. These are difficult questions which can be satisfactorily decided only by the civil Courts. What is the reason or justification for depriving the civil Courts of their jurisdiction to decide questions involving such disputes and investing the Land Tribunals with that jurisdiction? Is it to be supposed that the Officers who are to be constituted Land Tribunals under the Act are more learned or more efficient and competent than the judges who preside over the civil Courts?

Curiously enough, the jurisdiction of the civil Court to entertain suits for injunction or possession on the strength of title as against a trespasser is not taken away by the Act. It is retained; but its jurisdiction to try and decide the question of the existence of the tenancy claimed by the defendant is taken away by the new Act and that jurisdiction is given to the Land Tribunal and the civil

1. 1969 K.L.T. 822.
2. 1969 K.L.T. 499.

Court is commanded to accept the decision of the Land Tribunal on the questions referred to it and to pass a decree accepting the decision of the Tribunal—although the civil Court—it may happen to be a District Court or a Subordinate Judge's Court—may justly feel that the decision of the Land Tribunal on the question referred to it is wrong and perverse and contrary to law. Paradoxically enough, the ultimate decree in the cause (which is based on the decision of the Land Tribunal) will have the appearance and effect of a decree and judgment of the civil Court, although the civil Court has not applied its mind to the matter in dispute and is not in any way responsible for the decree and judgment: Nothing can be more absured and ridiculous than such a situation. In my opinion, the provisions of new section 125 constitute an insult to the judiciary.

Sub-section 7 of new section 125 enacts a contradiction in terms. The first part of sub-section 7 prohibits the granting of injunction or appointment of receiver by the civil Court only till the Land Tribunal decides the question of the existence of tenancy etc., referred to it under sub-section 3. It is obvious that the words "any such injunction or appointment" occurring in the second part of sub-section 7 can relate only to the injunction granted or receiver appointment made by the civil Court, under the first part of this sub-section, *viz.*, injunction granted or receiver appointments made by the civil Court in any suit or other proceeding coming within the purview of sub-section 3. And if, as I shall show presently sub-section 3 applies only to suits and other proceedings initiated after the coming into force of the Amendment Act (XXXV of 1969), and suits and other proceedings pending at the commencement of the Act of 1969 will not fall within the purview of sub-section 3, injunctions granted and receiver appointments made by the civil Court in suits and proceedings pending at the commencement of the new Act cannot be affected and cannot be treated as cancelled. The second part of sub-section 7 is inconsistent with the first part and is also in irreconcilable conflict with the proviso to sub-section 1 which is a saving clause, saving proceedings pending in any civil Court from the operation of sub-section 1 which is the provision that bars the jurisdiction of the civil Court to decide any question or matter which is required to be decided by the Land Tribunal. It is obvious that the question as to the existence of the alleged tenancy mentioned in sub-section 3 is a question which is "required to be decided" by the Land Tribunal within the meaning of Sub-section 1.

Apart from the proviso to sub-section 1 of section 125, the language used in sub-section 3 also shows that only suits and other proceedings which are instituted after the coming into force of the Amendment Act, 1969 come within the purview of sub-section 3. Note that the expression used in sub-section 3 is "arises". Where therefore a dispute or question as to the existent of tenancy has already arisen between the parties in a suit or proceeding pending at the commencement of the new Act, in other words, where a civil Court is seized of the question or dispute in a suit or proceeding instituted before the commencement of the Act, the civil Court will not lose its jurisdiction to adjudicate upon that question and therefore is not bound to stay the suit and refer the question to the Land Tribunal for decision and the civil Court is competent to grant injunctions and appoint receivers in such suits and proceedings. Such suits will not come within the purview of sub-section 3. In other words, the provisions in sub-sections 3 and 7 commanding stay of the suit and reference of the question mentioned in sub-section 3 to the Land Tribunal and prohibiting the granting of injunction and appointment of receiver have no retrospective operation and are inapplicable to suits and proceedings instituted before the coming into force of the Amendment Act. This principle is illustrated by the recent Full Bench

decision in *Neelakandeswarulu's case*[3] The decision in this Full Bench case turned upon the correct interpretation of section 56 (1) of the Andhra Pradesh Abolition and Conversion Act XXVI of 1948 which provide *inter alia* that when, after an estate is notified, *a dispute arises* as to (*c*) who is the lawful ryot in any holding, the dispute shall be decided by the "Settlement Officer". The question before the Full Bench was whether section 56 (1) applies to a case where the dispute contemplated by the section arose before the notification under sub-section 4 of section 1 was published on 27—1—1964 and as and from that date the estate in suit stood transferred to the Government. The suit had been filed on 25—4—1959 and had been decided in plaintiff's favour on 24—1—1962. The appeal was filed in the High Court on 1—3—1962. The notification under sub-section 4 of section 1 transferring the estate to the Government was published only during the pendency of the appeal—on 27—8—64. The Full Bench held that the provisions of section 56 (1) are not retrospective in operation, in divesting the jurisdiction of the civil Court in matters arising before the date when the section came into operation. According to the learned Judges, a dispute will arise only when such a dispute has to be determined by some authority competent to determine it. "Where, however, a dispute in fact arises for adjudication before any of these authorities competent to determine it prior to the estate being notified, it cannot be said that the dispute arises again subsequently at any time". "The language of section 56 (1) does not lend itself to the interpretation, whether express or implied, that the authorities already seized of a dispute in respect of matters referred to in that sub-section are prohibited from adjudicating thereon". Again Their Lordships say: "It is a well established principle that a jurisdiction once vested cannot be divested unless the Legislature has expressly or by necessary intendment directed otherwise". The principle had been laid down earlier in another Bench decision of the Madras High Court by Govinda Menon and Chandra Reddy, JJ., in an unreported case (which is referred to in the Full Bench decision) where their Lordships held that section 56 of the Abolition Act (XXVI of 1948) does not affect pending proceedings nor does it take away the rights incidental to the filing of the suit.

3. A.I.R. 1970 A.P. 1.

ABOLITION OF PRIVY PURSE HOW UNCONSTITUTIONAL.

By

K. R. R. SASTRY, M.A., M.L. (*Jurist*).

The treaties, engagements and Sanads of Indian States made by the paramount power—whose successor is India—have been found after a deep examination to have all the characteristics of those with *part-sovereign* states. "With shreds of sovereignty intact, with Rulers who had some rights of foreign sovereigns while travelling abroad, with subjects who like their cousins across the all—too thin frontier were British protected subjects while travelling outside their states, the status of Indian States that emerged from legal analysis was quasi-international." (Treaties, Engagements & Sanads—K.R.R. Sastry, p. 307).

Under the Indian Independence Act, 1947, these States had three alternatives open for them. To get merged volitionally into the neighbouring Indian provinces or with Pakistan (if principles of geographical contiguity, viability and other paramount considerations warranted it) or to become *Islets of independence*. By and large, good sense prevailed and except Junagadh and Hyderabad, all States sacrificed to merge either with India or Pakistan.

Solemn covenants or agreements were made with them by India's Bismarck "guaranteeing" them "the payment of any sums free of tax". Under Article 291 of India's Constitution such sums "shall be charged on and paid out of the Consolidated Fund of India".

Further, under Article 362 "due regard shall be had to the guarantee of assurance given under any such covenant or agreement as is referred to in Article 291 with respect to the personal rights, privileges and dignities of any Ruler of an Indian State".

The short point is, can Parliament *unilaterally* treat these solemn covenants as scraps of paper by amending Articles 291 and 362?

There are two insuperable legal objections:—

(1) As the covenants have the character of treaties under international law and custom, they should not be unilaterally scrapped.

(2) The remedy to the aggrieved party may be sought nationally through a request made to the President under Article 143 "to obtain the opinion of the Supreme Court". Failing which, there is no bar to go to the Hague, Court of International Justice after exhausting national remedies.

That the unilateral repudiation of a solemn covenant is "of such a nature and of such public importance" has only to be stated to be accepted (Article 143).

En passant, the *Clausula Rebus Sic Stantsbus* is neither a customary nor a conventional rule of international law. Thus treaties to be unilaterally altered may happen due to impossibility of performance or frustration of the objects of the treaty (Vide K.R.R. Sastry—*Studies in International Law*, 1952, p. 213) *The Canadian Bar Review*, April, 1935).

Certainly, India the successor strong government cannot in decency plead "that these treaty obligations had been imposed upon (her) at a time when the forces arrayed against her were too strong to be resisted". She certainly could not be stated to have accepted them willingly under a duress". (Bryce—*International Relations*—p. 168).

Apart from these weighty legal considerations, any gentleman is entitled to raise the issue: What are the provocations for such hurried pieces of legislation, when the highest Court of the land, the guardian and interpreter of the Constitution, has very recently characterized the hurried act of nationalization of 14 Scheduled Banks as tainted by "hostile discrimination"?

Elsewhere objections to such a step have been raised on grounds of morality and international comity.

It just remains to add that, under Article 51 of our great Constitution, India "shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another";

Certainly to repudiate unilaterally solemn covenants enshrined in the Constitution is to dig at the roots of international law and treat "treaty obligations" as "*scraps of paper*"

'BEST JUDGEMENT' IN SALES TAX ASSESSMENT*

by

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The concept of taxes on sales to replenish the coffers of the State is as ancient as the pyramids of Egypt. Ancient history bears testimony to the fact that Pharoahs of Egypt. the rulers of Athens and Caesars of Rome resorted to this levy[1]. But the modern concept of sales-tax, as we know it, is of recent origin. The First World War left both the victors and the vanquished with empty treasuries and compelled them to seek for a stable source of revenue that would absorb at least partially the shock of ever-expanding budgets. Moreover, by the time most of the countries had decided on the imposition of sales tax, they had also become agreeable to the idea of a Welfare State in which the State was the guardian of many functions thereto regarded as belonging to the area of private enterprise. This again in turn led to the inevitable increase in the size of the budget. The relentless search for new resources to balance the budget hit upon the device of taxes on sales as an elastic source of revenue suited to the needs of the day[2].

The method of assessment in a Welfare State like every other state action has necessarily to be carried out with the least possible hardship to the individuals. Assessment of tax on sales[3] affects not only the sellers and purchasers who are termed dealers or assessees but also to a large extent the consuming public. The concept of best judgment assessment forming part and parcel of every sales tax law in India is introduced as deterrent against evasion of tax but the statutes provide necessary safeguards against arbitrariness of the taxing authorities so as to give the dealers the maximum measure of justice.

Assessment is a function which particularises the exact sum that a person is liable to pay[4]. Under a sales tax law the dealer has to file a return before a stipulated time showing the quantum of business, the details regarding exemptions and the amount of tax to be paid. If the assessing authority[5] agrees with

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1. *New India Sugar Mills* v. *Commissioner of Sales Tax*, (1964) 1 S.C.J. 644 at p. 655 : A.I.R. 1963 S C. 1207. In the case Hidayatulla, J., traced the history of sales tax in the World as well as in India.

2. 'Moral' legislation became a part of welfare legislation. 'Prohibition' is the best illustration. This single subject required in states where prohibition was enforced, immediate replenishing of the treasury. Thus in Madras in 1939 Sales tax was introduced for the first time along with prohibition.

3. Bhagawathi, J., has observed in *Bengal Immunity Co.* v. *State of Bihar*, (1955) 2 M.L.J (S C.) 168 : (1955) An.W.R. (S.C.) 422 : (1955) S.C.J. 672 : A.I.R. 1955 S.C. 661 at p. 710) that the transaction of sale or purchase is not a unilateral one but a bilateral one and sales tax is to mean purchase tax too. But framers of the Indian Constitution had put this idea more specific and mentioned taxes on "sale and purchase". *See*, Entries 54 of List II and 92 of List, Schedule VII of Indian Constitution.

4. *Whitney* v. *Commissioner of Inland Revenue* (1926) A.C. 37 at p. 52 per Lord Dunedin.

5. Sales tax officers are the assessing authorities in most of the Sales tax legislations. In Madras a Commercial Tax officer exercises the powers of assessing authority.

the return there is no question of a contest between the dealer and the authority because the tax liability as proposed by the dealer is accepted by the authority. On the other hand concept of best judgment pre-supposes the absence of a return or a return which is incorrect or incomplete[6]. Best judgment takes place only when the dealer has not submitted his return as prescribed or when it appears to the assessing authority that the return submitted is incorrect or incomplete. The time for imposing a best judgment assessment spreads from the time of the dissatisfaction of the authority with the assessee's return or on assessee's failure to submit the return to the time of the final fixation of tax liability. Here arises a 'lis' between the assessee and the assessing authority as to the existence of, or the quantum of, the tax liability.

What is best judgment assessment.—Best judgment assessment is an assessment under statutory power exercised by the assessing authority in estimating the extent of the business of the dealer eventually leading to the quantification of his tax liability. The authority is allowed to exercise its discretion in this regard. This discretion is not the result of any whim or fancy. Subba Rao, J. has observed in *State of Kerala* v. *Velukutty*.[7]

"The limits of the power are implicit in the expression 'best of his judgment". Judgment is a faculty to decide on a matter with wisdom truly and legally".[7-8]

In order 'to decide' matters 'truly' there must be facts on which alone the decision can be built. That is why Subba Rao, J. holds in *Velukutty's case*[7-8] that the estimate of the turnover of the dealer must have a rational nexus to the materials available and to the circumstances of the case. In order to 'decide legally' the assessing authority has to follow the established canons of judicial process. This brings in the procedural fairness of the best judgment assessment. These two requirements—substantive and procedural—are the limitations upon the assessing officer when he exercises his best judgment in particularising the exact quantum of the tax liability of the assessees.

I

Substantive aspects of best judgment.—Lord Russel of Killowen[9] spoke about the substantive aspect of best judgment as follows:—

"The officer.....must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must be able to take into consideration the local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous return by and assessments of the assessee and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guesswork in the matter, it must be honest guesswork..."[10]

6. *Bata Shoe Co. P. Ltd* v. *Joint Commercial Tax Officer* I.L R. (1968) 3 Mad. 491 : (1968) I M.L J. 295 at 297 : (1968) 21 S T.C. 135 (Madras) Per Veeraswamy, J., p. 138.

7-8. (1966) 17 S T.C. 465 at 470 (S.C.) : 60 I.T.R. 239.

9. *Commissioner of Income-tax* v. *Badridas*, (1937) 2 M.L.J. 43 : 64 I.A. 102 : A.I.R. 1937 P.C. 133 at 138.

10. These observations had great influence in India *cf. State of Kerala* v. *Velukutty* (1966) 17 S.T.C. 465 : 60 I.T.R. 239 S T.C. 465 (S C.) : *Raghubar Mandal* v. *State of Bihar*, (1958) S.C.J. 22: (1957) 8 S.T.C. 770 (S C) : *Gulab Chand Lexmi Narayan* v. *Commissioner of Sales-tax*, (1964) 15 S T.C. 618; *Pyarelal* v. *State of Madras*, (1964) 15 S.T.C. 9. (Madras) : *Jammy Narasayya Pristy* v. *State of Orissa*, (1958) 9 S.T.C. 648 (Orissa) : *Madu Gala Pappayya* v. *Province of Madras*, (1956) 7 S.T.C 180 (Andra Pradesh) : (1956) An.L.T. 85.

The words of Lord Russel of Killowen show that the best judgment of the assessing authority involves some element of guesswork. This guesswork is inevitable because the officer either disagrees with the return or other evidence furnished by the dealer, or has to arrive at a figure himself when the dealer does not file the return or other evidence at all. In finding out the extent of the tax liability the officer has to arrive at a turnover on the basis of which he has to calculate the tax. In estimating the turnover the officer is not left with any 'wide discretionary power'. The quintessence of the *Badridas decision*[10-a] is that the guesswork involved in the estimate must be honest and should result in a fair and proper estimate considering all the circumstances of the case.

Relation between estimate and available materials.—The estimate of the turn-over of the business of the dealer must be based on something more than a suspicion when the return and accounts of the dealer are rejected. In *Raghubar Mandal* v *State of Bihar*[11] the Supreme Court quashed the arbitrary assessment by the officer who "indulged in a pure guess and adopted a figure without reference to any evidence or any material at all". In this case the Court had accepted the principles laid down in *Badridas case*[12] as well as those in *Dhakeswari Cotton Mills' case*[13] The Supreme Court held in *Velukutty's case*[14] that the element of guesswork in best judgment "shall not be a wild one but shall have a reasonable nexus to the available material and circumstances of the case". In *Gopala Srinivas Shenoy* v. *State of Mysore*[15] the question before the Mysore High Court was whether a tiny little book discovered in the premises of the dealer was a valid material on which the best judgment could have been based. The judge held that it was not at all a book of accounts especially when the dealer was *bona fide* believing that his business did not come to the assessable minimum. In a nutshell the materials on which the estimate is based must be sufficient ones so as to deduce reasonably a best judgment assessment.[16]

It is submitted that a judicial examination of all the materials is an essential pre-requisite of best judgment assessment. This necessarily follows that the assessing authority should have collected materials sufficient to base his judgment in the event of the default of the assessee to produce accounts or correct accounts. The materials are obtained by the officer by means of inspection, enquiry, checking of accounts, etc. These means are provided in every sales tax law in order to check the accuracy of the return as well as to discover the real sales and purchases when no return is submitted. They will bring to light unaccounted

10-a (1937) 2 M L.J. 43: 64 I A. 102· A.I.R. 1937 P.C. 133 at 138.

11. (1958) S C.J. 22 : A I.R. 1957 S.C. 810 per S. K. Das, J.

12. *See*, 10-a supra.

13. *Dhakeswari Cotton Mills Ltd* v *Commissioner of Income-tax West Bengal*, (1955) 1 M.L.J. (S C.) 60 : (1955) An.W.R. (S C.) 60 : (1955) S C.J. 122 : A.I.R. 1955 S.C 65 per Mahajan, C J. The officer when he exercised best judgment was not fettered by any technical rules of evidence and pleadings and was entitled to act on material which might not be accepted as evidence in a Court of law. But the Chief Justice was emphatic in declaring that the officer was not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment.

14 *State of Kerala* v *Velukutty*, (1966) 17 S.T.C 465 : 60 I.T.R 239. *See* also *Jayaraj Nadar* v. *State of Madras*, (1968) 21 S.T.C. 180. (Madras) per Veeraswami J., p. 183, ".... best judgment .....cannot be a wild one, but a reasonable and justifiable guess based on some material" *Ponnuswamy* v *The Government of Madras*, (1968) 21 S.T.C. 71 (Mad.) per Veeraswami J., at p. 72, " Any estimative of turnover should be reasonable and must be based on some materil."

15. (1968) 21 S.T.C 483 (Mysore), After quoting *Volukutty's case*, 60 I.T R. 239, the Court held that the addition to the turnover for the alleged business in firewood, furniture and timber was a speculation and should be struck off.

16. (1968) 21 S.T.C. 483 : at p. 484.

stock, unexplained cash, unbilled sales, the average daily sale, secret books, etc.[17] and supply a variety of materials on which best judgment can be exercised by the officer.

Materials on inspection as basis of assessment.—Facts found out on inspection of the business place form a good basis for the best judgment of the officer. In *Debu Lal Gadarmal* v. *State of Bihar*[18] the dealer had lost his book of accounts and could not produce the same before the officer. But the assessing authority based his estimate upon the report of the inspector who had seen the accounts previously. The assessment based on the report of the inspector was endorsed by Rama Swami J. On the other hand in *Jamini Narasayya Prasty* v. *State of Orissa*[19] the question was whether an assessment disregarding the inspection report was valid or not. Krishna Rao J. who thought that the inspection report would have played a good role in moulding the best discretion of the officer, quashed the assessment. However, the estimate of a turnover on the basis of the business of a single day when the inspection took place, cannot in fairness be said to represent the actual business for the whole year.[20] In order to base the best judgment upon the materials on inspection as has been said early they must be reasonably sufficient ones. The mere discovery of a number of workers in the place of business must not induce the officer to jump into speculations regarding the estimate of the business[21]. The detection of certain unaccounted bills will not give the officer a discretion to add to the taxable turnover an exaggerated multiple of the amount of unaccounted bills especially when the dealer included the amount in the returned figure[22]. If he does so the addition will be a mere guesswork and bad in law.

The fact that the dealer is an active participant in supplying materials for judgment of the officer is a substantial attribute of the process of inspection. The explanations of the dealer at the time of inspection are helpful to a large extent in moulding the best discretion of the officer. It is peremptory on the part of the officer inspecting to have put in black and white all the details of inspection so as to enable the assessing authority to correlate them accurately with the estimate of the turnover. The recording of the details will also erradicate any fantastic and whimsical conclusions of the officer, that will make his judgment far from the best.

Discrepancies in the accounts as basis.—It is a statutory obligation of all the dealers to maintain true and correct accounts of his business. In the absence of a return or in the absence of a correct return the accounts of the dealer is another basis on which the best judgment assessment can be made. Checking of accounts and cross verification of accounts of the dealer with that of another who had transactions with the former may bring out many discrepancies in the form of defects and suppressions in accounts which are not maintained truly and correctly. These defects are to be put to the assessees and their explanations sought. Then the officer must weigh the defects validly explained by the dealer against the defects unexplained and must estimate a taxable turnover having some logical proportion to the aggregate defects unexplained[23].

17. The findings of the present writer from his field study of nearly 400 Orders of the Appellate Assistant Commissioner, Ernakulam between the year 1962-63.

18. (1957) 8 S T.C. 583 (Patna).

19. (1958) 9 S.T.C. 648 (Orissa).

20. *Alikoya* v. *State of Kerala*, (1961) 12 S.T.C. 567 (Kerala).

21. *Sri Gopala Srinivasa Shenoy* v. *State of Mysore*, (1968) 21 S.T.C. 483 (Mysore.)

22. *Yousoof Sahib* v. *Addl. Commercial Tax Officer*, (1967) 19 S.T C. 210 (A.P.) per Gopal Rao Ekbote, J.

23. *See* 17 supra.

It is an objective scrutiny that the officer must have with these materials. This objective scrutiny will help the officer in arriving at reasonable conclusions. Thus when the accounts of a dealer show that there is suppression both of purchases and sales, it is not reasonable to make two separate additions for suppressions in purchases and sales. In *Ponnuswami* v. *Government of Madras*[24], it was correctly held that when purchases and sales were not shown in accounts it might be reasonable to assume that goods covered by such sales to the extent possible came from the goods purchased and not disclosed.

Relation between estimate and suppressed facts.—The method in which the officer correlates the details of detected suppression with the estimate of the business of the dealer is a matter of great importance. In *Velukutty's case*[25], the Supreme Court held that an addition made by the Sales Tax Officer to the branch office turnover for suppressions detected in the Head Office was without any basis and bad in law. A logical deduction from the ratio of this decision is that detection of suppression in one branch and in one item of goods must not give a *carte balanche* to the officer for arbitrarily adding to the turnover in other branches of the dealer or to the turnover of other commodities of the same branch. The trend of the Kerala decision in *Appukutty* v. *State of Kerala*[1] is that suppressions found through the secret books of a third party do not give valid material unless it is proved after giving the assessee an opportunity to cross-examine the owner of the secret books. In the second *Appukutty's case*[2] the Kerala High Court quashed a ten per cent. addition to the reported net turnover without any relationship to the detected suppression and without consideration of the assessee's explanation. Stressing the need to protect the assessees from the whimsicalities of officials who "allowed enthusiasm to overrun judicial discretion and fairplay". *Govind n Nair, J.*[3] observed:—

"..... the rejections of account books, does not give the taxing authority a right to make any assessment in any way it likes without reference to the material before him.....the process of best judgment is a quasi-judicial process, an honest and *bona fide* attempt in a judicial manner to determine the tax liability of a person....."[4].

From the above it is abundantly clear that when a suppression or a clandestine transaction is found out the sales-tax Officer is not left with a wide discretion to assume that such suppressions are practised occasionally or throughout the assessment year. In *H. M. Esufali* v. *Commissioner of Sales Tax*[5] a sale book for a period of nineteen days showing a sale of Rs. 31,171.28 was detected. Taking this amount as escaped turnover for nineteen days as a yardstick the assessing authority assumed that the assessee continued to effect in the entire year similar extra transactions which were suppressed. Dixit, C.J., held that

24. (1968) 21 S.T C. 71 (Madras) per Veeraswami, J., p. 72.

25. (1966) 17 S T.C. 465 : 60 I.T.R. 239.

1. (1963) 14 S T C. 489.

2. (1965) K.L.T. 805.

3. *Ibid.*

4. Ibid at p. 508.

5. (1969) 24 S.T.C. 1 (M.P.) *See* also *M Moideenkutty* v. *Sales Tax Officer*, (1967) 19 S.T.C. 302 (Kerala). Discovery in a check post of two purchases affected by the petitioner induced the officer to assume that such transactions were clandestinely carried out on every week of the year and to estimate a turnover on the basis of that assumption. Govindan Nair, J., held that this assumption was without basis.

there was no basis for such an assumption[6]. Mere discovery of a 'tiny little book' showing small transactions can never present signs of large scale suppressed transactions[7]. It is submitted that on the moderate materials one cannot make a gigantic assessment.

In a contingency when the dealer does not in any manner help the Sales Tax Officer in forming his best discretion, the officer may make his judgment upon certain established facts[8] such as three times the closing stock, a percentage addition[9] to the purchase value as in the case of hotel business or the extent of the consumption of electrical energy[10] spent on the machinery used in business or the multiple of the quantum of business in a day[11]. The assessments of the same dealer in the previous years[12] may also form a basis for best judgment. But these working rules cannot be applied mechanically[13] for the assessment will depend upon so many factors some of which are not capable of quantitative analysis[14]. It is submitted that the changes in the situation of business, the rise and fall in the quantum of business, the marketability[15] of the particular commodity dealt with, the changes in the statute with regard to the rate of tax and the fluctuations of prices in the market are some of the important factors that the sales-tax officer has to take into account before fixing the tax liability of the dealers. In this connection one has to agree fully with *Venkadri, J.*[16] who held that the adoption of a flat rate in making an estimate should have been made only on the basis of departmental sample surveys establishing the correct relationship between the nature of input and output in various trades. Departmental surveys on all the above aspects of different types of business are quite desirable to provide the necessary guideliness to the assessing authorities.

Procedural aspects of 'best judgment'.—In the procedural sphere of best judgment assessment the assessing authority is not given an arbitrary power or wide discretion. As the acts of the assessing authority involve civil consequences to the assessee, observance of natural justice is the keynote of the power of 'best judgment'.

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6. Iron and steel in which the assessee was dealing had no uniform market day after day and the sales depended on the extent of constructional activity. Moreover iron & steel being controlled commodity it should have been easy for the Sales Tax Officer the find out the quantity of iron and steel secured by the dealer under permits and the quantity sold from the assesee's stock register The Judge observed that no such attempt was made.

H. M. Esufali v. *Commissione of Sales Tax* (1969) 24 I.T.C. 1 at pp. 7, 8.

7. *Sri Gopal Sreenivas Shenoy* v *State of Mysore* (1968) 21 S.T.C. at 484.

8. *Basantal* v *Commissioner of Sales Tax*. (1963) 14 S T C 395 (Allahabad).

9. *Pyarelal* v *State of Madras*, (1964) 15 S T C. 9 (Madras).

10. *Nazir Khan* v. *State of Mysore*, (1969) 23 S.T C. 269 (Mysore) : *Raja Pullaiah* v. *Deputy Commercial Tax Officer*, (1969) 24 S T C. 90 (Andhra Pradesh) : 73 I T R. 224.

11. *Allkoya* v. *State of Kerala*, (1961) 12 S.T C. 567 (Kerala)

12. 1. *Gulabchand Laxmi Narayan* v. *Commissioner of Sales Tax*, (1964) 15 S T.C. 618 (M.P.) The assessments for 1953-54 and 1954-55 were made on the basis of the assessment for 1952-53, which itself was on best judgment made on the average of the real sales of the previous three years. *viz*, 1949-50, 1950-51 and 1951-52. The Court held that the turnover for 1952-53 was a real and actual estimate The estimate for subsequent years based on that for 1952-53 was also held to be real and not arbitrary.

2. *Jagdish Prasad* v *Board of Revenue*, (1951) 2 S T C 21 (Calcutta). The assessee had not filed any return. In the previous year the taxable turnover was 7 5 per cent. of the gross turnover. Though the officer increased the gross turnover he maintained the percentage of the net turnover. The Court approved the assessment.

13. *Narayanappa* v. *State of Mysore*, (1962) 13 S T C. 993 (Mysore) at p. 1009.

14. *Moideenkutty* v. *Sales Tax Officer*, (1967) 19 S T C. 302 (Kerala).

15. *H. M Esufali* v. *Commissioner of Sales Tax*, (1969) 24 S.T.C. 1. M.P.

16. *Pyarelal* v. *State of Madras*, (1964) 15 S.T.C. 9 (Mad.).

Official Bias of the authority.—The first principle of natural justice that no man shall be a judge on his own cause involves three[17] kinds of bias—pecuniary, personal but non-pecuniary and lastly official. Eventhough it is not strictly necessary to consider the Sales Tax Officer to be identical with the Government, generally there are no two opinions on the question whether he is not a judge of his own cause, because none other represents the Government which appoints him, to assess people to tax and carry out many administrative functions of an idencidendal nature. In this context there is every chance of the authority being carried away by the last mentioned bias, *viz.*, official bias[18]. In every arbitrary assessment elements of official bias lie hidden because such assessments may not be based on objective appreciation of the conditions of the particular assessee but on the enthusiasm of the authorities to increase the revenue.

In the *lis* between the Government and the dealer, the Sales Tax Officer represents the revenue in the role of proving the tax liability for a specific amount. In addition to this he has to act as a judge in determining the tax liability. The co-mingling of both these prosecuting and judging functions in the same authority may create official bias and to that extent weakens the position of the Sales Tax Officer as an impartial and disinterested umpire. The possible solution is to separate these functions and to appoint separate officers for each. If erstwhile 'prosecutors' are appointed as 'judges' it might be to have officers in whom the judicial balance will never be borne. The desirable thing is to appoint legally qualified and specialized persons of some standing at the Bar.

Reasonable opportunity.—The second rule of natural justice that no man shall be condemned unheard is part and parcel of the procedural requirements of best judgment assessment. The duty of adminstrative adjudicators of hearing the other side before condemnation, is brought out in no better words than those of *Loreburn, L.C. in Board of Education* v *Rice*[19].

"They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in controversy for correcting or contradicting any relevant statement prejudicial to their view".

The best judgment assessment is a process which deals with many circumstances prejudicial to the rights and claims of the assessees who if they are given an opportunity, may be in a position to explain away the facts and circumstances prejudicial to them.

Necessity of opportunity.—All sales tax legislations in India provide that when an assessee files a return which, in the opinion of the assessing authority, is incorrect or incomplete, he should be given an opportunity to prove his return with accounts or any other evidences. The factors that guide the authority to arrive at a conclusion whether the returns are correct or not, may not have worked well. Leach C.J. observed as early as in 1939.

"Information which the Income-tax Officer has received may not always be accurate and it is only fair when he proposes to act on material which he has obtained from an outside source that he should give the assessee an opportunity of showing, if he can, that Income-tax Officer is misinformed...."[20]

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17. Griffith & Street, Principles of Public Administration (1957) pp. 156, 157.

18 "In the case of official bias the officer is not actuated by any personal ill will He is so imbued with the desire to promote the departmental policy that he becomes blind to the existence of the interest of the private individual. Markose A. T. Judicial Control of Administrative Action in India (1956) p. 217.

19. (1911) A.C. 179 at p. 182.

20. *Gunda Subbayya* v. *Commissioner of Income-tax* I.L.R. (1939) Mad. 404 : (1939) 1 M.L.J. 451 at p. 454 : A I.R. 1939 Mad. 371 at p. 373. The provision of best judgment in Income-tax law is more or less identical with that in the sales tax legislations.

As the one-sided information of the officer is partial, it is safer to act on it after getting the view of the persons whose interest is going to be prejudiced by acting on such a view. Between the date of the decision of Leach C.J., *i.e.*, 1939 and today the concept of opportunity in sales- tax best judgment assessment has grown to have its various phases.

How opportunity is given.—The assessing authority implements the concept of reasonable opportunity in the form of sending a pre-assessment notice to the assessee. This notice must contain the basis and proposal of the turnover of the assessee. In *Ramanath Shenoy* v. *Sales Tax Officer.*[21] Vaidyalingam, J., observed:—

"In order that a party may have a full and effective opportunity....it is *obligatory* on the part of the officer to place before the assessee the basis which he proposes to adopt in making the best judgment assessment".[22]

The same judge in another case[23] held that there was a duty on the part of the officer,

"to make available to the petitioner every point or aspect that he proposes to take into account in making the best judgment, and give the assessee opportunity to place all the objections that may be available to him both under law and on facts, regarding the proposal".

Mere statement in the pre-assessment notice of the facts of suppression[24] or of the description of the defects in the accounts[25] does not amount to a correct proposal of all the basis adopted for best judgment assessment. When inferences are derived from escaped or suppressed transactions liable to be taxed all those inferences should be put to the dealer for his explanation.[1] The notice should not be an empty and idle formality.[2] It must be 'full and effective'.[3] For this it is obligatory on the part of the officer to issue a pre-assessment notice containing all the basis of estimate and every point or aspect of the proposal.[4] For instance take the case of a best judgment assessment based on the return or the estimate of the previous year. The fact that the previous year is going to be taken as the basis should have been intimated to the assessee in the pre-assessment notice.[5] If the officer thinks that there must be an addition to the previous return the reasons of the addition must also be stated in the notice. It is probable that there might have been a fall in the actual quantum of the business of the assessee in the assessment year. This change might not have been noticed by the officer. Only if the basis as to the previous return and all other aspects of the proposals are intimated to the dealer, he would have an effective opportunity to bring the actual state of affairs to the scrutiny of the officer.

Notice and personal appearance of the dealer.—Notice of appearance of the assessees before the officer is necessary in certain cases when the officer thinks that assessee's personal explanation will clear away many of his doubts.

21. (1962) K.L.J. 277.
22. Ibid at p. 285, Emphasis is mine.
23. *Namadeva Shenoy* v. *Sales Tax Officer*, (1962) K.L.J. 458.
24. *Ibid.*
25. *Abdul Rahiman* v. *Sales Tax Officer*, (1963) 14 S.T.C. 155 (Kerala).
1. *Murali Trading Co.* v. *Joint Commercial Tax Officer*, (1967) 1 M.L.J. 258: 80 L.W. 163: (1967) 19 S.T.C. 221 (Mad.) per Anantanarayan, C.J.
2. *Krishnan Nair* v. *Sales-tax Officer*, (1963) K.L.J. 933.
3. *Ramnath Shenoy* v. *Sales-tax Officer*, (1963) 14 S.T.C. 231.
4. *Namadeva Shenoy* v. *Sales-tax Officer*, (1962) K.L.J. 458.
5. *Gulabchand Laxmi Narayan* v. *Commissioner of Sales-tax*, (1964) 15 S.T.C. 618 (M.P.).

The personal meetings of the assessees and the assessing authority with evidence to substantiate the points of view of both sides will help clearing much 'dead wood' as well as inculcating confidence in the assessee that they get a fair deal from the assessing officer. But if a notice is issued for the appearance of the assessee and the notice does not contain all the basis of estimate of the turnover, the opportunity given to the assessee cannot be said to be effective.[6] If in pursuance of such a notice the assessee appears before the authority the appearance must not be taken as a sign of his silent approval of the basis which was not disclosed to him. In a pre-assessment interview, if any, the officer should seek the explanation of the dealer on every item of evidence relied on by him.[7]

Reasonable opportunity is all possible opportunity.—The failure of the assessee to produce evidence in support of the returns even on notice may induce the Sales Tax Officer to issue another notice proposing the basis for best judgment assessment. If in reply to the latter notice the assessee produces the accounts instead of filing objections as to the basis, the officer should not fall back upon making an assessment all on a sudden. On such an occasion the officer has to give a further opportunity to the assessee as to why he cannot rely on the books and to make known to the assessee any further particulars or basis which he proposes to adopt.[8] An occasion similar to this arose in *Bata Shoe Co.* v. *Joint Commercial Tax Officer.*[9] The dealer neither filed the return within the prescribed period nor even produced the accounts in spite of repeated adjournments for the purpose. Nevertheless before the officer exercised his best judgment the dealer filed the return. The officer did not consider the return. Holding this procedure as wholly unrealistic and unrelated to the task of finding out the true net chargeable turnover the High Court pointed out that the officer should have looked into the return. If he felt that it was incomplete or incorrect, the officer had to follow the procedures in the Act giving an opportunity to the assessee to prove the completeness or correctness of the return.[10]

Reasonableness and legality of opportunity.—An opportunity given to the dealer is not reasonable if he is not in a position to utilize it effectively. A notice calling upon the assessee to appear on a particular day on which occasion he was really unable to present himself, cannot be said to have given him a reasonable opportunity. In *Public Prosecutor* v. *Chandrasekharan*[11] the Madras High Court held that the respondent who was bedridden and unable to move on the day required to be present, was not given a reasonable opportunity. There is a warning note[12] in the judgment that deliberate non-production of accounts and delaying tactics would not be given a free play in the anxiety to safeguard the various aspects of the concept of natural justice. In *Ganesh*

6. *Namadeva Shenoy* v. *Sales Tax Officer*, (1962) K.L.J. 277.

7. *Murali Trading Co.* v. *Joint Commercial Tax Officer*, (1967) 1 M.L.J. 258 : (1967) 19 S.T.C. 221 (Mad.) : 80 L.W. 163.

8. *Abdul Rahiman* v. *Sales Tax Officer*, (1963) 14 S.T.C. 155 (Kerala) per Vaidyalingam, J., p. 158

9. I L R (1968) 3 Mad. 491 : (1968) 1 M.L.J. 295 : (1968) 21 S.T.C. 135 (Madras) per Veeraswami, J.

10. *Ibid.*

11. (1956) 2 M.L.J. 572 : (1957) M.L.J. (Cr.) 127 : (1957) 8 S.T.C. 6 (Madras.) per Somasundaram, J.

12. *Ibid* at p. 572 "If the assessee avoids going to the authorities with necessary account book and if after the issue of two or three notices, he does not choose to be present or that the reasons which he had given are found to be false by the authorities, then certainly they can proceed to assess him to best of their judgment."

Prasad v. *Commissioner of Sales Tax*[13] the Supreme Court has held that a dealer cannot argue that the opportunity given to him is not sufficiently long if the short time given for his explanation has in no way resulted in any prejudice against him. In *Udipi Vasanta Vihar* v. *The Deputy Commissioner.*[14] the Andhra High Court has held that a notice of re-assessment after a four day watch of the assessee's shop cannot be said to be illegal simply because the watch is improper. It is submitted that in this case there is neither violation of natural justice nor limitation upon the usefulness of the opportunity given to the assessee under the law, as the assessee himself has got an opportunity to contend in his reply to the notice that the watch has been illegal or improper.

Consideration of the reply to the pre-assessment notice.—The opportunity given to the assessee though reasonable would not be effective if the assessee's objections to the proposal of the basis are not fully considered by the Sales Tax Officer. Quashing an aribitrary estimate having no relationship to the detected suppressions or to the explanations of the assessee, Govindan Nair, J. observed:—

"The judicial process does not end by making known to a person the proposal against him and giving him a chance to explain but extends further to a judicial consideration of representations and materials..."[15]

The reply of the assessee to the pre-assessment notice may contain many things—the challenge against the basis or quantum of estimate, the disapproval of the rate of tax, the explanation of the defects found on inspection, the claim for the examination of a third party, request for another opportunity, the reasons for the fall in turnover or profits, etc.[16] In short the reply contains the whole case of the assessee against the officers' contentions. It is the bounden duty of the Sales Tax Officer to weigh the assessee's case against his own in the notice. If this is not done the assessment loses its judicial elements and the opportunity already given loses its meaning.

Cross-examination of the parties.—In *Gunda Subbayy's case*[17] Leach. C. J. held that though the materials should be proposed, the source of information might not be disclosed to the assessee. But when the records at the disposal of a third party are utilized as the basis of best judgment, natural justice demands that the assessee affected should have been given an opportunity to disprove the findings from that source. Will this concept of opportunity extend to the area of cross-examining the third party as in a Court? In the *First Appukutty's case*[18] the Kerala High Court held that there was no justification in relying on the secret books of a third party without affording an effective opportunity to the assessee to cross-examine the third party as to the veracity of the entries in the secret books connecting the assessees. But the Gujarat High Court has dissented from *Appukutty's case*[18] in *Jayantilal* v. *State of Gujarat*[19] The Court turned

13. (1970) 1 S.C.J. 68 : (1969) 24 S T.C 343 per Shah, J , at p. 346 : The officer did not give fifteen clear days' notice as provided in the rules. Holding that this provision was not mandatory the judge held, that " unless prejudice has resulted to the tax-payer the proceedings are not to be set aside."

14. (1969) 2 An.W.R 75 : (1969) 23 S T C 6 per Kuppuswamy, J.

15. *M. Appukutty* v. *Sales Tax Officer*, (1965) K.L T. 803 at p. 808.

16. *See* Note No. 17 at p. 44.

17. (1939) 1 M.L J. 451 : A I.R. 1939 Mad. 371 : I.L R. (1939) Mad. 404.

18. *Appukutty* v. *State of Kerala*, (1963) 14 S.T.C. 489.

19. (1969) 23 S.T.C. 11 : Gujarat per Divan, J., in this case the officer detected the suppression of a transction of the petitioner from the *uplak* books of another assessee whose letter to the effect that there was no such transaction, was produced. The petitioner requested the ahthority to cross-examine the other assessee.

down the claim to cross-examine the other assessee from whose *uplak* accounts the officer detected the suppression of a few transactions. The Court held that the evidence under the Sales tax law meant "any material having probative value irrespective of the manner in which the material is produced or of the mode of proving that particular piece of material".[20] The Court held the view that evidence on which the assessing authority should act need not be legal evidence as held in *Appkutty's case*[20-a]. The view of the Gujarat High Court that cross-examination need not be allowed, seems to be not correct. The opportunity to explain the suppressions must be effective and the prejudice caused to the dealer when the facts are not brought out by way of cross-examination, must be the test to be applied. There is a usual plea against cross-examination that the third persons if they are cross-examined, shall always be hostile to the Government and shall help the assessees.[21] This plea is a myth the acceptance of which will be tantamount to the abandonment of the very purpose behind the concept of cross-examination. If the assessee gets a good opportunity in presenting his case in a better way by cross-examining the third parties there is no justice in denying this right.[22]

Failure to file return and opportunity.—Is the assessing authority under an obligation of giving an opportunity even when the dealer does not perform the statutory duty of submitting the return ? The Allahabad High Court[23] maintained that the assessee who did not file the return went out of the picture and it was left to the assessing authority to have the best judgment after making whatever enquiries he deemed necessary. It was not a judicial enquiry.[24] The Andhra High Court[25] held the opposite view. They held that an *ex parte* assessment without proposing the basis was bad and violative of natural justice even though the assessee failed to produce the return and accounts in spite of posting the case several times for the purpose. It is submitted that best judgment assessment is process to be carried out objectively. It has been held in many decisions[1] that a process which should be carried out objectively requires hearing the other side even when the statute is silent. Hence the Andhra decision seems to be correct.

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20. Ibid at p. 17.

20-*a*. (1963) 14 S.T.C. 489.

21. *See* the contention of the Government in *M. Appukutty* v. *State of Kerala*, (1963) 14 S.T.C. 489.

22. Jain S. N. 'Best Judgment' under the Indian Sales-tax Laws (1965) 7 J.I.L I. 82 at p. 95.

23. *Quameruddin* v. *Commissioner of Sales Tax*, (1963) 14 S T.C. 534 per M. C. Desai C. J. Estimate without giving notice to the assessee who had not filed the return within the time prescribed by Rules was validated. Also see *Adarsh Bhandar* v. *Sales Tax Officer*, (1957) 7 S.T.C. 666 (Allahabad per Mootham, C. J., at p. 681.

24 *Adarsh Bhander* v. *Sales Tax Officer*, (1957) 7 S.T.C. 666.

25. *Devan Hamman* v. *State of Andhra Pradesh*, (1960) 11 S.T C. 473 (Andhra) per Anantanarayana Iyer, J.

1. That the objective determination of a question warrants a judicial process even in the absence of a statutory provision has been asserted by Wanchoo J., in his two decisions in *Board of High School* v. *Ghanshyam*, (1963) 2 S.C J. 599 : A.I.R. 1962 S C. 1110 and *Board of Revenue* v. *Vidyavathi*, (1963) 1 S C.J. 324 : A I.R. 1962 S C 1217. The two decisions are important because they were made months before *Ridge* v. *Baldwin*, (1963) 2 All.E.R. 66 as set the principle in line with older authorities in England. For other Indian decisions, see *Bhagwan* v. *Ramachand*, (1966) 2 S.C.J. 295: A I.R. 1965 1767 ; *Associated Cement Companies* v. *P. N. Sharma*, (1966) 1 S.C.J. 786: A I.R. 1965 S C. 1595 : *Board of High School* v. *Bagleswar*, (1963) 2 S C.J 651 : A.I.R. 1966 S.C. 875; *State of Orissa* v. *Binapani Devi*, (1967) 2 S.C.J 339 : A.I R. 1967 S.C. 1269: *Ramakanta* v., *District School, Board*, A.I.R. 1969 Cal. 397.

Reasoned assessments.—The necessity of giving reasons for a quasi-judicial decision has been stressed on more occasions[2] than one by the Supreme Court. An assessment order by a Sales Tax authority should contain reasons for its conclusions. This essential requirement is brought out by the following words of Anantanarayana Iyer, J.:

"The assessment order should contain a clear indication of the material on which the turnover is fixed, rates are adopted and the amount of tax is determined so that the assessee may know that fact and make his[3] representations, if any, on those matters".

In *Nazir Khan* v. *State of Mysore.*[4] Somanatha Iyer, J. quashed an assessment on a ground *inter alia* that the officer "did not disclose in his order any material, on the basis of which he found it possible to make the estimate which he made"[5].

Conclusion.—Best judgment assessment is a quasi-judicial process and one sees in it a typical cross-section of the entire field of current public administration. The rapid development of commerce and industry, the consequences of war and inflation and the recognition of Welfare State ideas created circumstances which necessitated an equally rapid development of practice of best judgment in sales-tax. *Pari passu* the judiciary and the administration had to develop substantive and procedural standards in the concept of best judgment in order to preserve the rule of law.

It is now well settled that best judgment process in its substantive side is not a guesswork but an objective determination of the tax liability with a rational nexus to the materials available. The porcedures of inspection, enquiry and checking of accounts will help the sales-tax authorities to gather sufficient materials on which best judgment is based. Coming to the procedural plane the observance of natural justice is not taken as a mere formality. The opportunity is to be enforced effectively. Timely notice proposing the basis to the assessee furnishes reasonable opportunity to the assessee. Consideration of details stated by the assessee in the reply to the notice is necessary ingredient of natural justice. The concepts of examination and cross-examination of persons including the assessee on whose evidence reliance is placed by the authorities, are to be recognised as necessary elements of natural justice. Lastly we are reaching a stage, if we have not already reached it, where it is realised that 'best judgment' must be a 'reasoned' judgment giving the assessee opportunity, just and effective, of carrying his case further to an appellate authority.

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2. *M. P Industries* v. *Union of India,* (1966) 1 S.C J 204 : at p. 207 A I.R 1966 S C 671 at p. 675 per Subba Rao, J., " If Tribunals can make orders without giving reason the said power in the hands of unscruplous or dishonest officers may turn out to be a potent weapon for abuse of power But if reasons for an order are to be given it will be an effective restraint as such abuse, as the order, if it discloses extraneous or irrelevant considerations will be subject to judicial scrutiny and correction. Also see *Harinagar Sugar Mills* v. *Syam Sundar Jhun Jhunjumwala,* (1963) 1 S.C J. 471 : A I.R. 1961 S.C. 1669 : *Govinda Rao* v *State of M P*, (1966) 1 S.C J. 480 : A I.R. 1965 S.C. 1222.

3. *Devan Hanuman* v. *State of Andhra Pradesh,* (1960) 11 S.T.C 473 at p. 478.

4. (1969) 23 S.T.C. 269, (Mysore).

5. *Ibid* at p. 272.

BOOK REVIEW

RELIGION, LAW AND THE STATE IN INDIA, By *J. Duncan M. Derrett* (Faber and Faber, 24 Russell Square, London), 1968. Price 90s net.

Dr. Derrett, Professor of Oriental Laws in the University of London, is familiar to the Indian legal public. He has been writing from time to time on various aspects of Hindu life and Hindu Law and has been subjecting, off and on, decisions of Courts to critical examination. The book under review is a volume of collected papers with however some chapters specially written for the attainment of its purpose, namely, to provide a critical study of the personal laws in India from the earliest times, from the point of view of its evolution and historical development.

India is now a secular State. In furtherance of its ideals of equality, avoidance of discrimination on grounds *inter alia* of birth, caste and sex enunciated in the Constitution and the policy underlying Article 13, large chunks of Hindu personal law have been overhauled. At the same time freedom of conscience and the right to practise religion, within limits set out, are guaranteed under Article 25. Being a secular State there is no patronage of any religion and there is no preference for the religion of the majority of the inhabitants of the country. The majority can no more offer affronts to the religious beliefs of the minorities any more than the latter can, with impunity, wound the feelings of the majority in matters of religion. Does it however mean that the personal laws associated in the minds of the public with the religions beliefs of the people stand excluded from alteration or refashioning by the Legislature? Thoughout the history of Hinduism, religion and law are found woven into the fabric of social life. What precisely was the nature of the association between law and religion, whether disentaglement of the secular elements of law from religious association consistently with the theory of the super-human origin and eternal character of *dharma* is possible, what devices and expedients were resorted to in the past to keep the law moving with the times, and whether the changes embodied in the codified parts of Hindu Law are entitled morally and legally to the faith and obedience to which the laws of the ancient sages were entitled are interesting questions of far-reaching importance. Answers to these questions from an emotional or merely metaphysical plane cannot satisfy. Though a sizable section of Hindus at the present time does not subscribe to its theology or its caste organisation, the majority of Hindus believe in the existence of a higher force and ethical values. The psychology of the masses by and large is still controlled by tradition. Hence purposive research detached from preconceived notions or bias in regard to the questions posed earlier is eminently to be welcomed.

Research involves fact-finding, fact-ordering and correlation. It also involves thinking about the facts and the observation of trends. Dr. Derrett has endeavoured to provide in the book under notice a connected survey of the various points at which religion has provided the law or law has made its impact on religion. He seems to believe in the indigenous legal system and the real continuity of Hinduism and in the ability of the people to adjust themselves even to novel ideas without abandoning their origional standpoint. According to him the rules comprised in the vyavahara portions of the various Smritis do not have their roots in religion at all and hence could be altered as in fact they were altered and reshaped by the sages and the laterday jurists. He relies for this view on a text of the Bhavishya Purana adopted by Apararka and Mitra Misra to conclude that Smriti texts, with a seen purpose, are not rooted in the Vedas like those relating to political science or international law (see pages 98-99). He suggests that the actual relationship between religious doctrine and the rules of substantive law is not that of cause and effect but rather that of form and substance (page 117). In Dr. Derrett's view the

framework into which the legal rules were set was religious in its entirety and it was the master mind of Manu that saw it neat and smooth (pages 117-119). The conclusions are to a degree plausible and attractive. The supporting material is however weak. The Bhavishya Purana is a relatively late and minor juridical work and it is doubtful whether its view had commended itself to any large section of the jurists. Dr. Derrett also points out that there appears to have been no stage at which law was immutable, at which custom was not open to influence from jurists or to modification or even abrogation at the hands of the Ruler (page 152). With this view there is bound to be a large measure of agreement. Chapters 5 and 6 of the book dealing with the " Right to Earn in Ancient India " and " Custom and Law in Ancient India " respectively are penetrative and illuminating. Dr. Derrett has made a critical assessment of the enactments of 1955-56, in Chapters 10 and 11. He considers the policy behind Article 44 of the Constitution that a uniform civil code should be devised wherein all personal laws should merge is sound and he has given useful hints as to the lines on which such a code may be prepared without offending the susceptibilities of any class of people, Hindu, Muslim, Christian or any other.

Dr. Derrett has considered quite a wealth of material and has stated his views forcefully. Occasionally his expression seems to be in the " I know what is good for you " manner, and at places a little bit overdone. When he states at page 336, that " it is widely expected that the increase in the daughters ' rights will lead to quarrels between brothers and sisters unless the latter not only take the dependent attitude which is traditional but also prevent their relations by marriage from attempting to exercise these rights on their behalf," there seems to be little warrant for it. At page 346, he remarks that under section 9 of the Hindu Adoptions Act the Court is given jurisdiction to *order* adoptions when what the Court does under the section is only to *permit* adoptions. These are minor details.

The book under notice is of great merit. It is a scholarly contribution which can be read with profit and pleasure by all thinking persons and students of law in particular.

MULLA. PRINCIPLES OF MAHOMEDAN LAW. Sixteenth edition By *The Hon'ble Mr. Justice Hidayatullah*, Chief Justice of India. (N. M. Tripathi Private Ltd., Bombay), 1968. Price Rs. 12-50.

Within a period of about 60 years from the date of its first publication in 1906 Mulla's book on Mahomedan Law has gone through no less than sixteen editions which testifies to its high popularity, value, and usefulness as an authoritative statement of what may be called the principles of Anglo-Mahomedan Law. The present edition has not disturbed the original scheme of the earlier editions. A feature enhancing the utility of the work is the indication also of how the principles are being applied in Pakistan, and the inclusion of materials—both case law and legislation—up to 1968. The decision of the Supreme Court of India in *Munnilal* v. *Bishwanath Prasad*, A.I.R. 1968 S.C. 450, holding that under the Muslim law of Pre-emption there must be full ownership in the land pre-empted and therefore the right of pre-emption does not arise on the sale of a leasehold interest in the land and that the preemptor also must have full ownership in order to maintain a suit for preemption, since reciprocity is the basis of the Muslim law of Pre-emption, does not seem to have been noticed, presumably because the decision had not been reported by the time of the publication of the book under review.

The Introduction supplied by the present Editor is bound to be of great interest. In its concluding part it deals with a question on which diverse views have been expressed, namely, reform of Muslim law. The Constitution of India, to which the Muslim members of the Constituent Assembly accorded their wholehearted support without any reservation, lays down in Article 44 that the State shall endeavour to secure for the citizens a uniform civil code throughout the terri-

tory of India. It means that the Muslim members along with the others have pledged the faith of the Nation to achieve that goal, which would result in the replacement of the personal laws by the civil code. Opinions are being expressed now and then on the desirability of reforming Muslim law. Changes however have been made difficult by the rigid postures of Muslim law as stated in doctrines like "the closure of the gate of ijtihad." There is also all the time the belief in the background that Islamic law is bound up with the religion of Islam and whoever touches the law touches the religion. The Introduction by the present Editior shows that it is not as if modifications have not been made in spite of the above doctrines. Outside India, in Muslim countries, reforms have been successfully attempted. Rigidity of Islamic doctrines have been relaxed in matters not considered fundamental. Everywhere moderate reforms in matters of procedure have been effected. In India itself, enactments like the Abolition of Slavery Act of 1843, Freedom of Religion Act of 1850, the Dissolution of Muslim Marriages Act of 1939, the Special Marriage Act of 1954, and the various wakf Acts have had repercussions, either directly or indirectly, on Muslim Family law. Judicial decisions also as has been pointed out have effected some modifications. But, by and large, whatever has been done concerns only the periphery of Muslim family law. As the Editor points out the correct position seems to be that reform is not impossible. Spread of education and pressure of public opinion inside the Muslim society can alone lead to large scale reform. The process however is bound to be slow.

Mulla's Mahomedan Law is a standard book on the subject and enjoys a unique reputation. The present edition fully lives up to the level of the previous editions.

TYABJI ON MUSLIM LAW, FOURTH EDITION By *Mushir Tayyibji*. (N. M. Tripathi Private Ltd , Bombay)., 1968. Price Rs. 50.

The present edition of Tyabji's Muslim Law appears after an interval of about 30 years since the previous edition was published. The title of the book also has been altered from 'Muhammadan Law' to 'Muslim Law'. The book is an exhaustive statement of the personal law of the Muslims in India and Pakistan. It states in the form of a code containing now 751 enunciations of the principles of Muslim Law, at the same time elucidating the rules of law. Almost every rule found in the original texts is included including those ordinarily not available to the public. Decisions of importance have also been considered. Tyabji's book has attained the status of a classic and is looked upon as an authority to be usefully referred to on the subject. It is, therefore, a happy event that the present edition has been brought out. Legislation affecting Muslim Law both in India and Pakistan is set out in the Appendices attached to the book.

Case law up to the end of the first quarter of 1968 has been taken into account. The important pronouncement of the Supreme Court in *Mohammad Sulaiman* v. *Mohammed Ismail*, A.I.R. 1966 S.C. 792 : (1966) 1 S.C.R. 37, holding that a decree in a suit against some of the heirs of a deceased Muslim would bind the other heirs also if without fraud or collusion and after due enquiry all the heirs known to the plaintiff had been impleaded and the suit was properly contested by such of the heirs as were actually impleaded and no other defence was open or suggested, finds mention at page 1060 in the *Addenda et Corrigenda*. Likewise the Supreme Court decision in *Munnilal* v. *Bishwanath Prasad*, A.I.R. 1968 S.C. 450, holding that for the operation of preemption there must be full ownership in land and not merely lease hold interest and that the preemptor must have full ownership as reciprocity is the basis of the law of preemption has also been noticed in the same page.

It is pointed out (page 6) that when a person is born a Muslim he would be recognised as such for application of Muslim Law, and foot-note 11 refers to "a Muhammadan family that in matters of worship had adopted the *Hindu religion* but

which was governed by Muhammadan Law", citing I.L.R. 40 Cal. 378 (P.C.). Does this indicate that worship *a la mode* Hindus is consistent with profession of Islam or does it show that for purposes of applicability of Muslim Law Islam need not be quite the same as for purposes of religion?

One could legitimately expect in an edition brought out for the first time after attainment of Independence a reference to the topic of reform of Muslim Law and enactment of a civil code applicable to Muslims also superseding their personal law as envisaged in Article 44 of the Constitution. Beyond a statement in the Preface to the Fourth Edition that section 21 of the Special Marriage Act of 1954 under which the registration by a Muslim of his marriage under this Act makes momentous changes in his personal law relating to divorce and succession, there is no mention by by the Editor about the desirability or practicability of further reforming Muslim Law.

Tyabji's book is a scholarly presentation of the subject of Muslim Personal Law and will be highly helpful both the busy legal practitioner and to the academic research scholar.

THE CONSTITUTION OF INDIA By *Dr. V. N. Shukla*, Fifth edition (Eastern Book Company, Lucknow and Delhi), 1969. Price Rs. 26.

There are quite a number of books on the Indian Constitution. Like "Ben Adam's tribe" they are increasing. Within the period of two decades during which the Constitution has been in force a number of things have happened and a number of interesting problems have been thrown up. The Constitution has been amended 22 times. The Supreme Court has held that the Fundamental rights in Part III cannot hereafter be altered or changed by resort to the amendatory procedure in Article 368 (A.I.R. 1967 S.C. 1743). The doctrine of prospective overruling—purely American doctrine born and developed in the U.S.A.—has been imported. Controversies have arisen regarding the respective jurisdictions of the Legislature and the Superior Courts in the matter of privileges as dealt with in Article 194. The question of the sanctity attaching to contracts and covenants between the Union Government and the Princes, and Members of the former Indian Civil Service, in the light of relevant constitutional provisions has come to assume considerable importance. The usefulness of bicameralism in view of the fact that, even in the 9 out of 17 States which had an upper House of Legislature, 4 have got out of or are in the process of getting out of it, calls for examination. Considered opinions of academic men standing aloof from political ideologies or emotions given in a purely detached spirit on these and other questions are bound to carry respect and weight. Dr. Shukla, as a scholar and Professor of Law has the necessary credentials. But in the book under notice he has attempted only a more modest task namely to analyse the provisions of the Constitution and provide comments thereon in the light of decided cases in a manner which will be of help primarily to the students. Justice Kidwai in his Foreword has observed that in view of the fact that the life, liberty and property of every citizen of India is vitally affected by the provisions of the Constitution it is necessary that every effort should be made to make the provisions easily comprehensible and that Mr. Shukla's book has fulfilled the need admirably. With his further observation that the book will provide sufficient materials to lawyers to assist them in unravelling the tangles of interpretation, one may state that it is an expression of hope rather than an assessment of achievement.

A blemish which could have been avoided with some care may be mentioned. Typographic mistakes which might mislead are to be found. Specimens of such mistakes are: On page 139 the reference in the footnote relating to the second proviso to Article 31-A (1) should be *Seventeenth* and not *Seventh* Amendment to the Constitution. On page 469 the legislative reference given to the change in the

151 has resulted between the Madras High Court and the Bombay High Court. The Madras decision is in *Sheik Mohamed* v. *B. I. S. N. Co.*, I.L.R. 32 Mad. 95, 120, and that of the Bombay High Court is in *Bombay Steam Navigation Co.* v. *Vasudev*, I.L.R. 52 Bom. 37. The Law Commission has suggested that to remove all doubts on the matter the words "the bailee is in the absence of any special contract bound" may be substituted in section 151 for the words "the bailee is bound." Though, at page 806, the Author has cited the two decisions in the footnotes there is no advertence in the body of the book to the existence of a difference in the views of the two High Courts, nor has the present Editor indicated his own view in the matter. The recommendations of the Law Commission have not elicited any comments.

The present Edition has maintained the standard set by the earlier editions and will be a useful book of reference to lawyers and the members of the Judicial Service.

LAW BREAKERS AND KEEPERS OF PEACE By *S. K. Ghosh* (Eastern Law House Private Ltd., Calcutta-13). Second Edition, 1969. Price Rs. 18.

The British Policemen on the Beat—the Bobby of England—has won for the British Police a reputation for courtesy and helpfulness and is a popular figure. His counter-part in India who is rarely on the beat is generally regarded as thorough only in beating. The prejudice engendered against the police during the British ragime is still to be lived down. On top of it, police duties have increased enormously during recent years. In the discharge of such duties what is required is no longer mere brawn but a judicious combination of brain and brawn. Problems coming to the fore in a democratic set up need delicate and imaginative handling which could at the same time be firm and effective. The public mind is conscious only of the strictures passed against the police now and then and looks upon the policeman with fear and suspicion. The public has not realised that unless it cooperates with the police the latter's task will be rendered more difficult and often ineffective. It is a familiar phenomenon that when there is a traffic accident for instance, or other trouble persons who were eyewitnesses are reluctant to come forward. Co-operation can result only if the policeman's outlook and methods change. It is rather happy therefore that a high placed police officer should write a book, in the light of his practical experience over a number of years and his research into several law and order problems, that could serve as a manual of instruction to the police. The Author has written candidly and has made quite a number of suggestions to improve the effectiveness of the police and its morale and discipline. The book consists of 19 chapaters including *inter alia* topics like Leadership, Ideal Police, Police and the Public, Police and the Press, Police and Politics, Police and the Magistracy, Crowd Control, Police in Riots, Traffic Accidents and Prosecution of cases. In the chapters on Crowd Control and Police in Riots a number of practical suggestions have been set out at pages 67 and 74. But as recognised at page 10 the power and effectiveness of the police depend on public respect and approval and the police problem really is how to inspire the public with better understanding and appreciation of police values. That can come only with realisation that the police serve the real interests of the people.

In this context is may not be out of place to mention a thing or two. The keepers of peace must themselves set an example to others in implicit obedience to and respect for law. It will not be permissible for the policemen to strike work. Was it not Calvin Coolidge, a former President of the U.S.A., that said that the policemen have no right to strike work? It will be even more impermissible for the policemen to take the law into their own hands and become law-breakers themselves. The recent happening in Bengal of policemen breaking into the Legislature when it was in session and behaving violently makes sad story. It is here that Napoleon's observation cited at the very commencement of the book that "there are no bad soldiers, only bad officers" becomes very pertinent.

In regard to prosecution of cases the Author stresses appropriately the need for proper and thorough investigation. Most prosecutions fail because of perfunctory and faulty investigation. The Author's plea for increase in the police force is quite justified having regard to the complexities of present-day life. But mere increase in number will be of no use unless men of the proper calibre and character are enrolled.

The Author has presented his ideas cogently and lucidly. The book will serve as a useful manual to all engaged in the police administration, particularly to those engaed in field work. It will help also in imparting proper training to the police personnel.

FAMOUS MURDER TRIALS By *S. Rajagopalan* (N. M. Tripathi Private Ltd. Bombay), 1968. Price Rs. 10.

Murder has been the theme of many books. "Murder will be out" said, Shakespeare. De Quincey wrote on 'Muder as a fine art.' Each book on the subject has its own appeal; even so the present volume.

Entitled after the famous British Notable Trials series, the book under review records sevent-five murder trials compiled from the official records. The trials selected have a story value; they also illustrate some of the important problems thrown up in criminal law. The murders dealt with range from capricious to calculated killings. They show the different motives from which they stem, such as quarrel, violent temper or fits of rage, insanity and mental disorder, lust and sex, cupidity and avarice, jealousy, desperation, etc. Incidentally the Author has dealt with interesting questions like sanctity of human life and abolition of death penalty, administration of criminal justice, importance of motive, production of the *corpus delicti*, value of testimony of child witnesses, scope of the right of self-defence, etc. The Author has made a skillful selection of cases, marshalled the salient facts and presented them in a manner which would hold the attention of the reader. He has brought out vividly the legal and the medico-legal elements involved giving his own views on them. The book can be read with profit and pleasure by one and all.

CRIME ON THE INCREASE By *S. K. Ghosh* (Eastern Law House Private Ltd., Calcutta). Second Edition, 1969. Price Indian Rs. 14; Foreign £ 1.

Crime is on the increase. Crime is a social disease and naturally the why and wherefore of such increase must exercise all thinking minds. Merely to describe crime as the result of the reaction of a hungry stomach on a virile body will cut noice. It is generally admitted that modern civilization has made people sophisticated and that criminality is a by—product of civilisation. Men and women live as it were in a hurry and there is constant craving for excitement in some direction or other. Fall in ethical values, failure of religion to operate as a controlling factor over evil propensities, population explosion, increasing unemployment, growing industrialisation, craze for power and wealth, recial tensions, communal and regional parochialism, linguistic chauvinism, labour becoming violently assertive, student indiscipline, growing number of civil disobedience demonstrations and strikes, tendency of politicians to exploit difficult situations, blackmarketing and smuggling and various other facts are all contributory causes to the growth of crime. As the Japanese Penal Code puts it, the aim of punishment is the end of punishment. Punishment by itself cannot hinder crime. It can be done according to Ruskin only by letting no man grow up as a criminal. The Author has made a number of valuable suggestions in regard to control of crime. He points out that the human touch in regard to prison life will have to be increasingly manifested and there

should be follow up attention or after-care of released prisoners. The Author observes *inter alia*: "Withdrawal of cases arising out of acts of violence against person and property and the failure to take up cases for such offences have become a common feature of settlements and favoured treatment of this kind are bound to have a dangerous effect on those who have committed such offences. There should not be favoured treatment for any offender and he must be left to face the consequences of his criminal acts. Lack of strength on the part of the Government generates lack of confidence in it among the people paving the way to anarchy." The observation is very pertinent and quite justified.

The Author has presented his thesis in an objective and realistic manner and his exposition is simple, direct and expressive. The book constitutes a valuable contribution to criminology.

THE SUPREME COURT ON CRIMINAL LAW By *J.K. Soonavala* (N. M. Tripathi Private Ltd., Bombay-2), Second Edition by V. D. Nayak, 1968. Volumes I and II. Price Rs. 80.

The volumes under review present an analysis of the decisions of the Supreme Court of India since its inception in 1950, on the Constitutional principles applicable to Criminal Law, the Penal Code, the Law of Evidence, the Code of Criminal Procedure, and Appeals to the Supreme Court and all other Criminal enactments and Interpretations of Criminal statutes. The subject-matter is arranged under seven Parts.

Article 141 of the Constitution lays down that the law declared by the Supreme Court is binding on all Courts within the territory of India. Authoritative interpretations of the Supreme Court from times to time have made a great impact on every branch of criminal law. On many aspects of criminal law the High Courts had expressed conflicting views. By the pronouncements of the Supreme Court many of the conflicts have been resolved and where that has happened delving into the earlier decisions covering the fields of conflict is obviated. The special feature of these volumes is their method of reference. The text is laid in seven Parts as already stated, each comprising a main branch of criminal law. Each Part is split into appropriate Heads and all the decisions relating to each subject are first noted in their chronological order under the Head covering the subject followed by an analysis of each case in the same order. The Contents show every Heading in the text of the book. Two Indexes, (*i*) Chronological and (*ii*) Alphabetical, containing the page numbers of each case in the text are provided. The Chronological Index which is also comparative is exhaustive. In the body of the text, instead of giving against the name of each case its full citation in the different series of law reports only its serial number in the Chronological Index is given and in that Index against the serial number and name of each case the page numbers are given of each of four law reports in which the case is reported, so much so, when the citation of any of the cases is needed all that has to be done is to turn to its serial number in the Index. The method adopted saves much time and labour and also facilitates a proper appreciation of the continuity in the development of the law in and through the successive judgments of the Supreme Court.

The inclusion of the Bombay Hindu Bigamous Marriages Prevention Act of 1946 and the impact of sections 4, 5 and 8 of the Act on section 177 of the Criminal Procedure Code seems unnecessary in view of the repeal of the Bombay Act by the Hindu Marriages Act of 1955.

Volume I comprises Parts I to IV, and Vol II Parts V to VII. Case law up to the end of 1967 has been taken into account. Each volume is provided with its own Indexes. The Author's exposition of the cases is lucid and neat. No pains have been spared to make the work comprehensive. The two volumes are bound to be of immense help to the busy practitioner.

CASE LAW ON THE INDIAN CONSTITUTION By *N. A. Subramanian* (Vimala Publications, Mylapore, Madras-4), 1969. Price: Popular Edition Rs. 12; Library Edition Rs. 15.

The book under review seeks to give an exposition of the important provisions of the Constitution through selected judgments of the Supreme Court. One hundred and twenty-one judgments have been selected for the purpose. The selection has been made carefully and judiciously. The book is not cast on the lines of a Case Book in the sense in which the term is used in England or the U.S.A. The Author's objective is more limited, namely, to stimulate thinking and make the cases serve as a springboard for further investigation. The Author has adopted the narrative form of exposition. The reader is greeted with a summary of the facts, contentions of the parties and the lines of reasoning of the learned Judges.

A proper appreciation of case law presupposes a knowledge of the basic principles of the Constitution and the organs of Government at least in skeletal outline. The value of the book will be enhanced if in an Introduction such an outline is provided. It will also be helpful if at the end of each case any important decision or decisions constituting a follow-up or development of the case presented, if any, is/are mentioned giving the citation alone. Thus under Articles 25 to 27 the decision in *Ratilal* v. *State of Bombay*, A.I.R. 1954 S.C. 388; 1954 S.C.R. 1046 may be noted since it holds, explaining the *Sirur Math Case*, that the ultimate test of what is religious, though within the Court's jurisdiction, is to be applied to the materials furnished by the community or sect itself and the Court would not force any religious group to express itself in a mode predetermined by law. Similarly, the case in *Ishwarbhai Patel* v. *Union of India*, A.I.R. 1969 S.C. 783 could be cited at the end of Case No. 1, but presumably the decision had not been reported by the time the book under review was published and hence could not be cited. In the Foreword, in para 2, line 3, should the words "task of *comprising*" be "task of *compressing*"?

The Author deserves congratulations for making a novel and non-conventional approach to facilitate understanding of the leading provisions of the Constitution. The presentation of the cases is lucid, and effective. The book can be read with profit both by law students and members of the Bar.

LAW AND MORALITY By *M. J. Sethna*, (University of Bombay, Bombay-32), 1969. Price Rs. 7-50.

This is a booklet of 69 pages: Its object is to show the respective provinces of law and morality. Law is the product of society and gives form, order and indeed reality to basic social relationships. Morality on the other hand is the doctrine of action as right or wrong. Law and morality are, no doubt, interdependent but are by no means identical. They reinforce and supplement each other as part of the fabric of social life. While positive law rules through sanctions, morality's appeal is always to the conscience. In the hierarchy of values, law is no doubt a powerful value, but it is only one of a number of values. There are besides law such values as religion, ethics, culture, art, etc. The difference between law and morals is that the one is the delimitation and the other is the evaluation of interests.

The booklet is divided into seven chapters: The Concept and Teleology of Law; Morality; Its nature and Purpose; The Achievement of Morality through Legislation; Relation between Man and Morality; Moral Justice through Equity; Morality of Legal Rights and Duties; and the Morality of Punishment. In regard to each of these headings the Author has quoted profusely the views of the protagonists of the several schools of jurisprudence. The Author would prefer, so far as constitutional and administrative laws are concerned, that there should be a proper balancing of State power and individual liberty. He states: "No doubt, every individual citizen should be legitimately allowed, and the Courts should protect, fundamental individual rights and liberties, but, at the same time, there should be

adequate provisions for securing the safety of the State and maintaining the solidarity of society, and, to that extent, individual rights and liberties may be qualified or modified (but not abrogated). It would seem that the Author is not in favour of the abolition of fundamental rights. Apropos of International Law the Author refers to the moral obligation of a State to obey treaties entered into by it and observes that apart from any principle of law, morality is at the basis of *pacta sunt servanda.*

The last chapter dealing with the Morality of Punishment is thought-provoking. The object of punishment is twofold: to protect the society and to readjust the culprit to the demands of social life. Though no one is sure about the exact justification for punishment, one may, with truth, state that the moral justification, by and large, has at its base retributive justice. The feeling of outrage in the community has to be satisfied. If the State fails to punish the malefactor, society may take the law into its own hands. As the Author justly observes the various theories of punishment are really interdependent. As to capital punishment, the Author states: "It is at best a deterrent and may still be tolerated as a necessary evil."

THE INDIAN EXTRADITION LAW By *R. C. Hingorani* (Asia Publishing House, Bombay), 1969. Price Rs. 22.

Extradition law has held the attention of the public in this country from the time of the surrender of V. D. Savarkar by the French Police to the Captain of the vessel from which he had escaped, without any authority from the French Government and without any extradition proceedings. The recent case of Dharma Teja, who fled the country and ultimately took refuge in Costa Rica and request for whose extradition to India was rejected, has kindled interest afresh. Extradition is the delivery of an accused or a convicted individual to the State on whose soil he is alleged to have committed or to have been convicted of a crime by the State on whose soil the alleged criminal happens at the moment to be. The interests of civilised communities, no doubt, demand that such person should be handed over, but sovereign States have claimed a right to grant asylum to such person as incidental to their territorial supremacy. The process of extradition is the only effective means of repatriation of a fugitive criminal to the place where he is alleged to have committed the crime. Hence extradition forms the subject of treaties between various States. Extradition Treaties are however controlled by the Extradition laws of a country. The Indian Extradition Act of 1903 was the first Indian legislation on the matter. It was in fact a supplement to the British Extradition Act of 1870 (as amended) and the Fugitive Offenders Act of 1881 which operated in this country earlier for purposes of extradition proceedings. And British Extradition treaties with foreign countries were made applicable to India also. After Independence came the Indian Extradition Act of 1903 was the only relevant law which continued to apply by specific provision made in the Adaptation Order of 1950. The British Fugitive Offenders Act which was an Act of the Birtish Parliament was left severely alone. To remove the anomalies in the Indian Extradition Act of 1903 and to adapt it to the conditions resulting from India becoming a sovereign republic, Act (XXXIV of 1962) was enacted and it is now in operation.

The book under review gives a lucid and concise account in about 130 pages of the extradition law in India and the customary rules of international law regarding extradition. The importance of extradition at the present time is brought out by the Author in the Introduction. Chapter I considers the historical aspect of the law. Chapter II covers the topic of requisition and explains what an extraditable offence is. Chapter III discusses the nature of the judicial enquiry which is now an integral part of the extradition procedure. In Chapter IV the special procedure in relation to the Commonwealth Countries is set out and in Chapter VI the procedure for obtaining the custody of persons who are fugitives from Indian justice is

expounded. Chapter VII contains the Author's suggestions for improvement of the law. There are five Appendices wherein are given the Extradition Act of 1962, the Extradition Treaties between India on the one side and Nepal, the U.S.A, and Sikkim on the other as well as pre-Independence Treaties which India considers to be binding on the country. These features add to the utility of the Book. The important decisions, Indian and foreign have been noticed. The decision in *Jugal Kishore* v. *Chief Presidency Magistrate, Calcutta*, A.I.R. 1968 Cal. 364 could also have been included. The Author has presented the subject neatly and with clarity.

CRIMINAL LAW PRACTICE By *Ram Chandra Verma* (Eastern Law House Private Ltd., Calcutta), 1969. Price Rs. 15.

This book is a handy treatise on Criminal law and procedure, and relevant provisions of the Evidence Act relating to appreciation of evidence in criminal trials and connected matters. It consists of 30 chapters, Chapters I to III deal with questions of jurisdiction, validity of criminal proceedings and the duty of a committing Court in offences triable by a Court of Session. Chapters IV and V give the 'dos and donts' which a Trial Court should have regard to. The topics of Link Evidence, Legal Evidence and Judicial finding discussed in Chapters V-A V-B and VI are intended to be of special use to Courts. Chapters VI to XXV give the classification of different kinds of evidence, their value and manner of appreciation. Chapter XXVI deals with the defences open to an accused in a particular offence and Chapter XXVII deals with Bail and matters, arising out of bail applications. Chapter XXVIII is devoted to investigation and irregularities arising in regard to it. Chapter XXIX considers questions relating to Public Prosecutors and Chapter XXX deals with precedents. In the Appendices, of which there are five, are given notes on salient provisions of the Criminal Procedure Code. Case law, particularly decisions of the Supreme Court up to May 1969 has been noticed. There is no Table of Cases provided so that it is not possible to ascertain easily whether any important judicial pronouncement has been overlooked or has been cited. In regard to proof of handwriting and the value of the evidence of a handwriting expert, the decision of the Supreme Court in *Fakhruddin* v. *State of Madhya Pradesh*, does not catch the reader's eye. The book is a commendable attempt to focus attention to the salient points of criminal law practice. The analysis throughout is very helpful. The book will serve not only the purpose of a book of reference on all important matters arising under the criminal law but will also be of much assistance to the Bench and the Bar in criminal cases.

N. D. BASU'S ARBITRATION ACT, (Eastern Law House Private Ltd., Calcutta). Edited By Sudhir Kumar Bose. Sixth Edition, 1969. Price Rs. 28.

Arbitration has been a striking feature of ordinary Indian life from early time and has always been regarded as one of the natural ways of settling a dispute. The Arbitration Act of 1940 (Act X of 1940) has standardised the law relating to arbitration throughout the country. The Act is a complete and self-contained code, and is intended to be exhaustive on the subject. There are not many good commentaries on the provisions of the Act. The book under review fills that need, It gives a section by section commentary of the Act discussing thoroughly the principle underlying the section elucidating the law in the light of decisions, Indian and English. As many as 15 Appendices are attached setting out *inter alia* the earlier enactments Indian and English on the subject, Chapter XIII of the Report of the Civil Justice Committee of 1924-25, the Rules framed by the High Courts of Calcutta, Bombay and Madras under section 44 of the Act, and the Rules made by various Chambers of Commerce. A Subject Index is provided at the end. Cases and Amendments up to the end of July 1969 have been incorporated.

Though most of the important decisions are referred to some seem to have escaped notice. Thus the Supreme Court decision in *Hindustan Construction Co., Ltd.* v. *Union of India*, A.I.R. 1967 S.C. 526 : (1967) 1 S.C.R. 843—holding that under section 14 (2) so long as there is the signature of the arbitrator or umpire on the copy of the award filed in Court and it shows that the person signing authenticated the accuracy or correctness of the copy, the document would be a "signed copy of the award" and it would be immaterial whether the arbitrator or umpire puts down the words "certified to be true copy" above his signature—does not seem to be mentioned. Likewise the Supreme Court decision in *Bungo Steel Furniture Private Ltd.* v. *Union of India*, A.I.R. 1967 S.C. 378 : (1967) 1 S.C.R. 633 dealing with the Court's powers under section 30 seems to be missing. The mention of *Union of India* v. *Union of India*, on page XLVI, col. 2 middle is unmeaning.

The Commentaries provided are full, helpful and dependable. The book is a welcome publication on the subject.

BAILMENTS AND PLEDGE. By *A. B. Majumdar* (Eastern Law House Private Ltd., Calcutta), 1969. Price Rs. 6.

The subject of Bailment is covered by sections 148 to 181 of the Contract Act. This book of 122 pages has been written mainly for the benefit of young learners. It does not give a section-war commentary but deals with the relevant provisions of law under broad headings. In his analysis and presentation of the elements constituting a bailment the Author could have referred also to the effect of delivery by mistake, the intention of the bailor being to deliver some other article. The Author could have noticed also the recommendation of the Law Commission in its Thirteenth Report relating to section 151 and the question of the bailee's liability for negligence. The statement of the principles and the exposition of the case law are quite simple. There is no doubt that the book will be appreciated by beginners in the study of law.

THE CARRIERS ACT (III OF 1865) By *Rasiklal N. Oza* (New Order Book Co., Ellis Bridge, Ahmedabad-6), 1969. Price Rs. 10.

The duties and liabilities of common carriers in this country stand outside the purview of the Contract Act and are governed generally by English common law except to the extent they are governed by special statutes like the Carriers Act of 1865, the Railways Act of 1890, the Carriage of Goods by Sea Act of 1925, or the Indian Carriage by Air Act of 1934. Thus the principles of law applicable to ordinary common carriers have a dual origin, namely, English common law and statutory provisions.

The Carriers Act of 1865 is a short Act consisting of 11 sections. Its provisions are more than a century old. It is modelled on the English Carriers Act. A public common carrier's liability for loss or damage to goods is that of an insurer against all risks. The liability may be limited however by special contract, as is recognised under sections 6 and 9 of the Act. But being in derogation of the general law, such contract has to be strictly construed. A noteworthy feature is that, on non-delivery of the goods, section 9 throws the burden of proving absence of negligence on the carrier.

The Author has brought out all the points vividly revealing a critical outlook. The addition of a chapter on Practice and Procedure and the inclusion of the text of the English Carriers Act at the end of the book have enhanced the utility of the book. On an enactment on which there is practically no good commentary, the book under review constitutes a valuable contribution.

INDIAN ADMINISTRATIVE LAW. By *M. C. J. Kagzi* (Metropolitan Book Co. Private Ltd., 1 Faiz Bazaar, Delhi). Second Edition, 1969. Price Rs. 30.

Administrative law is now considered to be an integral part of the legal system. One can no longer say with Dicey: "we know nothing of administrative law and we wish to know nothing about it. Change in the character of the Government from a *laissez faire* to the public service State set to achieve social and economic justice and equality of status and of opportunity has resulted in the vesting of immense power in the hands of the executive. Delegation of legislative powers and exercise of quasi-judicial functions by special tribunals, agents and authorities have become inevitable. The administrative process has become a complex of methods by which different administrative agencies carry out their tasks of adjudication, rule-making and allied functions. The exercise of such powers and the discharges of such functions, however, can only be subject to the limitation that they shall not trespass upon the guaranteed rights under Part III of the Constitution, now held to be immutable even against constitutional amendments. While effective and expeditious implementation of socio-economic programmes holds top priority, speedy redressal of individual grievances also has to be attended to. To facilitate implementation of the programmes a number of regulatory enactments have been passed. Nationalisation also has been adopted as in regard to railways, communications, broadcasting, life insurance, etc. Emergency declared during the time of the Chinese aggression resulted in the increase of administrative discretion under the guise of security legislation. The Administrative Reforms Commission appointed by the Government of India has made recommendations in regard to the toning up of administrative processes and procedures consistently with the demands of administrative efficiency. It has become necessary therefore for the lawyer as well as the layman to have a clear idea as to his position, rights and liabilities with reference to administrative law.

The book under review is divided into five Parts. Part I deals with Administrative law and process, Part II with executive legislation, Part III with Administrative adjudications and Tribunals, Part IV with Judicial Control of Administrative Authorities and Tribunals, and Part V with the Legal Liability of Government and Public Authorities. Appendix A sets out important provisions of the Constitution relevant to Administrative law and Appendix B reproduces in part certain important statutes (Indian and Foreign) referred to in the book. The text of the Lokpal and Lokayuktas Bill is appended at the end of the book.

There are a number of printing errors marring the image of the book. On page 4, l.13 Lord Haywart should be Lord Hewart. On page 10 footnote 1 Narso Ruju should be Narasa Raju. On page 12, l.8 Bourborn should be Bourbon. On page 19, l.33 transcedental should be transcendental and in l.35 kindered should be kindred. On page 332, footnote 3 Kamachand should be Kamachee. On page 329 line 1 dugged should be dug and in line 26 amputed should be amputated. These are but specimens.

The book fails to give the citations to *Narayan Bhattathiripad's* case mentioned in page 329 and to the *Damaged House* case referred to at page 331. The citation in footnote 1 on page 339 is incomplete.

Being a publication of 1969, the decision of the Supreme Court in *Mulchand* v. *State of Madhya Pradesh*, A.I.R. 1968 S.C. 218 reaffirming the view that the provisions of Article 299 (1) of the Constitution are mandatory and contravention thereof *nullifies* the contracts and makes them void, could have been included.

The book under review has covered the various aspects and angles of administrative law. It has brought together a mass of material and presented the principles in an assimilable form.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN INDIA AND PAKISTAN. By *M.A. Fazal* (Oxford University Press), 1969. Price Rs. 72.

Economic Planning on a national scale has led to massive State intervention in economic activities. Such intervention is in the form of regulation through licensing, etc., under specific statutes of trade and industry or more directly in the form of nationalisation of railways, communications, broadcasting, irrigation works, life insurance, banking, etc., or through the creation of public corporations. Various adjudicatory administrative tribunals, boards and authorities have been set up. There has been a steady flow of statutes, and, to a large extent they have left the making of subordinate legislation in the hands of administrative bodies which, in may cases, are in charge of the administration of such laws.

The book constitutes a study of the evolution of the principles of judicial control of administrative action and the remedies by which the principles are given effect. Though primarily a work on the law of India and Pakistan, a comparative study of the subject has been made with reference to English and American laws relevant thereto. The background of the subject is considered in Chapter I, the Introductory chapter. Chapter II discusses the scope and content of the doctrine of *ultra vires*. Chapter III deals with the scope of review of fact and law. Chapter IV is devoted to the study of the principles of natural justice. Chapter V concerns itself with remedies like damages, declaration, injunction prerogative writs, and their relative scope and efficacy. The last Chapter sets out the Author's conclusions.

The Author has made a number of helpful suggestions for the reform of administrative law and procedure. He suggests the enactment of a general statutory provision similar to that in section 12 of the Tribunals and Enquiries Act of 1958, in England which provides a legal right to reasoned decisions from the tribunals, if they are requested, on or before the giving or the notification of the decisions, to do so. Such a provision would ensure that the record does not present the "the inscrutable face of the sphinx" but will be a "speaking order" enabling detection of any error apparent on the face of the record. Another suggestion is that the requirement of a notice of two months for any suit against the Government or against any public officer acting in his official capacity which now applies to all forms of action or all kinds of relief should be dispensed with, since the object of a suit is often likely to be defeated where the remedy is immediately needed (*e.g.*, injunctions). The Author has observed on page 330 that the Indian Courts have distinguished between administrative and judicial or quasi-judicial proceedings and applied the *audi alteram partem* rule only to the latter class of proceedings and this has limited the application of the rule. Apropos of this, it is interesting to note that in *A.K. Kraipak* v. *Union of India*, A.I.R. 1970 S.C. 150, the Supreme Court recognises that there is a change in the concept of natural justice in recent years, and that since the aim of both quasi-judicial as well as administrative enquiries is to arrive at a just decision the rules of natural justice should apply to both. The Author has suggested the enactment of legislation on the lines of the Crown Proceedings Act of 1947, in India also, citing in support of his suggestion observations of Gajendragadkar, C. J., in *Kasturi Lal* v. *State of Uttar Pradesh*, A.I.R. 1965 S.C. 1039, 1049.

The book under review is an able presentation of the subject. It will be helpful not only to the members of the Bar but to all who are interested in or concerned with problems relating to the legality of administrative action throughout the English speaking countries.

ADMINISTRATIVE LEGISLATION IN MODERN INDIA. By *B. Ganguly* (S.C. Sarkar and Sons Private Ltd., Calcutta-12), 1968. Price Rs. 15.

National economic planning has led to a prodigious increase in the quantum of administrative legislation. Unless Parliament delegated law-making power it would not be possible for it to pass the kind and quantity of legislation which modern

public opinion requires. In the book under review, the Author has discussed the nature of administrative legislation through an analysis of important judicial decisions, statutes and subsidiary laws. In the process, he distinguishes conditional legislation from delegated legislation and sets out the limits of permissible delegation. The limits are well-established. Parliament cannot abdicate its function of law making in the sense that it is for Parliament alone to declare the policy and indicate it in outline. Working of the details or framing of rules consistently with the purpose of the legislation may be left to other bodies or authorities. The Author has considered the safeguards also against the possible abuse of delegated powers and the question of Parliamentary and Judicial supervision of administrative legislation. Judicial supervision takes the form of judicial review of the vires of an impugned legislation when it is brought up before the Court and an examination of impugned orders or actions to see whether they are in conformity with the principles of natural justice.

The Author has made a careful and analytical study of the subject in all its aspects. His presentation is simple and clear.

A PLEA FOR ENLARGING THE SCOPE OF SECTION 2 (7) OF THE MADRAS DEBTORS' PROTECTION ACT, 1935.

By

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It is common knowledge that many Kabulis, notorious as unconscionable money-lenders, have migrated to the hundreds of cities in India, and have been exploiting the impecunious lower middle class and middle classes, such as employees in the Railway Service or in Government Offices etc., by lending them often sums of monies in their dire needs and taking in return therefor promissory notes of the value of double, treble or many more times of, what they have actually paid as consideration. Not only that, they receive from the debtors month after month interest at 120 or 180% per annum, till the monies they paid are got back, and then if the debtors do not pay the actual principal advanced, they sue the debtors for the face value of the promissory note.

Now by the Madras Debtors' Protection Act, 1935, section 2 (7), the money-lenders are enjoined to keep accounts and produce them whenever required by the debtor or by the Court. It was in one such case, where the money-lender (a Kabuli) had advanced far less than what he claimed to have paid and filed a suit thereon, that a learned Judge of the Madras High Court, (in *Syed Abdul Shukoor* v. *Official Assignee*[1], observed that where the money-lender required to keep accounts, (when called upon to produce) would say he had none, an adverse inference could be drawn that his case was false and the claim was dismissed. Unfortunately the salutary and wholesome effect and benefit of the decision was not available in a good many cases of a similar nature, because, the definition of a loan in the Act, has restricted it to Rs. 500 only (the Act be it noted was enacted 3 decades back in 1935). Consequently, in a case in which the debt mentioned in the promissory note is over Rs. 500, the plaintiff could well say that he was not bound to keep accounts—as in most cases that is what he says—and the Court is helpless to draw the adverse inference adverted to supra though it readily sympathises with the case of the defendant. Now the value of Rs. 500 in the year of enactment of the Act has considerably increased today to Rs. 2,000 or more, so that those that could have contracted a debt of Rs. 500 in 1935 should go in, perforce, for a debt of Rs. 2,000, other circumstances of the need being equal.

In such a predicament, justice is virtually denied to the poor exploited debtor-defendant on account of the inapplicability of the Act. I would therefore suggest that the scope of the definition of 'loan' under section 2 (7) of the Debtors Protection Act be enlarged to suit modern conditions, by raising figure of the loan to say Rs. 2,000 at least, now that even a rupees two thousand suit on a promissory note is treated as a small cause matter. Such a change would unfailingly ensure justice to the harassed debtor.

1. (1958) 71 L W 764.

THE LEGAL CONCEPT OF INSANITY.

By

MISS B. SHANTHAKUMARI, B.SC., M.L.

Introduction.—In criminal law certain types of human conduct are characterised as irresponsible and therefore carry no criminal penalty therefor. In these cases an act which would ordinarily be regarded as an offence is not so because firstly, the special circumstances in which the act is done serve as a justification for its commission on broad grounds of policy or, secondly, the special conditions are incompatible with the existence of *mens rea* or responsibility. Insane individuals charged with crime come under the second category. Mentally abnormal persons lack the capacity to appreciate the distinction between right and wrong and are not able to comprehend the harmful consequences of their Act. Or even when they do have such capacity, they do not have the capacity to control their actions as a result of their mental abnormality.

The substance of the plea of legal insanity, as well established in Anglo-American systems of criminal law, is embodied in the *MacNaughton Rules*[1]. The Indian Penal Code embodies in section 84, the principles underlying the MacNaughton Rules.

The MacNaughton Rules do not include irresistible impulse and other subnormal mental conditions sufficient for exemption from liability. The view that the criminal law is intended to make individuals control their sane as well as insane impulses appears to be the main reason for this. Consequently this makes the provision for the defence of insanity ignore the modern psychiatric theories regarding mental abnormalities. Though progressive judicial opinion is in favour of an alteration in this behalf, the overwhelming judicial opinion does not allow it and statutory provisions have not yet been made to this end. The Royal Commission on capital punishment[2] recommended the recognition of 'irresistible impulse' as a defence of insanity but legislative effect had been refused to this recommendation. The inadequacy of the MacNaughton Rules has been reduced to some extent in English law by the adoption of the Scottish doctrine of 'diminished responsibility' for the offence of murder.

Twenty-eight jurisdictions in United States apply the MacNaughton Rules for determining the insanity of the accused, while a few of them have widened the defence by the inclusion of irresistible impulse. The American Model Penal Code recommended inclusion of substantial impairment of cognition as well as volitional capacity, thus improving upon the MacNaughton Rules and going further than the irresistible impulse test. But the *Durham Rule*[2-a] enunciated the simple test: 'that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect'. Despite the advantages of this simple rule, it has been rejected by four United States Circuit Courts of Appeal, by United States Court of Military Appeals and Supreme Courts of nineteen states. Later even in

1. The advisory opinion given by the panel of Judges at the request of the House of Lords after the decision in *MacNaughton's case*, (1843) C. & K. 130 ; 4 St. Tr. (n.s.) p. 847.

2. Cmd. 8932, (1949-53).

2-a. 214 F. 2 dp. 862, (1954).

District of Columbia there was dissenting opinion regarding this rule. In the state of Main and Virginia Islands the Durham Rule is adopted by a statute.

The defence of insanity in the Penal Codes of France, Italy, Germany, Russia, and Switzerland are wider in nature and scope, in so far as they include cases of partial or diminished responsibility and provide a reduced punishment for other subnormal mental conditions.

The Indian Penal Code allows the defence of insanity as a ground for complete exemption from criminal liability and it is based substantially on the MacNaughton Rules.[3]

Nature of Insanity.—The term 'insanity' is not clearly defined either in medical or legal literature. Sanity is said to exist when the brain and the nervous system are in their normal condition and the mental functions of feeling and knowing can be performed in their usual manner. Insanity is an abnormal state when one or more of the above said mental functions is not performed in the normal way or not performed at all, due to some defect or disease of the mind.

Instead of furnishing a clear and workable definition of insanity the authoritative medical books give only descriptions of various states of mind such as total insanity, partial insanity, moral insanity, impulsive insanity, pyromania and Kleptomania. For example, pyromania is described as a strong, causeless desire to set fire to a house and melancholia as a state of brooding. In them we try in vain to find answers to the legal question whether the so-called insane person should be held to be socially and legally responsible, so that he may be subjected to the appropriate sanctions under the criminal law. The physician or the psychiatrist is concerned only with the causes for the mental abnormality and the symptoms. For their professional purposes there is no need to distinguish between 'insanity' and lesser forms of mental abnormality.

In some medical books insanity appears under 'psychosis' which is the collective name for a group of mental abnormalities which include certain brain injuries, general paresis, maniac-depressive psychosis, senile psychosis, delirium tremens and schizophrenia.[4] The common element in these afflictions is a serious loss of contact with reality. Insanity is not just a departure from the normal but is a fairly advanced degree of disorder of the mind.[5]

The causes of madness are numerous. In the majority of cases there is a constitutional pre-disposition to it, either heredity or congenital. The brain may be affected directly by some physical injury or by a sudden mental shock, or continued annoyance, or excessive fatigue, or drunkenness or vicious habits.[6] Diseases like apoplexy, paralysis, and epilepsy affect the brain directly, whereas child-birth and its consequences hysteria, disorders of the stomach, bladder and liver, rheumatism, consumption and syphilis affect the brain indirectly.

MacNaughton's Rules.—In England the early authorities on the defence of insanity are very vague and general, Coke touches the topic of insanity in a vague and fragmentary manner. Hale's[7] reference to insanity as a source of mental error brings

3. Section 84 of the Indian Penal Code of 1860.
4. 'Criminal Law' by Glanville Williams, 1953, p. 293.
5. Taylor's 'Medical Jurisprudence', p. 759.
6. 'A History of Criminal Law of England'; by Sir Stephen, Vol. II, p. 183.
7. Hale, P.C. 29-37.

out vividly the scientific ignorance of those days. The important fact which should be noticed about the ancient law is that, even in very ancient times proof of madness appear not to have entitled an accused to be acquitted in the case of murder, but to a special verdict that he committed the offence when mad. This special verdict entitled him to a right of pardon.

The early legal requirement of insanity was absolute madness and a total deprivation of memory.[8] In the eighteenth century the defence of insanity was much discussed in the famous cases of *R. v. Arnold*[9], *R. v. Lord Ferrers*[10], and *R. v. Hadfield*[11]. In *Arnolds case*[9], the criterion laid down was knowing what one was doing ' no more than an infant, than a brute or a wild beast.'

In *R. v. Hadfield*[11], the accused Hadfield was tried for shooting King George III in Drury Lane Theatre. It was proved that he committed the murderous act under the delusion that he was required by his Lord to sacrifice himself for the well being of the world. Since suicide was wicked, he thought that if he shot the King dead he would be consequently executed for the criminal act. The jury acquitted him on the ground of insanity.

This was the position of the English Law regarding the defence of insanity before the enunciation of the MacNaughton Rules. Sir James Stephen states the English law of that time, regarding the effect of insanity on criminal responsibility as follows: no act is a crime if the person who does it is at the time when it is done prevented (either by defective mental power or) by any disease affecting his mind (*a*) from knowing the nature and quality of his act or (*b*) from knowing that the act is wrong, or (*c*) from controlling his own conduct, unless the absence of power of control has been produced by his own default[12]. If the mental abnormality does not affect the mind in the abovesaid manner, then the person will be held responsible for the crime committed by him. The statement can be further illustrated thus: If *A* kills *B* under the insane delusion that he is breaking a jar, then *A*'s act is not a crime and he is not held responsible for his criminal act. Conversely, if *A* who is under the delusion that his finger is made of glass, poisons *B* out of revenge, then he is responsible for the death of *B* as there is no connection between A's delusion and his gruesome act. In the first illustration ' A ' did not know the wrongful nature of his act through he knew that it was destructive, whereas in the second illustration, *A* was not at all influenced by the delusion in committing the murderous act.

In the famous *MacNaughton case*[13] the accused MacNaughton was a respectable man leading a normal life. His friends and neighbours had a very good opinion of him and least expected the abnormal behavoiur which followed. Unknown to his friends, he was under an insane delusion that his enemies—of whom Sir Robert Peel, the Prime Minister was one—were in conspiracy to make his life impossible and to persecute him. In consequence he bore an unjustified grudge against Sir Robert and planned to come to London to kill Sir Robert. To accomplish his plan, he came to London with a pistol and went to Sir Robert's official residence. There

8. ' A History of Criminal Law of England ' by Sir Stephen, Vol. II, p. 151.
9. (1724) 16 St Tr., p. 695.
10. (1760) 19 St Tr., p. 886.
11. (1800) 27 St. Tr., p. 1281.
12. Stephen, op. cit., p. 149.
13. (1843) 1 C. & K. 130 ; 4 St Tr. (n.s), p. 847.

he shot the first person he encountered in the belief that he was Sir Robert. But it so happened that the person shot was Mr. Drummond, Sir Robert's secretary.

At the trial Tindal, C.J., directed the jury to consider whether the accused had the competent use of his understanding to know the nature and quality of his act and to appreciate that what he was doing was wrong. The medical evidence proved that his mind was affected by morbid uncontrollable delusion which deprived him of perception of right and wrong. Considering the evidence the jury came to the conclusion that he could not be held responsible as he had no knowledge of the nature and quality of his act and also that it was wrong. Therefore he was acquitted.

This order of acquittal enraged the public as there were similar prior attempts against individuals in high official position. The agitation against this decision was so overwhelming that the House of Lords was compelled to convene a board of judges to ask their opinion regarding the defence of insanity and the proper direction to the jury in insanity cases. The judges were asked to give their advisory opinion in the form of answers to five questions put by the House of Lords.

The first question was "What is the law respecting alleged crimes committed by persons afflicted with insane delusions in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to Law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? The answer was: "if an individual is under a partial delusion but is quite sane in other respects and has committed the crime in the circumstances stated in the question, then he is punishable according to the nature of the crime committed, if he knew at the time of the commission of the crime that he is acting contrary to law."

The second question was: What are the proper questions to be submitted to the jury when a person, afflicted with insane delusions respecting one or more particular subjects or persons is charged with the commission of a crime (murder for instance) and insanity is set up as a defence?" The third question was: " in what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?." As the third question was interwoven with the second, a single answer was given by their Lordships.

Their Lordships opined that first all the jury ought to be told " that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved." Further they stated that to establish the defence of insanity, it must be clearly proved that at the time of committing the act the accused was labouring under such *defect of reason* from *disease of the mind* as not to know the nature and quality of the act he was doing or if he did *know* it, that he did not *know* he was doing what was wrong.

The essential fact to be determined is whether the accused knew the nature and quality of his act. Absence of such knowledge may by due to insane automatism or mistake or simple ignorance of fact. In insane automatism the patient continues his action even in the unconscious state. A good illustration of such a condition is the following case. A woman suffered a vertiginous attack while cutting bread. She continued the act of cutting and in the automatic phase, she

cut off her child's arm. Obviously, the accused did not know the nature and quality of her act. Committing an illegal act in a state of trance is also similar to this. In these cases the lapse of consciousness is only transitory and therefore should be dealt cautiously as otherwise they are likely to be rejected as a ground for the defence of insanity.

If in a murder the accused knew the '*actus reus*,' that is, the act of killing, there is no mistake as to the fact, so he is responsible for it. What is relevant is the killing and not the mode of killing. For instance, if an insane person saws off the head of an individual thinking that he is sawing off a log of wood, he is not criminally responsible as he does not know the nature and quality of the act. The mistake should be with regard to the *actus reus*, as when an insane person mistakes a live body for a dead one and drowns it. On the other hand, if he mistakes a boy for a girl, then it is not considered as a mistake, as the sex of an individual is not relevant. Only the intention and act of killing are relevant. The accepted view is that the term *actus reus* includes not only the physical act, that is, the muscular movement but also its consequences.

In some rare cases the lunatic may know what he is doing but may mistake who he is. An insane individual may knowingly commit a murder, imagining himself to be a turnip. In this case the lunatic cannot be held responsible for his crime as he is not a legal person since he thought himself to be a vegetable. Oppenheimer supports this view by observing that a man does not know the nature and quality of his act, if does not know his own identity.

Alternatively, if the accused knew the nature and quality of the act, then the question is whether he knew that it was wrong or contrary to law. The word 'wrong' is ambiguous and a controversy arose as to the proper implication of that word. The earlier authorities were of the view that the word connoted a moral wrong as well as a legal wrong. Such an interpretation was accepted by Tindal, C.J. in his direction to the jury in *MacNaughtons' case* [13-a] case when he stated that "the accused would be guilty if he knew his act to be a violation of the law of God or man." This view was accepted in the MacNaughton's Rules. The prevalent judicial opinion is that it is sufficient if it was known to the accused that his act was legally wrong. In *R.* v. *Windle*,[14] the Court of Appeal affirmed the lower Courts' conviction though the accused's act was not a moral wrong. The appellant administered a large quantity of aspirin tablets to his wife and murdered her, thinking that it was beneficial to her. Though the motive was good the intention was criminal. The medical evidence was that he knew perfectly well that he was committing an illegal act. But due to defective reasoning he thought that he would be exonerated from punishment for the consequences of this act as it was beneficial to her. The Court of Appeal, rejected this argument and affirmed his conviction.

It is obvious from the above decision that the morality of an act is irrelevant where the accused knew the act to be legally wrongful. Lord Goddard, C.J., supported this view by observing that Courts of law could only distinguish between that which was in accordance with the Law and that which was contrary to it. He also added that there was no doubt that in MacNaughton Rules 'wrong' meant 'contrary to law' and not 'wrong' according to the moral opinion of the few individuals.

13-a. (1843) C. & K. 130, 4 St. Tr. (n.s.) p. 847.
14. (1952) 2 Q.B., p. 826.

This line of reasoning is not followed in Australia and Canada. Even in England, a few previous decisions are inconsistent with this view. These decisions accept the view that the accused must know that his act was morally wrong in the sense that it was something, which would be condemned by right thinking men. Thus in *R.* v. *Coders*,[15] the Court of Appeal held that knowledge of moral wrong was relevant and that 'moral' meant objective moral standard adopted by reasonable man.

Before the decision in *R. V. Windle*[15-a] there was no doubt about the 'dichotomy' of the word 'wrong,' that is, that it meant both moral and legal wrong. A literal interpretation of the decision in *Windle's case*[15-a], rejected this dichotomy and pointed out that the word 'wrong' meant only legal wrongs. Thereafter the judicial trend was to determine only whether the accused knew that he was breaking the law.

The fourth question was: "if a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" The judges answered that it depends on the nature of the delusion. If he labours under partial delusion, he should be considered in the same situation as to responsiblity, as if the facts with respect to which the delusion exists were real. If under the influence of his delusion he supposes another man to be in the act of attempting to take a way his life and he kills the man as he supposes in self-defence, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury on his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

This approach makes responsibility depend on the legal relevancy of the delusion. This rule covers cases of hallucination as well. The difference between a delusion and a hallucination is that, the former is a false belief and the latter a false sensation. In application, this test poses certain practical difficulties, as it is difficult to analyse a delusion and more so if it is a complicated one, as the stages of its progress in his mind can be narrated coherently only by a clear headed lunatic. In other words, this requirement implies that the mentally afflicted should be subjected to a similar critical examination like the sane. Thus in certain cases the application of this test leads to unexpected results.

In some peculiar instances apparently there seems to be no connection between an insane person's conduct and his delusion. A good illustration of such an instance is the case of a man who had an insane delusion about windmills and would watch them for hours. His friends tried to cure him of this, but were unsuccessful. Quite unexpectedly he mutilated and nearly killed a little girl. Apparently no connection could be found between his crime and his delusion. But in the accused's mind there was a connection as he thought that if he committed a crime, he would be imprisoned in some place from where he could watch windmills throughout his life. Strangely enough in this case the accused gained his object as he was confined in such a prison.

Such cases point out that it is difficult to determine the influence of a delusion on the conduct of an affected person. Similarly in cases of partial delusion, the influence of the delusion on the illegal act of the accused and his mental condition at the time of the commission of the act should be determined.

15. (1916) 12 C.A.R., p. 21.

15-*a* (1952) 2 Q.B. p. 826.

The fifth question was with regard to the admissibility of the evidence of the medical experts in cases where they had no prior knowledge of the mental state of the prisoner, though they had been present during the trial. Their Lordships observed that strictly speaking such evidence cannot be admitted as the questions involve the determination of the truth of facts deposed and are not questions upon a mere matter of science.

Proof of Insanity.—In cases of insanity the burden of proof is on the defence. For a successful defence it has to be proved that the accused was labouring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was committing or that it was wrong. This is not a persuasive burden of proof as the accused is not legally compelled to adduce evidence proving beyond a reasonable doubt his mental abnormality. Analogous to other criminal cases, the burden of proving the *mens rea* of the accused is on the prosecution, in cases of insanity also. Only after a clear poof or *mens rea*, the defence of insanity arises at all to neutralise the evidence of the prosecution.

The general presumption is that an accused is sane and knows what he is doing unless he adduces evidence to rebut it. In practice the prosecution does not take the initiative in tendering medical evidence regarding the mental condition of the accused. It is for the accused to let in medical or other evidence to prove insanity. If such evidence is not adduced by the defence, the judge will withdraw that issue from the jury.

The importance of introducing evidence to prove the mental abnormality of the accused by the defence is brought out vividly by *H. M. Advocate* v. *Fraser* [16]. The accused murdered his baby while sleeping, under the delusion that he was struggling with a wild beast. The prosecution proved that the accused had the requisite *mens rea* and the presumption was that he committed the murder. If the defence had not adduced evidence regarding the abovesaid delusion, the jury would have convicted the accused for murder. Thus the onus of proof of the delusion is on the accused in the sense, that the burden of introducing evidence on the subject is his. But the persuasive burden of proof still rests on the prosecution. So strictly speaking it cannot be said that the burden of proof is on the accused. This confusion arises because of the failure to distinguish between the burden of introducing evidence and the persuasive burden of proof.

But a different view was taken by Viscount Sankey in *Woolmington's case.* [17] His Lordship said obiter, that insanity cases were an exception regarding burden of proof. This view is inconsistent with the general rule that cases of insanity should be considered subject to the rule that the burden of proof of *mens rea* is on the prosecution. Insanity is not an exception to that principle, on the contrary it is that principle that is an exception to the rule in insanity cases that the burden of proof of insanity is on the accused. [18] The defence of insanity does not always involve a denial of *mens rea*, probably it does involve such a denial where the defence falls under the second of MacNaughton Rules *i.e.*, the denial that the accused knew that his act was wrong. Glanville Williams is of the view that even as applied to the second rule, the burden of proof of *mens rea* is still on the 'prosecution' and that,

16. (1878) 4 Couper, p. 70.
17. (1935) A.C. p. 475.
18. "Criminal Law" by Glanville Williams, 1953, p. 102.

even if the burden is on the accused, it is almost a burden to shift the balance of probability. The position is the same where the issue is the result of insane mistake or is a crime of negligence.[19]

Criticism of Rules.—The various interpretations of the MacNaughton Rules have created more confusion than the interpretation of any other legal formula. The main difficulty is due to the verbal exactitude of the Rules. Though the phrase 'to know the nature of the act,' is potentially wide, the courts have not availed the opportunity but have interpreted it to mean only 'intellectually comprehend.' Such an interpretation has given rise to practical difficulties in the trial and appellate courts.

The main criticism levelled against the MacNaughton Rules is that they completely ignore the psychiatric concepts of insanity. The Rules are based exclusively on the old concepts of mental medicine, as the lack of knowledge of the nature and quality of an act or the inability to distinguish between right and wrong are considered as the criteria to determine the mental condition of an individual. The Rules ignore the role of unconscious motivation or irresistible impulse. There is no provision in the Rules for such volitional and emotional factors in mental disorders as they are concerned only with cognition or intelligence. Since the Rules are considered to be exhaustive, it implies that irresistible impulse is not relevant as a criterion of irresponsibility. Such a view is taken by the majority of the English Courts. This is illustrated by Baron Bramwell's observation in *Regina* v. *Haynes*[20], that if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any, of the safeguards tending to counteract it. Thus his Lordship attacked the theory of irresistible impulse and rejected it. This defence was also rejected in the cases of *Burton*[21], *Holt*[22], and *Lesbini*,[23].

Lord Hewart rejected, in *Ronald Trus's*[24] case, the direction given by Macardie J., in the lower Court that the accused's incapacity due to mental disease to control his actions entitled him to acquittal.

In 1923, the Atkin Committee[25] recommended the alteration of the law so as to accept 'irresistible impulse' as a defence. The committee's view was that it should be recognised that a person charged criminally with an offence is responsible for his act, when the act is committed under an impulse which the person was by mental disease deprived of any power to resist. An attempt was made to give legislative effect to the recommendations of the committee by introducing the Criminal Responsibility Bill in 1924. The House of Lords refused a second reading of the Bill. The Bill was opposed by Lord Haldane L.C., Lord Hewart C.J., other Law Lords and the majority of judges in the King's Bench Division. In 1930, a committee on capital punishment suggested a revision of the rules, which was not implemented.

The Royal Commission on capital punishment[1] after a thorough evaluation of the MacNaughton Rules came to the conclusion, that the Rules were inadequate

19. *Ibid*—Sections 165, 166 and 167.
20. (1859) I.F. and F., p. 666.
21. (1863) 3 F and F., p. 772.
22. 15 C.A.R. p. 10.
23. (1914) 3 K.B., p. 1116.
24. 127 Law Times, p. 563.
25. cmd. 2005.
1. (1949-53) H.M.S.O. and cmd. 8932,

as they did not cover case of irresistible impulse and other cases of mental abnormality. Therefore, the committee proposed the alternative solution of either abolishing the Rules or extending them so as to cover all cases of mental aberrations. The majority of the commission favoured abrogating the Rules *in toto* and leaving it to the jury to determine in each case 'whether at the time of the commission of the act, the accused was suffering from the disease of the mind to such an extent, that he ought not be held responsible for his illegal or harmful act.' This view is not very sound as it would not be advisable to leave the intricate issue of insanity in the hands of a lay jury without any rules to guide them. The minority view was that it would be more justifiable to extend the MacNaughton Rules to cover cases of irresistible impulses, than to abolish them completely.

The objection against the majority view is that, it neither defines insanity exactly nor differentiates it from the lesser mental abnormalities. Despite this drawback Glanville Williams opined that the implementation of this view would effect a great improvement in the defence of insanity. The principal objection against the minority view is that it leaves unremedied the inadequacy of the MacNaughton Rules with regard to insane delusions. This is illustrated by the fact, that this view does not exonerate an accused like Hadfield from conviction except under the cover of irresistible impulse. Another objection to this view concerning irresistible impulse, is that it lands in the metaphysical quagmire of determinism.

A minor recommendation of the commission is that psychiatrists can be called in to assist the Court in assessing the mental condition of the accused. Another recommendation is that the trial judge should have the power of raising the issue of insanity of his own motion, when he deems it necessary. This suggestion serve well in cases where the issue of insanity is not raised by the defence even though the accused is mentally abnormal. Though these recommendations are replete with practical advantages, yet they have not received legislative assent.

Lord Devlin presents a very clear and powerful analysis of the problem. He suggests that much of the criticism against the MacNaughton Rules is really against the sentence that follows that is, the conviction of a man who is 'insane' in the legal sense. But he says, it cannot be against the rule itself which helps the jury or a judge in distinguishing the guilty from the not guilty. There should be two distinct procedures. It may be that if a man is acquitted on the ground of insanity he should not be allowed to go free atonce, he should be handed over, as it were, to the civil authorities. Then he should be dealt with in precisely the same way as any person who had committed an act of violence perhpas not amounting to a crime or not giving rise to a prosecution, in which there was a danger of its repetition because of his state of mind. These are the things that have distorted consideration of the MacNaughton Rule. Instead of it being, as it ought to be, the Rule that divides 'conviction from liberty, it has become in the minds of most people the Rule that divides the death sentence from indefinite confinement. It is only, I suggest, if you strip it of those excresences that you can begin properly to evaluate it and to give it its true place in the theory of the law.[2]. Very significantly he remarks that consideration appropriate for a legal determination of guilty should always be separated from those which are appropriate in the realms of sociology, psychology and philosophy since the law does not take its source from them.

2. 'Changing Legal Objectives—Mental Abnormality and Criminal Law' by Devlin, 1963, p. 74 and 75.

The 1957 Act :—The Homicide Act of 1957 has not suggested any amendment to the MacNaughton Rules. But a conspicuous change has been introduced into the English Law by the Act, by the acceptance of the doctrine of diminished responsibility as in Scottish Law. This defence is restricted to the crime of murder. The acceptance of this doctrine has neutralised much of the criticism against the MacNaughton Rules.

The Homicide Act of 1957, in section 2 (1) defines the degree of mental abnormality to establish a plea of diminished responsibility. Further the act in section 2 (3) states that if this defence is successfully raised, it reduces the crime of murder to man-slaughter. The Court may award such term of imprisonment or other punishment or treatment as it thinks fit. This provision is parallel to that provided by the Scottish Law, wherein the crime is reduced to culpable homicide. Section 60 (1) of the Mental Health Act of 1959, provides for institutional treatment by the order of a Court in the case of individuals suffering from mental illness, psychopathic disorders, subnormality or severe subnormality[3]. The Act has certain limitations : (1) it does not apply to murder ; (2) the accused may be convicted ; (3) it rests on the unfettered discretion of the judge whether to invoke the procedure of consulting the doctors, for the accused not being insane may be regarded as responsible and therefore convicted. On the other hand, the Act has the following merits : (1) it is not subject to the cramping limitations and artificial questions of the MacNaughton Rules ; (2) the determination of insanity is made by medical men, not by a lay Tribunal; (3) the evidence of insanity is given, whether the accused raises the issue or not ; (4) atleast one doctor has to give evidence orally in Court which is subject to cross-examination.

In *R. V. Spriggs*[4], and *R.V. Walden*[5], the English Judges followed the direction given by Lord Cooper in *H. M. Advocate*, v. *Braithwaite*[6], as an authoritative and helpful summary of the explanation of diminished responsibility given by Scottish judges in their direction to juries. The acceptance of this doctrine has served the ends of justice in partial insanity cases and has parried the strong criticisms against the MacNaughton Rules to a large extent.

Legal position in United States :—One of the contentions problems of the criminal law which has attracted the attention of jurists, legal writers, sociologists and psychiatrists recently in the United States, concerns the criteria that should determine whether individuals whose conduct otherwise would constitute a crime ought to be exculpated on the ground that they are suffering from mental disease or defect at the time of the commission of the act. The importance of determining such criteria is vividly brought out in the case of homicide when sentence may be capital though it is not limited only to such cases. Hence the need for a sound basis of discrimination between cases that should be regarded as a problem of penal correction and those considered as a problem of mental health.

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3. The doctrine of diminished responsibility came in for adverse criticism by Lady Wooton in her book 'social science and social pathology'. She points out that the acceptance of this doctrine and the recognition of the defence of psychopathic personality are the first steps towards the ultimate shattering of the whole idea of moral and legal responsibility. The better and more preponderant view is against this—'Essays in criminal science'—Diminished responsibility, by J. L. J. Edwards, 1961, p. 33.

4. (1958) 1 All E.R., p. 300.

5. (1959) 43 Cr. App. R., p. 201.

6. (1944) J.C., p. 55.

The MacNaughton Rules are applied in twenty-eight states of the United States. But as the Rules are found inadequate in cases of mental disorder due to lack of self-control, some jurisdictions extended exemption to cases where conduct is the product of irresistible impulse. This criterion was also found to be insufficient as it applied only to cases of spontaneous action and not to conduct produced by insane propulsions accompanied by brooding or reflection. In order to meet these inadequacies, it is argued that a standard which does not confine the inquiry to cognitive or volitional capacity but asks more generally, whether the conduct charged to constitute a crime is the product of mental disease or defect[7] should be adopted. A more or less similar formula had been applied in *State* v. *Pike*[8], and *State* v. *Jones*[9]. These decisions were influenced by the views of Dr. Ray an eminent psychiatrist. This criterion was brought to limelight by its adoption in the famous Durham decision.

Curiously enough *Durham* v. *United States*[10], was a case of house-breaking, that is a non-capital offence. The accused Durham had a record of imprisonments for theft, as well as commitments and treatment for mental illness. Once, after an attempted suicide, he was placed in a mental asylum and his condition was diagnosed as ' psychosis with psychopathic personality '. After discharge he was again arrested for passing bad checks. At the trial he was found to be of unsound mind, so he was again placed in a mental hospital. This time he was diagonsed as ' without mental disorder, psychopathic personality '. After discharge he was arrested for house-breaking in the present case. The prosecutor argued that there would be no use in placing him in a mental hospital as after discharge he would again commit a crime which may even be a murder. Durham waived trial by jury. The trial judge rejected the defence of insanity and convicted him.

On appeal, the appellate Court after perusing the psychiatric evidence and the evidence of the mother came to the conclusion that the accused was mentally abnormal. Hence it reversed the conviction and ordered a retrial. The Court availed this opportunity to point out the inadequacy of the prevailing tests based on the MacNaughton Rules for determining the criminal irresponsibility of the insane accused. The Court proposed the following test : ' an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The Court defined the term ' disease ' in the sense of a condition which is considered capable of either improving or deteriorating ' and the word ' defect ' in the sense of a condition which is not capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease'.

The Durham Rule widens the scope of the defence of insanity by including the various types of mental aberrations and also by permitting more of psychiatric testimony regarding the mental condition of the accused. Thus this rule eschews away the injustice of penalising the mentally abnormal individuals in whom the absence of cognition or the presence of irresistible impulse or compulsive drives are not vividly apparent. In addition this rule is consistent with the general princi-

7. ' On culpability and crime : The treatment of *mens rea* in the Model Penal Code ' by Herbert Wechsler, Annals of the American Academy of political and social science, Vol. 339, January, 1962, p. 37.

8. (1870) 49 N.H. 399.

9. (1871) 50 N.H. 369.

10. (1954) 214 F. 2d., p. 862.

ples of the criminal law and also permits the jury to perform its traditional functions of judging the accused according to public morality. The Durham Rule was followed in *Stewart* v. *United States*[11]. The Court observed that it is wrong to instruct the jury that mental abnormality is a physical disease and that psychopath is a person of low intelligence and not an insane person.

Notwithstanding the apparent clarity of the definition in the Durham Rule, he doubt arose whether it included the psychopathi or sociopathic personality types. Due to this uncertainty Judge Biggs rejected the Durham Rule in *Currens case*[12]. For the same reason it was not followed, in later decisions[13], where it was pointed out that the term ' disease ' was not clearly defined. In addition it is criticised that Unlike the MacNaughton Rules the Durham Rule is vague as it does not provide any guidance to the jury. The Court of Appeal anticipating such a criticism, stated that the jury must determine the issue from the facts of the case. Professor Glueck, while defending the Durham Rule, points out that the term ' insanity ' defined by it embraces persons deemed by psychiatry to be pathological whether their aberration is a psychosis or some other psychiatrically recognised pathological state[14].

Evidently the main criticism against the Durham Rule is that it does not define clearly the crucial concepts of mental disease and mental defects. Though this objection cannot be parried it should be noted that this defect is inherent even in the MacNaughton Rules as they too depend on prior proof of disease or defect of the mind. The Newhampshire Court pointed out that these practical difficulties should be solved by the jury according to the circumstances of each case. Glueck while supporting the Durham Rule observes, that the ' right and wrong test ' of the MacNaughton Rules is also not crystal clear as it is quite confusing and conflicting. The vagueness of the MacNaughton Rules is made vividly clear by the objections of competent witnesses before the Royal Commission on capital punishment.

Another criticism is that it depends on the unsatisfactory ' product test '. The ambiguity regarding it was clarified in *Carter's case*[15]. The Court explained that the product test does not require the act to be a direct or immediate result of a mental disease but that the relationship between disease and act must be ' critical or determinative ' so that the accused would not have committed that act if he had not been diseased as he was.

Finally, the chief objection to the Durham Rule is that by equating mental abnormality with criminal irresponsibility it may eventually open the door to non-penal treatment of all criminals; further, that such a situation will impair the deterrent influence of punishment as it will lead to wholesale acquittal of criminals. It is doubtful whether the Durham Rule would have this effect. In an *Arizona case*[16]

11. 214 F. 2d. 879 (D. C. Cir. 1954).
12. *U. S.* v. *Currens*, 290 F. 2d., p. 751.
13. *Blocker* v. *United States*, 288 F. 2d. p. 853 (D.C. Cir) (1961); *Commonwealth* v. *Chester*, (1958) 337 Mass. p. 702, *Sollans* v. *State*, (1957) 73 Nev. p. 248.
14. ' Law and Psychiatry ' by Glueck, 1962, p. 87.
15. *Carter* v. *United States*, 252 F. 2d. 608 (D.C. Cir. 1957).
16. *McCarrell* v. *State*, 357 p. 2d. 139 (Ariz. 1960).

the Court supported this criticism and observed that though the question of mental abnormality is one for psychiatry, its answer is not sufficient for the legal issue of the presence or absence of criminal responsibility and that the MacNaughton Rules are adequate to resolve this legal issue. The Durham Rule was rejected in *State* v. *Davies*[17], on the ground that it will make the psychiatrist's judgment virtually conclusive.

Since both the MacNaughton Rules and the Durham Rule are criticised, Glueck proposes the test that 'if you are convinced that the defendant at the time of the crime, was suffering from mental disease or defect which impaired his powers of thinking, feeling, willing or self-integration, and that such impairment probaby made it impossible for him to understand or control the act he is charged with as the ordinary, normal person understands and controls his acts, you should find him 'Not guilty on the ground of insanity'[18]. The test also defines cases of partial responsibility, guilt and also the consequence of the verdicts. Glueck points out that his test fills the lacuna left by the Durham Rule in the psychological aspect and that though simple is yet more comprehensive than the American Model Penal Code's formulation. Further, he adds that it supplies the omissions of the currens test. Thus he advocates that his test is more acceptable than the other tests suggested.

The American Law Institute also made attempts to improve the existing tests in its draft of a Model Penal Code. It suggested the following formula : " a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of Law". The fomula specifically stated that the terms 'mental disease or defect' did not include " an abnormality manifested by repeated criminals or otherwise anti-social conduct ".

The Model Penal Code's formulation avoids the ambiguity of the product test of the Durham Rule by focussing attention to the effects of disease on the specific psychical capacities relevant to action and self-control. Critics remark that this test is equally vague and ambiguous particularly, the use of the term 'substantial'. But this criticism can be met by pointing out that 'substantial' is a quantitative term which means clearly that the actor is responsible unless he lacked capacity to know or to control, of some appreciable magnitude, when measured by the general standard of humanity[19].

Though the test does not explicitly state that psychopathy and sociopathy are included in its definition of mental disease, it is not unreasonable to regard such behaviour as a form of mental illness, in the view that reasonable capacity to adapt to the requirements of social life is a constituent of mental health for ordinary purposes[20]. The code clarifies the doubt regarding repeated conduct as a criterion of mental abnormality by providing that the terms mental disease or defect do not

17. (1959) 146 Conn. pp. 137, 148 A. 2d. 251.
18. Glueck, op. cit., p. 105.
19. On culpability and crime by Herbert Wechsler, —The Annals of the American Academy of Political and Social Scince, Vol. 339, January 1962, p. 39.
20. *Ibid* p. 40.

include an abnormality manifested only by repeated criminal or antisocial behaviour[21]

In cases where mental element involves issues other than responsibility such as premeditation and deliberation, the code provides that evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offence[22]. Such a provision sets aside the decision in *Fisher* v. *United States*[23] and the like. It also reduces murder to man-slaughter, in cases where homicide was 'committed under the influence of extreme mental or emotional disturbances, for which there is reasonable explanation or excuse[24]. The provision regarding capital punishment implicates the concept of diminished responsibility as a ground for mitigation.

Despite the unambiguity and clarity of the provision of the Model Penal Code, critics remark that to make this test an improvement over the existing criteria, the judge should explain the deeper and comprehensive meaning of the term 'appreciate' and the expression 'to conform his conduct to the requirement of law'. Due to these defects the Model Penal Code's formulation has been rejected by a majority of the canadian Royal Commission on the Law of Insanity, by the Massachusetts special commission on Insanity, and by the New Jersey Supreme Court. But some states have accepted the code's formulation and have abolished the MacNaughton Rules by a Statute and substituted a statute based on the Model Penal Code's provision.

Proof of Insanity :—Regarding burden of proof, even in American Law the presumption is that the accused is sane and hence the prosecution is not required to prove the sanity of the accused. So the burden of proving insanity is on the defence. Analogous to English Law the accused has only to introduce evidence sufficient to raise a reasonable doubt regarding his mental condition. In some Federal courts the lower standard of 'some evidence' is sufficient to raise a doubt. In District of Columbia after *Durham* v. *United States*[24-a], even a mere scintilla is sufficient for the judge to instruct the jury to consider the accused's claim of insanity. This imposes a greater burden on the prosecution as to establish responsibility, the prosecution must prove that there was no connection between the mental disorder and the commission of the crime. On the other hand to establish lack of responsibility the defendant need prove only 'some connection' between his mental disorder and the criminal act. Thus the Durham view makes the task of the prosecution a herculean one whenever the defence introduces even a scintilla of proof of mental abnormality. The position of the prosecution is better in case of partial responsibility as it has to bear only half of the burden.

In some States to lessen the hardship of the prosectuion, the rules of affirmative defence is followed. This rule places the onus not on the prosecution but on the

21. *Ibid.* p. 40.
22. Model Penal Code—proposed Final draft No. 1. 1961 section 402.
23. (1946) 328 U.S. 463.
24. Model Penal Code. Tent. Draft No. 9, 1955, section 201. 3.
24-a. 214 F. 2d. 862.

defence to convince the jury regarding the lack of responsibility of the accused due to his mental abnormality.

This lack of uniformity in the states regarding the test of insanity indicates the complex nature of the problem and the reluctance to accept completely the medical view of insanity for the purposes of the criminal law.

The legal position in continental countries and Japan :—In the continental countries the provisions regarding insanity in the Penal Codes are more or less uniform. These provisions also do not explicitly define insanity but merely outline its nature. The continental codes simply refer to insanity as ' demence ' or ' mental disorder ', or ' mental deficiency' which excludes ' intentional and volitional capacity ' or state of non-imputability.

Germany :—The German Penal Code [25] rests on the principle of ' *mens rea* ' and the nature and quantum of punishment is based on the degree of personal guilt. Article 51[1] of the code defines irresponsibility as a state of : (1) incapacity of appreciating the unlawfulness of the act, or (2) in capac.ty to act in accordance with such appreciation even if there is capacity to appreciate the unlawfulness of his deed. The incapacity in either case may be due to mental derangement of senses, mordbid disturbance of mental activity or mental deficiency. Such incapacity completely exempts the person from criminal liability. The second paragraph of the article provides for reduction of sentence where such ability is substantially impaired at the time of the commission of the act, *i.e.*, in a case of diminished responsibility.

The reduction is to be on the same principles as in the case of attempts. In addition clause (2) of the same provision states that in the case of persons with limited responsibility confinement shall be imposed in addition to punishment. This clause was added in 1953. Article 42 (*b*) provides for the placement of the mentally abnormal in mental institutions for curative treatment.

Russia:—In Article 11, of the Fundamentals of criminal legislations for the U.S.S.R. and the Union Republic[2] it is provided as follows :'A person who at the time of commission of a socially dangerous act, is non *compos mentis*, i.e., unable to account for his actions or to govern them as a consequence of chronic mental disease, temporary mental affliction, weak-mindedness or some other morbid state, is not held criminally responsible. Obligatory medical treatment as defined by the legislation of the Union Republics may be applied to such a person by order of the Court[3]. Under Article 2, criminal laws of the Union Republics should conform to these Fundamentals. The criminal code of the R.S.F.S.R. of 1960 as amended upto 1965, contains a provision which is substantially similar.

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25. American Series of Foreign Penal Codes, 4 Germany,—German Penal Code of 1871 amended upto 1st January, 1961).

1. The original section 51 read as follows : ' If the offender at the time of committal of an offence was in a state of unconsciousness or derangement of the intellect due to illness by which the free exercise of his will was prevented, the act is not punishable '.

2. Fundamentals of crimnial Legislation for the U.S.S.R. and the Union Republic (approved by Supreme Soviet of the U.S.S.R., 25th December, 1958.)

3. Penal Code of R.S.F.S.R. of 1926 in Article 11, provided to the same effect.

It is clear from the above that the concept of non-imputability includes both incapacity to appreciate the nature of the act and incapacity to control such act, the cause in both cases being chronic mental disease or temporary mental affliction and other mental states, which may be covered by the concept of ' diminished responsibility '.

Switzerland :—Article 10[4] of the Swiss Penal Code exempts an individual from punishment if due to insanity, imbecility or serious mental disturbance he was unable, at the time of commission of the act to realise its unlawful character or to act accordingly. Thus it covers a case of incapacity to realise its unlawful character as well as a case of incapacity to act in accordance with such realisation, that is to say the incapacity to control his conduct even if he could appreciate its unlawfulness. If similar consequences follow due to his partial insanity, the punishment is reduced under Article 11. Partial insanity is said to occur when the persons' mental capacity is affected or his consciousness is affected or his mental capacity is not fully developed.

France :—Article 64, of the French Penal Code states : ' If a person charged with the commission of a felony or misdemeanour was then insane or acted by absolute necessity, no offence has been committed '. It means that an individual is not responsible for his criminal act if he is insane at the time of the commission of the act. The concept of insanity is not explained in the code. Marc Ancel in his introduction to the French Penal Code made this remark : " there was a particular regret that the problem of mental incapacity, a problem of grave concern today, was given such short treatment in Article 64, the rigid if not somewhat elementary simplicity of which is in some respects similar to the famous MacNaughton Rules ".[5]

Italy :—Italian code[6] also in Article 88[7], exempts from criminal liability a mentally infirm person, when he is incapable of exercising his capacity of intention or volition. Article 89[8] provides for mitigated punishment in case of diminished responsibility. Article 90[9] provides that conditions of emotion or passion do not exclude, nor do they lessen responsibility.

The provisions regarding insanity in the continental Codes include the cases of irresistible impulse also, as is evident from the provisions cited above. The exemptive provisions of these codes include cases covered by the MacNaughton Rules, and at the same time they are more comprehensive because they recognise the force of

4. The Swiss Penal Code of 1937.

5. American Series of Foreign Penal Codes, 1 France—French Penal Code of 1810, (as amended upto 1959).

6. Penal Code of the Kingdom of Italy of 1930 (as approved by the Royal Decree of 19th October, 1930.

7. A person who at the moment when he committed an act, was by reason of infirmity, in a state of mind such as to exclude capacity of intention or volition, shall not be chargeable Article 88.

8. A person who at the moment when he committed an act, was by reason of infirmity, in a state of mind such as largely to diminish, without excluding, his capacity of intention of volition shall be responsible for the offence committed ; but the punishment shall be reduced Article 89.

9. Conditions of emotion or passion do not exclude, nor do they lessen responsibility—Article 90.

the irrational, emotional element—the irresistible impulse—in producing a criminal act, a situation not covered by the MacNaughton Rules. The common links between these codes are : firstly, the recognition of the irresistible impulse ; secondly, the inclusion of mental deficiency, and 'non-sane—non-insane', group including the psychopathics ; and thirdly, the placing of the burden of proof on the prosecution.

Japan :—The Penal Code of Japan of 1907 as amended upto 1954 provides in Article 39, that an act of an insane person is not punishable and adds that punishment shall be reduced for the acts of weak-minded persons.

Legal position in India :—The draft Penal Code proposed by Macaulay in 1837 contains two sections : (1) section 66 : ' Nothing is an offence which is done by a person in a state of idiocy ', and (2) section 67 : ' Nothing is an offence which is done by a person in consequence of being mad or delirious at the time of doing it '. The provision was assumed by the draftsman to be self-evident and a plain statement of the English law. As for the elastic character of the provision, J.D. Mayne remarks, it is clear that section 67 would grant to a lunatic an immunity extending as far as anything claimed by medical theorists.[10] The draft provisions were apparently shadowed in the final stages, owing to the formulation of the tests by the English judges in 1843, in the MacNaughton Rules.[11] The result is the present provisions in section 84 of the Indian Penal Code.

Section 84 of the Indian Penal Code states that 'nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.[12] In interpreting this provision the judges emphasised its substantial identity with the MacNaughton Rules and therefore borrowed the same language—According to judicial interpretation, to establish a defence on the ground of insanity it must be proved that at the time of committing the alleged offence the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, he did not know he was doing what was wrong.

The first requirement under the section is that the accused should be incapable due to unsoundness of mind to understand the nature and quality of the act. Such a

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10. ' The Criminal Law of India ' by J. D. Mayne, section 61 of the commentary.

11. J. D. Mayne, *op. cit.*, notes in section 63 that the Indian Act IV of 1849 was already influenced by the MacNaughton Rules. This Act in section 1 provided as follows: "No person can be acquitted for unsoundness of mind, unless it can be proved that by reasons of unsoundness of mind, not wilfully caused by himself, he was unconscious and incapable of knowing, in doing the act, that he was doing an act forbidden by the law of the land."

12. Under section 470 of the Criminal Procedure Code, when a person is acquitted under section 84, Indian Penal Code, the finding shall state specifically whether he committed the act or not. Under section 471, whenever the finding states that he committed the act, the Court orders such person to be detained in safe custody in such place and manner as the Court thinks fit and shall report the action taken to the State Government. Such person shall not be detained in a lunatic asylum except in accordance with the procedure prescribed in Indian Lunacy Act, 1912.

requirement covers situations arising from automatism, or mistake or simple ignorance of fact. The individual should be incapacitated by his mental abnormality from knowing the nature and quality of his act. This knowledge is with regard to the accused's consciousness of the consequence of his act on the individuals who are affected by it. Absence of such a knowledge is relevant in determining the insane mental condition of the accused. This is illustrated by *Lakshman Dagu's case*[13]. The accused who was laid up with fever killed his two children, when they annoyed him by crying. It was alleged that the fever had made him irritable and sensitive to sound. But it did not appear from the evidence that he was delirous at the time of perpetrating the crime as not to know the nature and quality of his act. The accused made a full confession of his crime. The Court rejected the defence and convicted him for murder.

A common test to determine whether a person knows the nature of his act or that he is doing a wrongful act is to ascertain whether he would have committed the act if a policeman would have been at his elbow. The capacity to know a thing is quite different from what a person knows as the former is a potentiality and the latter its result. The section covers only an organic incapacity and not an erroneous belief "which might be the result of perverted potentiality[14]. When a man is ignorant of the consequences of his act and the external agencies which he brings into play, then he is said to be incapable of knowing the nature of his act.

The second or the alternative requirement under section 84, is that the accused did not know that what he was doing was wrong or contrary to law. Analogous to English courts, the Indian courts are also of the view that the term 'wrong' means 'legal wrong' and not 'moral wrong'. The High Court's decision in *Chhotelal's case*[15], clarified this point. In this case the accused killed his wife and infant daughter with a *dao* without any apparent motive. The accused admitted his crime without any attempt to conceal it and further he did not try to escape. Though there was some vague evidence regarding the deranged mental condition of the accused, the lower Court held that it was not sufficient to prove that the cognitive faculties of the accused were so impaired that he did not know the nature of his act or that he was doing what was wrong or contrary to law. The sessions judge convicted and sentenced him to death. When the case was referred to High Court for confirmation the High Court took a contrary view and reversed the lower Court's decision. The High Court observed that since the accused had only a glimmering knowledge that his act was contrary to law, that is, it was a legal wrong, he could not be held criminally responsible for it. The mental condition and circumstantial evidence also indicated that the accused could not be said to be 'under the guidance of reason'. Therefore the High Court came to the conclusion that the accused's unsoundness of mind was within the exemptive provision of section 84. The view that it is only unsoundness of mind which materially impairs the cognitive faculties of mind that forms the ground of exemption from criminal liability and not that which affects the will and emotions, is not very sound as it is difficult to say that these disturbances have no connections with the unsoundness of mind. The High Court observed that in the light of recent developments in psychiatry it would be better to revise the present

13. I.L.R. (1886) 10 Bom. p. 512.
14. 'Commentaries on Indian Penal Code' by V. B. Raju, Vol. I, p. 220.
15. *State* v. *Chhotelal*, A.I.R. 1959 Madh. Pra. 203.

restricted conception of unsoundness of mind in section 84 and to include irresistible impulse also as a ground of exemption. This view, it may be pointed out, indicates a progressive trend in the judicial interpretation of section 84. It has the merit of an independent evaluation of the language of the section, unfettered by the MacNaughton Rules. Further it marks a bold attempt at the integration of law and psychiatry.

Non-liability of accused in cases of delusion depends on the nature of the delusion. *In Dilgazi's case*[16], the accused murdered his wife without any rational motive. The accused neither tried to escape nor did he resist arrest. The evidence showed that he suffered from a failure of reasoning powers and also that he was under the delusion that dangers threatened his wife. The Court held that the facts proved, that the mental derangement of the accused prevented him from knowing the nature of his act. Hence the accused was exonerated from criminal liability. In *Kazi Bazlur's case*[17], the conviction against the accused was upheld as the delusion did not render him unconscious of what he was doing or to make him ignorant of the fact that he was committing a wrongful act. The accused was charged with the murder of Mr. Davies, the District Magistrate and Collector of Chittagong. There was evidence that the accused was labouring under the delusion that he was a person of extraordinary ability and qualification, and hence wanted to complete his education in England. To accomplish his object, he wrote lucid letters to Mr. Davis and fixed up an appointment with him. On the appointed day he went early and killed Mr. Davies with a knife. After the commission of the crime he tried to escape and resisted arrest. This fact unmistakably proved that the accused knew that he had committed a criminal act. As his delusion did not impair his capacity to appreciate the quality of his act, his conviction was upheld but the sentence was reduced to transportation for life. Though partial delusion is a mitigating factor, it is insufficient to exonerate the accused.[18] Erroneous beliefs are not regarded as exceptions. So an accused is not exonerated from his liability even if he commits the illegal act in consequence of a wrong belief.[19].

Somnambulism is a ground for exemption if it is proved to constitute that a unsoundness of mind which falls within the exemptive provision of section 84. In *Pappathi Ammal's case*[20] the conviction was confirmed due to lack of substantial medical evidence that the puerperal disorder amounted to unsoundness of mind of the type described in section 84. The accused after her confinement was in a depressed and disturbed state. On the night of occurrence, the accused drowned herself with her baby in a well. She was rescued but the baby died. Therefore she was charged for murder of the child and for attempting to commit suicide. The defence was that the offence was committed during the phase of Somnambulism and the accused was entitled to the benefit of section 84. The defence was rejected and the sentence of transportation for life confirmed.

Proof of Insanity :—The burden of proof of insanity is on the accused, while the burden of proving the guilt is on the prosecution. As in English law this burden is

16. I.L.R. (1907) 34 Cal. 686.
17. (1929) 33 Cal.W.N. 136.
18. Arzao, 2 W.R. 33.
19. *Lakshmi* v. *State*, A.I.R. 1959 All. 534.
20. (1959) M.L.J. (Crl.) 147 : (1959) 1 M.L.J. 125 : (1959) 60 Cr.L.J., 724.

not a persuasive one as the accused has only to introduce proof regarding his mental abnormality. The persuasive burden of proof still rests on the prosecution, as it has to prove the presence of requisite *mens rea* as in all criminal cases. Thus in cases where insanity is pleaded, two principles run counter to each other, one covering the general principles of onus on the prosecution to prove the case beyond reasonable doubt and the other demanding from the accused to prove his special plea of insanity. The defence has only to rebut the presumption under section 105 of the Indian Evidence Act, that the accused was then not of unsound mind and that he knew the nature of the act. It need not prove beyond reasonable doubt, the opposite of the presumption. In *Raju Shetty's case*[21], the Court stated that the burden placed on an accused taking the plea of insanity is in the nature of the burden placed on a party in a civil litigation.

In *Chhotelal's case*[22] their Lordships opined that the accused in discharging the burden has to lead evidence of circumstances which establish the degree of insanity required by law or make its existence so probable that a prudent man ought under the circumstances to act on the supposition that it existed. The onus of proof is discharged by letting in evidence as to the conduct of the accused shortly prior to the offence or at the time of committing the offence or immediately after the commission of the offence. The accused's mental condition, his family history and heredity are also relevant to prove his mental abnormality. If it is proved that the crime was committed not in a paroxysm but in a fit of anger, the accused is criminally held liable for his act as it could not be said that he was *non compos mentis* at the time of the commission of the crime.[23] Even if the accused is in a highly excited and unbalanced condition, he is not relieved of his criminal responsibility as he is conscious that he is committing an offence.[24] A moody and pensive temperament or eccentricity or abnormal behaviour does not in the least indicate an unsoundness of mind[25]. Mere absence of motive or attempt at concealment alone does not evidence a mental derangement but they strengthen a defence of insanity. Though the accused might be insane from the medical point of view, he would not be exonerated under section 84 of the Indian Penal Code, if he knew the nature of his act or that he had done something wrong.[1].

The need for reorientating the Indian Law in the light of recent psychiatric theories has been emphasised in *Ramdulare Ramadhin Sunar* v. *State*[2]. There the Court observed that in the practical application of the principle enunciated in section 84 of the Indian Penal Code, ' a more progressive attitude will have to be adopted for determining criminal responsibility of a person suffering from ' mental disorder' in the light of recent advances in the medical science especially in the branch of psychiatry.[3].

21. (1959) M.L.J. (Cri.) 986 : A.I.R. 1960 Mys. 48.
22. *State* v. *Chhotelal*, A.I.R. 1959 Madh. Pra. 203.
23. Tolaram, I.L.R. (1927) 8 Lah. p. 684.
24. *Venkataswami*, I.L.R. (1889) 12 Mad. p. 459.
25. *Koli Jeram*, A.I.R. 1955 Sau. 105.
1. *Lachhman*, I.L.R. (1924) 46 All. 243.
2. A.I.R. 1959 Madh. Pra. 259.
3. It is significant to note that in the recent *Raman-Raghav's* case the Bombay High Court ordered a psychiatric panel named by them, to give a report of the mental condition of the accused, when it came up for the confirmation of the death sentence. It was pointed out in the papers that this was the first time when psychiatry was availed. This line of thinking is in tune with the modern psychiatric theories in the field of criminology.

Mr. Battacharya in his survey of the law of insanity expresses a similar view when he says that the door should be kept open for appropriate relaxation and extension of MacNaughton Rules, so that criminal trials may be rationalised, if not humanised though the task will not be an easy one and some of the difficulties may be baffling[4]. The only redeeming feature at the present day is that in appropriate cases of mental disorder short of insanity, the alternative punishment of transportation for life, instead of death, may be awarded in cases of murder. In other offences, there is no special provision authorising reduction of sentence except that the judge has latitude between the maximum and minimum penalties imposed under the Indian Penal Code.

Apart from the need for extension of the scope of exemption by broadening of the concept of insanity it will be worthwhile to consider the insertion of a provision for reduced punishment, instead of complete exemption from liability, in the case of substantial impairment of the ability to appreciate the unlawfulness of the deed[5] partial mental deficiency[6] and weak-mindedness.[7] Undoubtedly, the Indian Law needs to be interpreted progressively by the judges and, if necessary legislative modification may be undertaken in that behalf.[8].

[END OF VOLUME (1970) I M.L.J. (JOURNAL).]

4. 'Insanity and Criminal Law' by B. K. Bhattacharya, 2nd edn. 1964, p 5.
5. As in German Penal Code, 1871 (amended upto 1961).
6. As in Penal Code of the Kingdom of Italy of 1930 and Swiss Penal Code of 1937.
7. As in Penal Code of Japan of 1907 (as amended upto 1954).
8. Mr. R. B. Tewari seems to think that the statutory crystallisation of rules as in section 84 fetters the judiciary by rendering the provision inelastic. He suggests an examination of the whole matter *de novo*—Essays on the Indian Penal Code, Indian Law Institute Publication, p. 83.