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Preface

The major part of my professional life was spent as a counsel for the defence. The richness of this is largely due to the trust placed in me by the countless people whose freedom I found myself defending. It is this that has carried me through dark days, providing hope when it would have been easy to despair. Friends, colleagues and far-off sympathisers have also lent me strength and support. The respect I have been accorded by the leaders of various revolutionary groups as well as the admiration of their cadres has borne me lightly across many troubled times. The unquestioning yet critical support of my wife Vasanth and children, Chitra, Kalpana and Arvind, has been vital through these years.

After the revocation of the Emergency, I was elected President of the Andhra Pradesh Civil Liberties Committee. I held this post for fifteen years. I owe my growth as a defender of democratic and human rights to this period, which also helped me outgrow both extreme left dogmatism and impotent liberal rhetoric. My association with the members of the APCLC, especially with K. Balagopal, has been valuable. In the People's Union of Civil Liberties, V.M. Tarkunde has been a source of tremendous support. My friends in the PUCL—Yash Pal Chibbar, Rajni Kothari, Kuldeep Nayyar and Rajinder Sachar—have been precious to me. I cannot forget Arun Shourie's friendship, love and total support of my human rights activity in the decade following the Emergency, particularly during the tenures of the Tarkunde Committee and the Bhargava Commission. I am indebted to my young friends in the human

rights movement, too many to enumerate, who have been an inexhaustible source of inspiration and energy.

It is the period from 1975 onwards that provide the background for these articles. Some were written for advocacy, some to clarify my own understanding. At no point did I expect that they would come together as a book. Pulling these scattered pieces together, organising them and checking out the references has been a Herculean task undertaken with love and commitment. Without my daughter Kalpana's effort this book would not have been possible. My thanks to Subbalakshmi and Padmini for secretarial assistance. Finally, I am grateful to Orient Longman, especially to Hemlata K. Shankar, for her enthusiasm and personal attention to every aspect of the publication.

Much of my own understanding and clarity has come from what I have read (voraciously) through the years. Together these pieces trace my intellectual and political growth. If they provide a single insight or inspiration to anyone who is seeking the tools to fight for a principle, then my labours will not have been in vain.

January 2004

K.G. KANNABIRAN

1

The Saga of Impunity

The relationship between violence, power and the law is especially evident to those committed to democratic values. There is an overwhelming play of violence as power and power as violence, sometimes in breach of the law and sometimes as a tool for its enforcement. If violence in society is perceived as a breach of the law, the law itself is equally violent and in fact has an even more debilitating effect because of its systematic and thorough ruthlessness backed by official sanction.

While still in my college days, my enthusiasm for the communist movement suffered a setback after I read the then popular anthology of writings called *The God that Failed*. After the October Revolution many intellectuals were attracted by the communist experiment, which if carried out successfully, promised the possibility of an egalitarian society. But this vision was disrupted by the Stalin-Hitler pact and subsequent abuse of power. Abuse of power is synonymous with violence. Fascism and totalitarian power in general represent a massive abuse of power against large human collectives, with guaranteed impunity. From the 1930s to the end of the Second World War, power was exercised through violence, both internally, i.e. within a nation, and externally, in relationships between nations. This violence was always legitimised and explained by law.

While the rule of law is a civilising factor, it is at the same time an instrument that facilitates the uncritical acceptance of the deployment of violence for governance and to justify war. This interplay of violence and power has little to do with the ideology that states or governments profess.

It was as a consequence of this use of power that countries met together to draft and adopt the Universal Declaration of Human Rights, with the sole purpose of ensuring that human rights would be protected by the law.

Although the post-war world and newly liberated countries had constitutions with entrenched rights, they too (like the countries that were independent by then) abused power and defaulted in their conduct, both according to the Declaration and their own constitutions.

India was no exception. By the late 1960s, all its grandiose five-year plans had failed, and its mammoth state-owned industrial and trading enterprises were no longer profitable and could not be justified on grounds of accrual of any social benefits. The agricultural sector fared no better. Very soon, the maintenance of law and order became the *raison d'être* of governance. And this crisis was not India's alone, but one that India shared with most of the world. The fragmentation of political parties from right to left, the emergence of the Naxalbari movement in Bengal, Jaya Prakash Narayan's struggle to force accountability in governance and fight authoritarian trends, particularly in the biggest national party, the Indian National Congress, were all part of the crisis. The movement led by JP (as he was known) was the first major assault on the Indian national government after Independence, and the first major test of all the institutions of governance, including the judiciary. No institution was spared in this fight, and almost all institutions of governance became ranged against the people. This period also revealed the violence of law in all its facets.

Law represents a society's consensus for the regulation of human activity in various fields, and the regulation of these activities by the deployment of state power, a deployment that need not necessarily be violent or backed by the threat of force.

However, expressions like 'law and order', 'public order' and 'state security' enable the state to employ violence against the people without a corresponding obligation to exercise discretion. Any scrutiny of this exercise of power by the state is only possible after the damage has been done. An assembly of protestors, for instance, brings to life the exercise of free speech and the citizens' right to association and assembly. It also involves the freedom of movement of the citizens constituting the assembly. There are constitutional safeguards that protect these rights. Very briefly, in maintaining public tranquility, the assembly of protesting persons may be declared unlawful; they may be dispersed and their leaders taken into custody. If the assembly does not disperse, force may be employed to disperse it, but orders to open fire must only be issued in the presence and with the authorisation of a magistrate. These safeguards, however, have never been complied with, from Jallianwala Bagh and the Hunter Committee report during colonial times to the present day. S. Satyamurti, the well-known South Indian politician, tabled an amendment in the 1930s to the provisions dealing with 'public tranquility' with a view to reducing the harshness of the law. The law, of course, does not provide any guidelines to measure the force used. The law only stipulates that minimum force should be used; it does not seem to consider that the force used is likely to take away life and liberty, the very issues covered by Article 21 of the Constitution.

The law is employed to restrain the exercise of rights and to manage and contain any unrest that may signal rebellion. The state confronts the very first protest with ruthless dispersal and informs the citizen that force will be used to contain public expression of discontent, no matter how weak the protest. For instance, a protest by the visually challenged before Andhra Pradesh government buildings against corruption and ill treatment in their hostels was met with police batons. The police of this state are not particularly wicked. The Delhi police has meted out the same treatment for similar demonstrations. The constant promulgation across the country of Section 144 of the Criminal Procedure Code, prohibiting assembly of more than

five persons without police permission, points to the looming threat of violence legitimised by law. Violation of this order may lead to preventive arrest or use of force if the assembly does not disperse with threat and persuasion. The promulgation itself is violence, because the rights to free speech, assembly and movement stand withdrawn. Ironically, the government brings this provision into operation around Parliament and the Legislative Assemblies when they are in session, thereby protecting elected representatives from the citizens who elected them. Violence under cover of law manages to remain unaccountable. When Section 144 was questioned by Dr. Ram Manohar Lohia in the Supreme Court, the latter did not define the limits of the expressions 'law and order', 'public order' and 'security of state', but instead illustrated the areas of operation with reference to concentric circles, the outermost being 'law and order', the middle, 'public order', and the innermost, 'security of state'. The court thus imbued these expressions with overriding qualities, as Chomsky points out. And precisely because they are undefined, these expressions abrogate all constitutional guarantees. Defining power would limit it and make it accountable and enhance rights.

The battle between the exercise of rights and the exercise of power has a long history. The stability of political institutions has always been challenged in times of crisis. Anticipating such situations, the Constitution and criminal law contain provisions to meet these challenges.

Radical social movements, for instance, are seen initially as disrupters of public order and later as a threat to state security. The state has the power to invoke criminal laws for the arrest and prosecution of persons it charges of treason and conspiracy to overthrow a lawfully established government. It can also accuse them of waging war, which charge divides itself into various ancillary offences like attempt to wage war, concealment of a design to wage war, etc. Now, waging war normally means carrying arms, ammunition or explosive substances. After charging the suspect compendiously for waging war, the accused will then also be charged under the Arms and Explosive

Substances Act on the same set of facts. The violence these prosecutions engender has to be seen to be believed. From the time of arrest to the time of trial the persons suspected of these offences are put through covert and overt forms of violence. Between arrest and production before the court there is custody with the police. The Constitution says the arrested person has to be produced within 24 hours of his or her arrest. There is a difference between actual arrest and legal arrest; actual arrest precedes legal arrest. The time spent between the two may vary from two days to several days or even weeks. The length of such custody always depends on the alertness of the arrested person's friends and relatives. Fearing the worst, they may not rush to court as they should, but try and manage the person's release or production before the court. This gives the police time to subject the arrested person to violence, including the possibility of execution without reference or recourse to law. This is yet another chapter of violence operating under the protective arms of the law.

This is just the beginning. To leash legitimate protests the state often formulates a vague and inchoate conspiracy charge incapable of precise definition. The coming together of persons to agree to do unlawful acts can never be proved, because it would require evidence not admissible under law otherwise. The coming together need not be physical; a meeting of minds is sufficient. The charge of conspiracy is a convenient tool to target political movements. The British used it effectively during the freedom struggle. By nature a sprawling charge, a large number of persons can be recruited as accused in these cases. There are political advantages to be gained by such elaborate trials. During the Meerut conspiracy case, the British government aimed at undermining communism by exposing the movement's leaders and turning national opinion against them. An elaborate criminal proceeding was initiated against them, making it difficult for the communists to later align with anti-British, nationalist parties in India. In the course of this criminal proceeding, legal precedents for the criminal prosecution of communist leaders were set out in order to make future

prosecution easier. Finally, it was believed that 'a favourable judicial verdict would make it easier for the Government to proclaim ordinances concerning similar situations, and if required, to disband at an early stage in their development, such organisations as the government considered dangerous.'¹

The principal function of the criminal justice system then appears to be the power to use the judicial process to break an opposing political movement and discredit it, with the executive and the judiciary working in tandem. All the repressive laws used by the British against the freedom struggle have been retained in independent India, despite constitutional provisions mandating scrutiny.

1968 was a year of crisis. While there was no clear ideological polarisation, there were fractures between adversarial groups within various political parties, many of which split into two right across the spectrum. Indira Gandhi split from the conservative block popularly known as the Syndicate. She became the leader of a new faction which claimed the following of the people. Her populist slogan reiterated the Directive Principles, which brought the fundamental obligations of the government centre-stage, 25 years after the Constitution had been adopted. She was surrounded and encouraged by a political elite that included well-meaning bureaucrats who sincerely believed that top-down social transformation was possible. They found in the Directive Principles a radical agenda which was not revolutionary. But there was a fundamental problem. By positing that the Directive Principles were prior to fundamental rights, in an environment in which hysteria was orchestrated around 'forces of destabilisation', her party found it easy to enforce political stability through the suspension of democracy and a declaration of a moratorium on rights by invoking a state of emergency. Increasing dissent was put down ruthlessly without the minimum procedure to be followed for the forfeiture of someone's liberty. It was during this period that the Supreme

¹Pramita Ghosh, *Meerut Conspiracy Case and Left Wing in India*, 1978, pp. 161–162.

Court was restructured and the Maintenance of Internal Security Act (MISA) came up for judicial review. The court that had taken an adversarial position on the attack on the right to property² did not display the same eagerness when it came to personal liberty. The intellectual rigour displayed by the court in dealing with property rights was missing when dealing with the right to liberty (an expression which includes the right to free speech, association and assembly). The incarceration of a large number of people under preventive detention laws was validated. This was apart from the large number of people held in illegal custody all over the country. In Andhra Pradesh alone, I appeared on behalf of some five hundred detainees between 1975 and 1977. One of the earliest cases to question the validity of the proclamation of Emergency and of the new provisions introduced under MISA was filed in the A.P. High Court. This case, decided by the full bench, became a precedent for the decision by the Supreme Court in ADM Jabalpur. The full bench in A.P. upheld the validity of the act and the detentions. The Advocate General of Andhra Pradesh claimed, even before the Attorney General could, that if a police officer shoots down a citizen on the roads, no action could be taken against him during a period of emergency.

All this in the name of security of the state. The definitions of the words 'security' and 'state' have never been subjected to scrutiny, despite the transition in politics from absolutism to democracy. The Indian state, originally constituted to be a democracy that would represent a plurality of interests, grew absolutist during the 1960s. An activist court was now increasingly perceived as a substitute for politics, masking the undermining of rights that was already under way. Judges talked about 'barefoot lawyers' and 'door delivery of justice', even as the ground was prepared for the proclamation of emergency in 1975. The abuse of power under emergency rule was legion, as revealed by the Shah Commission and other commissions of

²Golak Nath v. State of Punjab, AIR 1967 SC 1643.

enquiry. The emphasis in this and other enquiries was on the fundamental rights of free speech, assembly, association and personal liberty.

In Andhra Pradesh, as a result of internal turbulence within the communist movement, the party split into two, and from a further split emerged the Naxalbari experiment and the CPI ML assertion that armed struggle was the only road to social change. These ideas spread like a forest fire from Naxalbari to Srikakulam. The declaration of the policy of armed struggle and individual annihilation of class enemies paved the way for a major onslaught. This provided the state with a legitimate pretext for abusing power, unleashing violence and rendering the law totally irrelevant. The Naxalite movement preceded the Emergency by six or seven years. Initially, the A.P. Preventive Detention Act, 1970, and the A.P. Suppression of Disturbances Act, 1967, were used to silence a group of revolutionary Telugu writers, with three of them being arrested. The 1970 act provided that every ground in a detention order could be deemed sufficient for a detention. This was to circumvent the requirement that the grounds shown must have some relevance to the activities of the detainee, to satisfy the authority that the activities alleged were detrimental to public order or the security of the state. By declaring that one or the other ground was relevant, the act created a fiction which in effect dispensed with the satisfaction of the authority, thus disabling the courts from setting aside the order. The High Court struck down the act as invalid, as violating Article 22(5) of the Constitution.³ Of significance here is the assumption that rights do not inhere automatically in citizens. A right becomes available only when, through litigation, a certificate is obtained from the court allowing the citizens to speak, write, assemble and move as an

³Article 22(5) of the Constitution reads: 'When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.'

assembly, and stating that such activity does not disturb public order or the security of the state.

The Naxalite movement in Andhra had its base initially at Srikakulam, a hilly terrain with dense forests covering an area of 600 square miles. These areas were inhabited by the Jatapu and Savara tribes. Like other tribal areas in the country, these peoples have been subjected to immense exploitation and were being organised by the Naxalites to assert their rights. On 31 October 1967, some land-owners intercepted tribals on their way to a meeting at Mondemkhal and opened fire, killing two of them. That these areas had been badly neglected is an admitted fact. That such areas will always attract political activity is axiomatic. Instead of addressing questions of exploitation in the tribal areas, the government exercised its power to liquidate political activity. Almost all the tribal areas were notified as 'disturbed' under the A.P. Suppression of Disturbances Act, 1967, and the Naxalite movement there was ruthlessly crushed. Once an area has been so notified, any assembly of more than five becomes unlawful. To disperse such an assembly a sub-inspector can open fire to kill. It was the abuse of this repressive provision which gave birth to 'encounters'. Persons were apprehended outside the notified areas, taken inside those areas and killed. The leadership was decimated in these encounters. More than 150 Naxalites were killed in this way and the rest of the leaders were prosecuted. 140 accused (and around 1,000 witnesses) endured a prolonged trial that began in 1970 on charges of conspiracy to kill, murder and pillage and conspiracy to wage war, apart from sedition. Although most of the accused were tried for overt acts, all these various prosecutions were tied together and projected as offences committed in pursuance of an earlier conspiracy, as in law conspiracy is a distinct offence. All offences that are pending or concluded may be put in issue in a trial for conspiracy. The possibility of arriving at conflicting conclusions cannot be ruled out. Nagabushanam Patnaik, for instance, was found guilty of murder and sentenced to death by a sessions court where he did not defend himself. It was an *ex parte* death sentence! The president of India commuted the sentence to life. Later, in the

conspiracy trial, the same murder was put in issue and the judge found that the accused had nothing to do with the murder. The carrying out of the death sentence would have been without the authority of law. Later, when the matter was taken to the Supreme Court on the ground that his serving a sentence would be violative of Article 21, the principle of finality was invoked to refuse interference. One had to wait till *Antulay* to reopen finality on grounds of palpable injustice.⁴

The Secunderabad conspiracy case went on for fifteen years and all forty-five accused were acquitted. However, these acquittals really obscure the abuse of power and the law. They also obscure the violence employed using the law as a shield. The accused were held for long periods. The anguish and mental stress suffered by their families, the uncertainty of their return, the near bankruptcy to which these families are reduced, all these are factors that are critical to the assessment of the system.

Politics is treated as a crime. The subversion of law begins with the reduction of politics to a crime. After such subversion, the law becomes a pretext for violence. The liquidation of political dissent brings up the troubling erasure of the human rights of political dissenters. The position of human rights activists that the political philosophy of a targeted group should not affect the protection of their rights is misinterpreted and projected as political support for the targeted group, be they Naxalites or terrorists. On the contrary, this concern attempts to curb the state from turning into the biggest violator of the law, with an impunity that destroys governance in all its facets.

This kind of large-scale liquidation was carried out in West Bengal and Andhra Pradesh, and in the latter state it has become part of administrative practice. In Andhra Pradesh, 'encounter killings' average around 150 to 200 per year. The practice of liquidation is also familiar in Punjab, and in the state of Jammu

⁴*A.R. Antulay v. R.S. Nayak*, AIR 1988 SC 1531. A judicial authority violating a fundamental right (though binding until it is set aside) may be set aside for that reason. For a discussion see Durga Das Basu, *Shorter Constitution of India*, Thirteenth Edition, Nagpur: Wadhwa, 2002, pp. 39–40.

and Kashmir. Advocate Kalra was killed for auditing the dead bodies of Punjabi youth suspected to be terrorists. Andrabi, a practising advocate in Srinagar, was killed because he took the law and the Constitution seriously, and questioned the ways of the government in containing militancy. Dr. Ramanatham of Warangal, Japa Laxma Reddi of Karimnagar, Advocate Narra Prabhakar Reddy of Warangal, Advocate Purushotham of Hyderabad and Syed Azam Ali of Nalgonda, all from Andhra Pradesh, were killed for demanding that the government should abide by the Constitution and its laws. There has been no investigation leading to trial in almost all these cases and in all the cases of 'encounter' recounted earlier. In a perpetually misgoverned society, any movement for good governance and governance according to law becomes rebellion.

The movement for human rights is a struggle against misrule and unconstitutional governance. We have been fighting against encounters and exposing impunity in governance from the revocation of the Emergency in 1975 through various commissions of enquiry appointed by the Janata government. A commission presided over by a former judge of the Supreme Court, Justice Vashisht Bhargava, to go into the question of encounters in Andhra Pradesh, was appointed at the behest of the central government on the basis of reports submitted by the Tarkunde Committee. This enquiry was aborted after a year by a notification by the state government that its proceedings should be *in camera*. However, the struggle to contain state violence continued and three writ petitions were filed from Tamil Nadu, Uttar Pradesh and Andhra Pradesh. In these petitions, squarely covered by Article 21 of the Constitution, the state was accused of systematically killing people. Characteristically, instead of reckoning with the seriousness of the accusation, the court accepted the unsupported claim of the state that magisterial inquiries had been conducted into these killings, and the petitions were dismissed.

Where liquidation is used against a targeted political group, it becomes a crime against humanity. Where a religious or ethnic group is targeted it is genocide. Citizens can guard against fellow

citizens who violate the law; and the state is entrusted with the task of protecting life and liberty by an elaborate system of laws and through institutions meant to cope with and defuse the tensions produced by competing forces in society. These tensions, created by social and other imbalances, can scarcely be resolved by the use of violence by the state, a major premise of all liberal democracies.

Unfortunately, there appears to be no consensus about including a targeted political group within the definition of genocide. It is now possible to bring these killings within the scope of crimes against humanity, a distinct offence under the Rome Statute of the International Criminal Court. While on paper at least, this last is set to prevent member states from committing crimes against people living in various countries, every member state is guilty of continuous violations of human rights that result in killing a large number of people with impunity and without any remedy. Will the International Criminal Court work at all in a world where all governments are bent upon reducing Hitler and Mussolini to small-time operators? The movement for human rights marks a departure from traditional politics, by laying particular stress on the fundamental rights to liberty of the person, free speech, assembly and association; and this is where its significance lies.

Like all human rights activists, I am not unmindful of the group violence perpetuated by various 'extremists' or 'terrorists', leading to mindless killing and destruction. But the answer to this cannot be the abandonment of governance and civilised conduct on the part of the state. Impunity is never the answer. This sanction of impunity throws into question the legitimacy of governance and order and points to decay in the system. It is a matter that calls for a national debate. Unless human rights becomes part of political activity, unless human rights discourse forms part of the substrata of our political arrangements, we will have no road to civilised governance.

2

Justice Must be Seen to be Done

Human rights as a concept, as a principle of jurisprudence, as a code of conduct governing the nations of the world, completed fifty years on 10 December 1998. The atrocities committed by the Nazis and Fascists on the people of their own countries and against the people, combatant and non-combatant, in the territories occupied by them during the Second World War, were the principal motivation for the victorious nations to promote the Universal Declaration of Human Rights.

Instead of imposing treaties on the vanquished, the United Nations (U.N.) Charter signed in 1945 set out to establish an international legal order with the object of outlawing aggressive wars. Towards that end, it set down guidelines to defuse conflicts by stipulating that disputes should be settled in conformity with justice and international law. Friendly relations among nations are a mandatory requirement. The operating principle among nations should be based on respect for equal rights and self-determination of peoples, as well as respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. However, the charter, which talked about

human rights and fundamental freedoms, didn't define, describe or enumerate these rights and freedoms. To remedy these defects the U.N. drafted the famous Universal Declaration of Human Rights, which was adopted on 10 December 1948.

The setting up of the Nuremberg and Tokyo War Crime Tribunals has some relevance here. In the words of Justice Robert Jackson of the U.S. Supreme Court, who appeared as America's chief prosecutor at the war crimes trials in Nuremberg:

That four great Nations, flushed with victory and stung by injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.¹

But these tribunals were constituted by the victorious nations, and therefore the U.S.A. was not indicted for a horrendous violation of human rights, namely, the explosion of atom bombs over Hiroshima and Nagasaki. The Holocaust Museum in Washington, D.C., is a grim reminder to posterity of what power can do, but there should also be a museum depicting the bombing of Hiroshima and Nagasaki and its continuing aftereffects. This, I believe, the U.S.A. owes to the people of the world.

These events, the subsequent witch hunt of suspected communists during the McCarthy period, and the persecution of Vietnam war dissenters and draft card burners underscore the necessity of a strong and enforceable human rights code. During the whole period after the Second World War, what was highlighted was the absence of human rights in the Soviet Union and the Eastern European countries and not the paranoid response of the U.S.A. and the consequent large-scale human rights violations. In 1988, George H.W. Bush began his presidential campaign by attacking the Democratic Party's

¹Robert H. Jackson, 'The Case against the Nazi War Criminals', 3 (1946), cf. Sandra Day O'Connor, 'Federalism of Free Nations', in *New York University Journal of International Law and Politics*, 28:1–2, Fall 1995–Winter 1996, p. 35.

candidate, Michael Dukakis, as a card holder of the American Civil Liberties Union (ACLU), as if it was treason to be a member of the ACLU.

All these trends did not halt the progress of the human rights movement. In fact, the Nuremberg and Tokyo Tribunals provided the U.N. with the impetus to set up a permanent International Criminal Court to try large-scale human rights violations. Nonetheless, the Nuremberg and Tokyo Tribunal trials were the earliest attempt to try human rights violations as crimes.

When, at the behest of the U.N. General Assembly, the International Law Commission prepared a draft Code of Offences against Peace and Security of Mankind, the international body took the first step towards universalising the concept of the rule of law. The effort did not receive attention until 1990, when the International Law Commission resumed its work on the setting up of a court with international criminal jurisdiction for dealing with crimes against humanity.

The idea of a permanent court took root after the break-up of the former Yugoslavia. It was only after the outbreak of internecine violence between the constituents of the former Yugoslavia that a working group under the International Law Commission brought out a comprehensive draft statute for an International Criminal Tribunal and in 1994 a revised draft statute for an International Criminal Court. The Yugoslav Tribunal set up by Resolution 827 and the Rwanda Tribunal set up by Resolution 955 of the U.N. Security Council may be regarded as important steps, as pilot projects preparatory to the setting up of a permanent court. Its realisation requires a major cultural shift in the fields of politics, law and jurisprudence. This means a redefinition of concepts so that power, authority and sovereignty are subordinated to the requirements of human rights. The very acceptance of the idea of a permanent court is an indication of a cultural shift that is taking place. These developments do offer some solace, some hope.

At the national level, we in India have not witnessed any significant reduction in human rights violations, more

particularly in areas of political turbulence (and armed conflict) such as Jammu and Kashmir, the states of north-eastern India, and Andhra Pradesh. In Bihar we are witnesses to violence by private armies of groups based on caste. The caste system adds another dimension to the human rights issue in India.

In 1997 in the state of Andhra Pradesh, after human rights activists had battled for over two and a half decades, the High Court, in a case of alleged extra-judicial execution by the police, or, as it is termed in India, an 'encounter killing' of one Madhusudhan Raj Yadav, held for the first time that killings in so-called encounters are homicides and have to be investigated and prosecuted.² Around the same period the National Human Rights Commission of India (NHRC), in an inquiry into encounters in Andhra Pradesh, arrived at a similar conclusion and ordered the prosecution of police officials. These have had no effect on the state government, and encounters are a daily feature. Neither the rulings of these bodies nor the Protection of Human Rights Act, 1993 (which established the NHRC), has made any difference. The High Court has ordered inquiries by investigative agencies into some encounters and in others it has directed the filing of private complaints against the police. The Tamil Nadu High Court, in early 1997, held that a complaint could be directly lodged before a sessions court (a lower court) which can be nominated as a human rights court under Section 29 of the 1993 Act.³ This is a positive gain, because every district thereby gets a human rights court which is easily accessible to the people. The acceptance by the premier democratic institution — the courts — that killings and torture are unlawful and in breach of international covenants would amount to the constitutional entitlement of the victim's dependants and the concept of the rule of law.

²K.G. Kannabiran v. Chief Secretary, Government of Andhra Pradesh & Ors., 1997 (2), ALD 523 (D.B.).

³Pazhankudi Makkal Sangam v. State of Tamil Nadu & Ors., unreported, 1997.

If governments ignore judge-made law, governance will sooner or later suffer erosion of legitimacy, as is already visible in areas of political turbulence. Notwithstanding the indifference of political governments, the courts have gone ahead and are holding that international covenants have acquired the status of customary law.

We do not hear the outcry that the sovereignty of a country is in peril. We have witnessed governments coming forward with proposals for and the consequent establishment of human rights commissions. The existence of these commissions is an admission of guilt. A variant of these is the Truth and Reconciliation Commission in South Africa. They have no powers to punish the perpetrators of horrendous human rights violations. But they do serve the purpose of superseding the existing authoritarian culture.

After a long and continuous innings of around three decades as a defender of human rights, I believe that there is a possibility to arrive at a broad consensus on this issue. Implied in this possibility is the assurance of the presence of democracy in governance.

3

Colonial Baggage

In our time, direct colonialism has largely ended; imperialism... lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic and social practices.

Edward Said¹

A constitution framed after a liberation struggle or a struggle for independence is, like poetry, emotion recollected in tranquility. It is a severance from the past, a termination of imposed suzerainty and the setting up of a political sovereignty of one's own people. It rests on the proclamation of legal discontinuity, the transition of a people from the status of subjects to that of citizens, of a nation whose sovereignty is located in the people. This announcement of discontinuity we find in the Declaration preceding the Preamble to the Indian Constitution. We resolved to constitute India into a sovereign democratic socialist republic and thereafter set out the goals which this republic had to achieve. We moulded our struggle on liberal values and the rule of law. We rejected imperial domination but not the

¹Edward W. Said, *Culture and Imperialism*, New York: Alfred A. Knopf, 1993, p. 9.

parliamentary system, which animated the politics and history of Britain and the British people's struggles against absolute monarchy.

Our political transition did not and could never have triggered a social revolution. Our political struggle retained with total composure the entire colonial legal system which had been effectively used against the freedom struggle at various stages. While we repealed Article 395, the Indian Independence Act, 1947 and the Government of India Act, 1935, with all the amendments that were made to the latter, we did not follow up with the repeal of various laws which cannot operate in a sovereign democratic socialist republic, and which have no moral and political claim to continuance because they were statutes used against the people and its leaders during the course of our struggle for independence, like the Criminal Law Amendment Act, 1908 and 1932 and the Prevention of Seditious Meetings Act, 1917, to mention only the notorious ones.

It is amusing to read the origin of the three principal High Courts, namely Madras, Bombay and Calcutta. It reads:

Victoria, by the grace of God, of the United Kingdom and Great Britain and Ireland, Queen, Defender of the Faith

and proceeds to establish these courts in archaic and arcane language and style. The other High Courts created by the Letters Patent came in the reign of George V. The recital for setting up these High Courts read:

George the Fifth, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the sea, King, Defender of the Faith, Emperor of India...²

An understandable emotional response to such laws would be to throw them overboard and enact a new set of laws clearly defining the powers of the High Courts to suit the requirements

²Umaji Keshao Meshram & Ors. v. Smt. Radhikabai & Anr., AIR 1986 SC 1272.

of the people. No such effort was made and the courts continued in their colonial tradition quite unimaginatively. Fourteen years after the Constitution it was argued, *inter alia*, before a constitution bench of the Supreme Court, that the sovereignty of the dominion of India and of the Indian states was surrendered to the people of India, in the exercise of which the people gave themselves a new constitution as and from 26 January 1950.

The Supreme Court pointed out that the

promulgation of the Constitution did not result in transfer of sovereignty from the Dominion of India to the Union. It was merely change in the form of government... The new governmental set up was the final step in the process of evolution towards self-government... The continuance of the governmental machinery and of the laws of the Dominion, give a lie to any theory of transmission of sovereignty or of the extinction of the sovereignty of the Dominion, and from its ashes, the springing up of another sovereign...³

With unrelenting logic the court pointed out:

There is no warrant for holding that at the stroke of midnight of 25 January 1950, all our pre-existing political institutions ceased to exist, and in the next moment arose a new set of institutions completely unrelated to the past... It did not seek to destroy the past institutions; it raised an edifice on what existed before.⁴

The learned judges were not conscious of the cynicism involved in this analysis. They were not critical of the Constitution. They were merely interpreting it. And yet, however reluctantly, the court was compelled to concede that the Constitution in fact represents the aspirations of the people:

The Constituent Assembly moulded itself no new sovereignty; it

³*State of Gujarat v. Fiddali Badruddin Mithibarwala & Ors.*, AIR 1964 SC 1043.

⁴*State of Gujarat v. Fiddali Badruddin Mithibarwala & Ors.*, AIR 1964 SC 1043.

merely gave shape to the aspirations of the people by destroying foreign control and evolving a completely democratic form of government as a republic.⁵

Sixteen years thereafter, dealing with an issue arising under the Letters Patent, a full bench of the Bombay High Court proceeded on the premise that the Constitution of India is a unique document, the first of its kind. Proceeding on this assumption, the Bombay High Court was of the view that the Constitution 'purports to lay down an original institutional matrix of its own,' and that 'it is not out of the historical ramparts that something is being put up, but a fundamental scheme,' and that in matters of the High Court's powers, therefore, there is clear evidence that the Constitution 'made a break with the past and had made absolutely a new, original and vital beginning...'⁶

When the matter came up before the Supreme Court in 1986, the apex court unflinchingly pointed out that the assumptions made and the conclusions reached by the full bench were wholly erroneous. Without mincing words and setting aside patriotic or any similar emotional consideration, it was pointed out by the apex court that the legal and constitutional basis of our independence was the Indian Independence Act, 1947, and it was in exercise of the power conferred by that act that the Constituent Assembly adopted and enacted the Constitution of India. It was pointed out that the setting up of the Constituent Assembly itself was an act of the British Parliament.⁷

This interpretation ignores the social history of the period preceding the Constitution. It does not reckon with the struggles of the people who fought for freedom, the repressive legal structures on whose altars people were sacrificed and their

⁵*State of Gujarat v. Fiddali Badruddin Mithibarwala & Ors.*, AIR 1964 SC 1043.

⁶*Umaji Keshao Meshram & Ors. v. Smt. Radhikabai & Anr.*, AIR 1986 SC 1272.

⁷*Umaji Keshao Meshram & Ors. v. Smt. Radhikabai & Anr.*, AIR 1986 SC 1272.

dreams shattered. It ignores the aspirations of the people to build a better society for themselves. The rise of political democracy leading to liberation from foreign domination is not a mere matter of evolution. There can always be a break in the continuity, a severance from the past, without being preceded by violence and destruction. There cannot be, there should not be two social histories, one for political theorising and another for legal theorising. The setting up of a Constituent Assembly and the passing of the Indian Independence Act, 1947, are a consequence, a culmination of the struggle for independence. It was the shared belief of a large section of the people that there was a political severance on August 15, 1947, and a severance constitutionally on 26 January 1950. If this aspect is lost sight of, the court disables itself from performing its assigned role under our Constitution.

The people who met in the Constituent Assembly were not mere technicians who had gathered there to prepare a handbook for running the government. They had participated in the struggles and, short of holding elections, every effort had been made to give their gathering a representative character. The historical background leading to the formation of the Constituent Assembly has not informed our understanding or interpretation of the Constitution. With that understanding absent, the institutions under the Constitution were looked upon as a continuation of the colonial system of administration.

When the Government of India Act, 1935, was about to be brought into force, Satyamurti, a staunch member of the Congress party from the South, introduced a Private Members' bill to repeal all repressive laws. While debating this bill, he held the floor for three continuous days. While debating the Constitution of independent India, not one member proposed that all the repressive laws enacted and repeatedly used against the people should lapse with the coming into force of the Constitution. This task was delegated to the executive under Article 372, and the executive adopted all the laws passed by the British without much thought. This was not a lapse. The

political party that was elected to govern genuinely felt that they were successors to the colonial masters.

Neither the Constituent Assembly when it was in session or immediately thereafter, nor the government set up a commission or directed the First Law Commission to examine what laws we required for enforcing the Directives contained in Part IV of the Constitution and the objectives set out in the Preamble as well. Nor was any attempt made to verify whether the legal structure we inherited had the capacity to operate the constitutional system we had adopted.

British rule in India was not concerned with improving the lot of the people living here. A certain amount of stability was necessary for the effective exploitation of the country and its resources. It is this desire for effective control which prompted the British to make attempts to bring about a certain degree of uniformity in the legal structure, both civil and criminal. The Charter Act of 1833 directed the Governor General to appoint a law commission to examine and report on the state of the laws and the administration of justice in India. This commission was headed by Macaulay, and it resulted in 1860 in a uniform penal code to control all the territories under British control. Two more commissions were appointed, in 1853 and in 1861. These led to the passing of the Civil Procedure Code, 1859, the Code of Criminal Procedure, 1861, the Indian Succession Act, 1865, the Hindu Wills Act, 1870, the Evidence Act, 1872, the Contract Act, 1872, the Specific Relief Act, 1877, the Negotiable Instruments Act, 1881, and the Limitation Act, 1908. These were measures to regulate trade, commerce and property transactions, and are guidelines for the administration of justice.

These were British priorities. If they introduced us to the principles of liberalism by piecemeal constitutional legislation, it was to gain acceptance of their rule by the growing western-educated middle classes, which produced the leadership for the freedom struggle. It is evident that a legal system structured to rule colonies can never square with a constitutional scheme. A bureaucracy trained to man the colonial power structure and a

judiciary that was responsible for interpreting the Government of India Acts were neither prepared nor trained to cope with a constitution whose objectives were so different from those of the colonial administration. With a colonial mindset dominating administrative structures, it was impossible to compel the government to perform its fundamental obligations. At the lower level, governing has always meant allowing time to roll by without taking decisions. This state of affairs is not conducive to evolving the principles of an administration that will allow society to proceed towards the minimal transformation provided for by the Constitution. Restructuring an administration implies the existence of trained personnel with a commitment to the vision essayed by the Constitution.

It does not stop there. We were unaware that around 258 British statutes were in operation even till 1960. In 1954 in *C.G. Menon*, the Supreme Court, while dealing with the Fugitive Offenders Act, 1881, pointed out that the operation of this act after Independence and the Constitution offends the sovereignty of India.⁸ The Law Commission, in its Fifth Report, listed around 258 statutes and recommended their repeal. It was only in 1960 that a Repealing Act was passed putting an end to all these British statutes in operation in India.

The Law Commission also suggested replacing certain statutes. Through the statement of objects and reasons of the Repealing Statute of 1960, we were assured that the matter was receiving the attention of the government. However, in the Supreme Court in 1993, in *M.V. Elisabeth*, a matter under Admiralty Law, Justice Sahai pointed out:

Unfortunately nothing was done. Neither the law was made up to date and brought in line with international covenants on maritime passed in 1952 etc. nor even the salient features of English law as by the Administration of Justice Act 1920 and 1956 were adopted and rights and interests of citizens of independent sovereign state continue to be governed by

⁸*State of Madras v. C.G. Menon*, AIR 1954 SC 517.

legislation enacted for colonies by the British Parliament. Various provisions in 1890 Act have been rendered not only anomalous but even derogatory to the sovereignty of the state. No further need be said except to express the hope that the unfortunate state of affairs shall be brought to an end at the earliest.⁹

That is, the statutes were noticed only in 1994 and not earlier.

What is more amusing is that we have been carrying the colonial baggage even with respect to our sovereign State Legislatures and Parliament. The Constitution has created a legislature for each state and a parliament for the country. These are sovereign bodies with powers to legislate in the respective fields assigned to them by Schedule VII of the Constitution. The members of these bodies are elected representatives of the people. The Constitution provides freedom of speech to enable them carry on their work without fear. The British House of Commons has in the course of its history secured certain privileges and immunities.¹⁰ The house claims them in its corporate capacity and the member claims them as a representative of the people.

When the British in India set up representative institutions, the people were never allowed such privileges against the representatives of the British empire. The Indian Councils Act, 1861, set up a rudimentary legislature without any privileges or immunities to the members of the Central Legislative Council. The Governor General in Council made rules laying down the procedure for the conduct of the Council and defined the freedom of speech of its members. The Government of India Act, 1919, made provisions granting immunity for anything said in either chamber of the house or for anything contained in the report of these proceedings. But the Governor General had the power to regulate the proceedings, including the questions asked and the discussion of any subject specified in the rules. The rules

⁹*MV Elisabeth v. Harwan Investment & Trading (P) Ltd.*, 1993 Supp. (2), SCC 433.

¹⁰For a more detailed discussion see Chapter 26.

made by the Governor General in Council needed the sanction of the Secretary in Council, and no legislature had the power to repeal the rules so made.

Section 28 of the Government of India Act, 1935, makes provision for the federal legislature to define its privileges by passing an act from time to time. Until then they were those obtaining in Indian legislatures immediately before the passing of the 1935 act. For breach of privilege, no powers of imprisonment were conceded to the federal legislature, which was not accorded the status of a court, nor was there any punitive or disciplinary power excepting the power to remove or exclude any person from the house. The vast powers enjoyed by the British House of Commons were not conceded to the federal legislature, and this was obviously a deliberate denial.

When the Indian Independence Act, 1947, came into force to make the transition authentic and legal, the Governor General passed a few Indian (Provisional Constitution) orders amending the Government of India Act, 1935, one of which was Subsection 2 of Section 28. It introduced the words 'members of the House of Commons of the Parliament of the United Kingdom' in place of the words 'members of the Indian Legislature'. This equation made by the British ceases to be an equation when continued after Independence. For the interpretation of Article 105 of our Constitution, if one relies on Clause 8 of the Bill of Rights of 1688, it only means this democratic republic of ours is still not sovereign. In fact, Article 105(3) or 194(3), which subordinates the Parliament to the privileges of the House of Commons, is declared to occupy the same primacy of place as Article 19. Said the Supreme Court, 'they are as supreme as the provisions of Part III.'¹¹ What is involved here is not the near unanimity of principles which govern all institutions operating under the rule of law. We may even lean on the precedents of these 'alien' institutions as reasons in the decision-making process. But where we subjugate sovereign institutions to the decisions and principles of an 'alien'

¹¹*M.S.M. Sharma v. Sri Krishna Sinha & Ors.*, AIR 1959 SC 395.

country and allow them to regulate these institutions, it cuts across the entire theory underlying the Constitution and the proclamation of political sovereignty contained therein. The slow transfer of power from time to time and in bits and pieces has led to internalisation of procedures institutionalised during the colonial period, which govern us as tradition even today. In sedition prosecution we very often find ourselves citing decisions where Bal Gangadhar Tilak was convicted!

The continuance of this is amply demonstrated by the brief submitted to the Supreme Court in the Special Courts Bill, 1978, by the central government under the Janata Party. The setting up of a special court for the trial of emergency excesses and other offences was under attack. In justification of special courts, the government relied on the Rowlatt Acts, 1919, the Bengal Provincial (Amendment) Act, 1925, the Sholapur Martial Law Ordinance 1930, the Bengal Criminal Law (Amendment) Acts, 1930 and 1932, the Maintenance of Public Order Act, etc. These were special laws passed by the British to contain the independence struggle. The court rejected them as precedents on the ground that

these laws were Draconian in nature and were characterised by a denial of fair trial to those who had the misfortune to fall within the truncated procedure prescribed by them. They provided a summary procedure for the deprivation of right to life and liberty without affording the aggrieved person the right to carry an appeal to the High Court for a dispassionate examination of his contentions. Special courts were set up under these laws mostly to suppress the freedom movement in India.¹²

What is important to note is that as subjects, the leaders of the freedom struggle used western liberal values insurgently, but when they assumed power they were heirs to the British and not to the freedom fighters. The colonial tradition of governance continues today.

¹²*In re Special Courts Bill*, AIR 1979 SC 478.

In the power to punish for contempt or breach of privilege, whether by the courts or the legislature, the colonial countenance, the divine right to subjugate is visible, and it is compounded by the oppressive arrogance of a caste-ridden society which has a tradition of extracting unquestioned obedience to authority. The myth about contempt powers is that it is an emanation of royal authority. It is *sui generis*. It is said that it always inheres in an original court of records. Of course there is no rational explanation to justify this power. It is absolute power unmitigated by any restraint, statutory or otherwise. It totally negates the freedom of speech and expression. In *Bridges vs. California*, a contempt proceeding, common law was relied upon in justification of contempt powers.¹³ It was pointed out that to assume that English common law in this field became theirs is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'

As late as 1996, the Andhra Pradesh High Court traced its ancestry to the period of George III of Great Britain when, under the Letters Patent dated 26 December 1818, a Supreme Court of Judicature at Madras was established.¹⁴

The courts also claim that the power of the Chief Justice of a court to allot cases to judges and to constitute benches flows out of Section 108(2) of the Government of India Act, 1915, which was re-enacted in the Government of India Act, 1935. We are now asked to read Section 108(2) of the Government of India Act, 1915, into Article 225 of the Constitution, though that article exhorts the appropriate legislature to make laws in this regard under the provision of our Constitution. Thus, what was transitory was allowed to continue permanently for a full fifty years.

¹³*Bridges vs. California*, 314 US 252, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941), cf. Freund, P.A., Sutherland, A.E., Howe, M. de W., Brown, E.J., *Constitutional Law: Cases and Other Problems*, Boston, Toronto: Little, Brown and Company, 1954, p. 1373.

¹⁴*A. Srinath & Ors. v. APSRTC & Anr.* 1996 (3), ALD 56 (F.B.).

We entered our tryst with destiny with this colonial baggage fifty years ago. We still carry it. Our attitude has introduced distortions in our understanding and interpretation of the Constitution. We transferred our sins and inadequacies to the Constitution and then put it in the dock for its failures.

4

Personal Liberty after Independence

Everything has been said already; but as no one listens, we must always begin again.

Andre Gide¹

Nehru described the advent of 15 August 1947 as our 'tryst with destiny'. The Madras government released all its prisoners on that day, except A.K. Gopalan. He was in solitary confinement. He celebrated India's independence within the jail premises. Joined by some of his fellow prisoners, he walked the length of the jail carrying the national flag. Hoisting it on the roof of the third block, he addressed those gathered there for four or five minutes. For his performance, he was produced before the ADM Calicut on a charge of sedition for stirring up the people against His Majesty the Emperor. Like Gandhi and Tilak, he too made a statement before the court, but in independent India:

¹Cf. Huntington Cairns, *Legal Philosophy from Plato to Hegel*, Baltimore: The Johns Hopkins Press, 1949, p. 551.

I am proud that I am being tried for creating enmity against the legally constituted Emperor of British India. All freedom lovers in this country and the leaders of the freedom movement from its birth, like Nehru, Gandhi and such leaders, have tried to create enmity against the Emperor's Government. Mahatma Gandhi has been proceeded against under Section 124-A IPC for working towards the same end.

As a result of all this, His Majesty's Government and British India have ceased to exist today. Many of my colleagues who committed the same crime along with me have become Ministers and Governors. There is some incongruity in bringing me to trial at this time when on the face of it we have just achieved freedom. I am sorry that things should have come to such a pass.²

The government was represented by K.P. Ramunni Menon. For the magistrate and the public prosecutor, nothing appeared incongruous. They were not able to see any break. Governance for them was a continuous process and the principles of governance set up by the British in India were seen as appropriate and relevant for free India. The advent of Independence was just an event which did not disturb continuity; it did not announce a change in the existing social order. However, A.K. Gopalan was released on October 12, 1947, only to be re-arrested on December 17 and this time under a preventive detention law. When the Constitution came into force, Gopalan continued in detention. If the Indian government had remedied the wrong done to Gopalan, the legal profession would have been deprived of its first major precedent after Independence. It is our own. It is the first Indian-made foreign judgement.

When Gopalan sent a petition from jail to the Supreme Court, his detention was brought under the Preventive Detention Act, 1950, which came into force on 26 February

²A.K. Gopalan, *In the Cause of the People: Autobiographical Reminiscences*, Madras: Sangam Books, 1976, p. 168.

1950.³ There was no debate about continued incarceration even after Independence; there was no reference to the freedom struggle, which should instruct all such debates. The violation of Gopalan's personal liberty was described as a restriction of his freedom of movement. This debate led to the question, in the case of preventive detention, whether a detainee can complain that his detention is invalid as it violates Article 19. Chief Justice Kania said that Article 19 should be read as separate and complete. According to him, the Constitution authorises legislation on preventive detention in normal times, even as a permanent measure. Parliament's power to legislate and deprive personal liberty is very wide. The maximum period of detention was not fixed under the 1950 act, and when this was questioned as arbitrary, the answer was that if such a construction is correct,

the courts can do nothing to reduce the rigour... It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition.⁴

By opting for the expression 'procedure established by law' at the draft stage instead of a due process clause, the Constitution gave the legislature the final word in determining the law, said Kania. When this article was debated in the Constituent Assembly, Alladi Krishnaswami Ayyar was at pains to point out the pitfalls in adopting the expression 'due process'. He briefly touched upon the abuses it could be subject to and apprehended that such a clause may be highjacked by vested interests to obstruct all social welfare legislation, which in any event happened. He felt that

it might prove fairly satisfactory if the judges of the Supreme Court in India did not follow American precedents, especially in the early stages, but moulded their interpretation to suit

³Gopalan v. State of Madras, AIR 1950 SC 88.

⁴Gopalan v. State of Madras, AIR 1950 SC 88.

Indian conditions and the progress and well-being of the country.⁵

This was a plea for evolving our own jurisprudence. He felt that three or five gentlemen sitting in a court pronouncing what 'due process' is all about cannot be more democratic than the expressed will of the representatives of the people, or an executive responsible to such representatives. Most of the members were, however, against the expression 'procedure established by law'.

Ambedkar did not rule out the possibility of a legislature getting packed with their supporters by the party in power; nor was he able to assert his confidence in the judges who formed the courts. He declared, 'It is rather a case where a man has to sail between Charybdis and Scylla,' and abstained from endorsing any view. Since many members felt that Article 21 hands a blank cheque to the executive, they introduced Article 15A (which is the present Article 22), which declared that

nobody can be held in detention for more than twenty-four hours without being produced before the nearest magistrate.

The person arrested has a right to know the grounds for his arrest and he has a right to be represented by a lawyer of his choice.⁶

This is the first part of the article. The second part legitimises preventive detention by providing what was at that time thought of as a limitation on the powers of arrest. This limitation was interpreted as a power by the court in *Gopalan*. Says the court:

There is no authoritative definition of the term 'Preventive Detention' in Indian law... The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification of such detention is

⁵B. Shiva Rao, *The Framing of India's Constitution: A Study*, New Delhi: Indian Institute of Public Administration, 1968, p. 237.

⁶B. Shiva Rao, *loc. cit.*

suspicion or reasonable probability, and not criminal conviction which can only be warranted by legal evidence...⁷

that an offence posing a threat to public order or to the security of the state is likely to be committed.

It is widely believed that the court upheld by a majority the preventive detention law in its entirety, that is, Article 22 is a separate and self-contained code barring reference to other rights in the majority view of the bench in *Gopalan*'s case. But this was disputed subsequently in the Bank Nationalisation case.⁸ Seervai also argues conclusively that Justice Mahajan alone of all the judges in *Gopalan* held that Article 22 was a complete code.⁹ Yet, arbitrary power wearing the garb of a statute may satisfy the test of procedure established by law, and the Indian government, which has been in perpetual insurrection against its own people, desired that the court should endorse its attempt to abrogate the minimal value system contained in the Constitution by incarcerating personal liberty and suspending political justice. Both the government and the court ignored the value of the principles of governance set out in Part IV of the Constitution and thus liberated themselves from the responsibility of being socially relevant.¹⁰ Subclause 4(a) of Article 22 makes it obligatory, in the first instance, not to detain a person for more than three months, and if such person is to be detained beyond this period, the matter has to go before a duly constituted

⁷ *Gopalan v. State of Madras*, AIR 1950 SC 88.

⁸ *R.C. Cooper v. Union of India*, AIR 1970 SC 564.

⁹ H.M. Seervai, *Constitutional Law of India: A Critical Commentary*, Volume 2, Bombay: N.M. Tripathi, 1993, p. 974.

¹⁰ Part IV of the Constitution of India is called 'Directive Principles of State Policy'. The provisions contained in this part, while not enforceable by any court, nevertheless enjoin the state to apply the principles contained therein when making laws. Particularly relevant to the present argument is Article 38(1), which says, 'The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.' Refer Durga Das Basu, *The Shorter Constitution of India*, Thirteenth Edition, Nagpur: Wadhwa, 2002.

advisory board for an opinion. Subclause 7(a) dispenses with the requirement for an advisory board when the statute authorising preventive detention stipulates the circumstances under which, or the class or classes of cases in which a person is to be detained beyond three months. Section 12 of the Preventive Detention Act, 1950, deriving its source from Subclause 7 of Article 22, laid down that persons who according to the detaining authority are acting or likely to act prejudicially (a) to the defence of India, the relations of India with foreign powers or the security of India, or (b) the security of the state or public order, can be detained for a period beyond three months and not beyond one year without reference to an advisory board.

The expressions used indicate that this section applies only to political dissent. The terms 'defence of India', 'relations with foreign powers', and 'security of India' refer to fields of legislation exclusively of Parliament. Public order and security of state are fields of legislation in the concurrent list. A mere enumeration of these politically loaded expressions in the 1950 act may not comply with the requirements stipulated in Article 22(7). The power under 22(7) is drastic; it should be treated as an exception. Legal grammar, in this instance, abrogated liberty, and the court endorsed as valid the incarceration of political dissidents without any accountability.

The apprehensions expressed by the members came true. Bakshi Tekchand, for instance, described Articles 22(4) to (7) as reactionary. According to him, there was no written constitution in the world which contained such provisions for the detention of persons without trial in normal times. Mahavir Tyagi pointed out that the

adoption of Article 15A would change the chapter on fundamental rights into 'a penal code worse than the Defence of India Rules of the old Government'.¹¹

¹¹ B. Shiva Rao, *loc. cit.* Draft Article 15A is Article 22 of the Constitution,

It was reiterated that the Constituent Assembly was gathered there to ensure rights to the people, not to denude them of their rights. Despite this debate and the apprehensions expressed, soon after the Constitution came into force and almost immediately after the President was sworn in, the Preventive Detention (Extending the Duration) Order was promulgated to ensure the continuance of the public safety and public security measures enacted by the British Indian government. Four High Courts—Patna, Calcutta, Orissa and Hyderabad—where this order was made an issue, struck it down as invalid.¹² Immediately thereafter, the Preventive Detention Act, 1950, was brought into existence. Like the British, politicians and political parties in independent India continued to define governance in terms of power.

But there was one judge in the history of the Supreme Court who understood the Constitution in terms of the people and their struggles. Construing the same provision, namely Article 22(7), with specific reference to whether the direction contained therein, that Parliament by law may fix the maximum period of detention, Justice Vivian Bose said:

Brush aside for a moment the pettifogging of the law & forget for the nonce [sic] all the learned disputations about this & that, & 'and' or 'or', or 'may' & 'must'. Look past the mere verbiage of the words & penetrate deep into the heart & spirit of the Constitution. What sort of State are we intended to be? Have we not here been given a way of life, the right to individual

¹² *Brahmeshwar Prashad v. The State of Bihar*, AIR 1950 Pat. 265:51, Cr. L.J. 1081 declaring Bihar Maintenance of Public Order, Act 3 of 1950 void. *Sunil Kumar Bose v. The West Bengal Government*, AIR 1950 Cal. 274:51 Cr. L.J. 1110; 54: C.W.N. 394 (S.B.) declaring Bengal Criminal Law Amendment Act, 1930 and West Bengal Security Ordinance, 1949 void. *Prabhalad Jena v. State*, AIR 1950 Ori. 157, ILR (1950); Cut. 222: 1951 Cr. L.J. 1189 (F.B.) declaring Orissa Maintenance of Public Order, Act 4 of 1948 void. *Showkat-un-nissa Begum v. State of Hyderabad*, AIR 1950 Hyderabad 20(F.B.) declaring Hyderabad Public Safety and Public Interest Regulation VIII(81) of 1358 void. See for example, V. Swaroop, *Law of Preventive Detention*, Delhi: DLT Publications, 1990, p. 17.

freedom, the utmost the State can confer in that respect consistent with its own safety? Is not the sanctity of the individual recognised & emphasised again & again? Is not our Constitution in violent contrast to those of States where the State is everything & the individual but a slave or a serf to serve the will of those who for the time being wield almost absolute power? I have no doubts on this score.¹³

He was all along aware that he was dealing with the case of a communist, and found it ironical that he should uphold the freedoms of a class of persons who, 'if rumour is to be accredited and if the list of their activities furnished to us is a true guide, would be the first to destroy them if they but had the power.' The one test of belief in principles is to apply it to cases with which you have no sympathy at all. Bose's attitude to personal liberty was refreshingly wholesome and courageous. He alone of all the judges present and past understood the Constitution in terms of the people, their struggles, and the necessity of ensuring the rights secured by them in the course of their struggles:

I cannot bring myself to believe that the framers of our Constitution intended that the liberties guaranteed should be illusory & meaningless or that they could be toyed with by this person or that. They did not bestow on the people of India a cold, lifeless, inert mass of malleable clay but created a living organism, breathed life into it & endowed it with purpose & vigour so that it should grow healthily & sturdily in the democratic way of life, which is the free way. In the circumstances, I prefer to decide in favour of the freedom of the subject.

I am not hampered here by considerations of war necessity or emergency legislation where some authorities hold that the canons of construction are different & that allowance must be made in favour of the State for imperfections of language used in legislation which had to be drafted & enacted in a desperate hurry with the State in dire & immediate peril. I am construing a Constitution which was hammered out solemnly & deliberately after the most mature consideration & with the most anxious

¹³ *S. Krishnan & Ors. v. State of Madras*, AIR (38) 1951 SC 301.

care ... After all, who framed the Constitution & for whose benefit was it made? — not just for those in brief authority, not only for lawyers & dialecticians but for the common people of India. It should, therefore, be construed, when that can be done without doing violence to the language employed, in a simple, straightforward way so that it makes sense to the man in the street, so that the common people of the land can follow & understand its meaning. To my mind, the whole concept of the Constitution is that after years of bitter struggle the citizens of India are assured that certain liberties shall be guaranteed to them & these liberties cannot be curtailed beyond limits which they & all the world can know & which can only be fixed by the highest authority in the land, Parliament itself, directly & specifically after affording opportunity for due deliberation in that august body.¹⁴

To the man in the street the niceties of law and grammar have no relevance, he said. Speaking against the majority view that Parliament need not specify the maximum duration of detention, he pointed out that the Constitution as interpreted tells the people:

Though we authorise Parliament to prescribe a maximum limit of detention if it so chooses, we place no compulsion on it to do so & we authorise it to pass legislation which will empower any person or authority Parliament chooses to name, right down to a police constable, to arrest you & detain you as long as he pleases, for the duration of his life if he wants, so that you may linger & rot in jail till you die, as did men in the Bastille.¹⁵

Fifty years later, this remains a comprehensive criticism of preventive detention from the angle of the people. Bose alone understood that words were mere symbols and indeed a gloss, and that the prolonged struggle for independence should form the key to understanding the Constitution and the laws affecting freedom. Therefore, he declared, it is rights that are fundamental and not the limitations on freedom. The approach of the

¹⁴S. Krishnan & Ors. v. State of Madras, AIR (38) 1951 SC 301.

¹⁵S. Krishnan v. State of Madras, AIR 1951 SC 301.

majority in this case stems from the assumption that the administration should be adversarial to the people, that freedoms are granted and therefore subject to withdrawal, which would also imply curtailment.

If one looks at the Preamble to the Constitution, this is made quite clear:

We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

Justice, social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity;

and to promote among them all

Fraternity, assuring the dignity of the individual and the unity and integrity of the Nation;

The words 'to secure' could not have been used in the sense 'to obtain'. They can only mean that we were going to constitute a state in which our concepts of justice, equality and liberty, for which we had waged a struggle, would remain secure. They would be protected and safeguarded.

Is such a legislation on the statute books in tune with the constitutional value system, and more particularly the statement in the Directives that political justice should inform all the institutions of the state? When the matter was brought before the Supreme Court by Gopalan, the preventive detention act was a temporary measure, for one year only, initially. After the Supreme Court upheld its validity, there has not been a debate at the political level, and the act was renewed quite mechanically for almost nineteen years. One does not need to be in Parliament to oppose such measures. One can oppose them by mobilising public opinion to bring pressure on the state.

The courts never recognised the political content of liberty in their discourse while adjudicating the validity of the restraints to be imposed on personal liberty. The Preamble and every expression used there, the rights enumerated in Part III, and the fundamental obligations, are primarily political concepts. The

failure to recognise this has led the courts to embark on puerile disquisitions and debates on constitutional questions, ignoring the transformative use of the words and expressions in the Preamble, the Fundamental Rights, and the Directives. Progress towards the very minimal programmes set out in the Directives has been obstructed. For over a decade and a half the Directives were not assigned any interpretive role, and the principles of governance set out therein were not perceived as having a transformative role.

Absent this perception, every issue raised, every dissent and every political movement was looked upon as a law and order or public order problem, and dealt with accordingly. Every democratic protest and dissent was driven underground. As a result, even the long tenure of the Preventive Detention Act, 1950, was found inadequate when the Indo-China war broke out on 8 September 1962.

The President issued a proclamation under Article 352 of the Constitution declaring a state of emergency on account of external aggression.¹⁶ On the same day, the Defence of India Ordinance came into existence. On November 3, 1962, the President notified under Article 359(1) the suspension of rights under Articles 21 and 22 of the Constitution, namely the right to life and personal liberty, and protection against arbitrary arrest and detention. Article 19, which gives citizens the right to free speech and expression and the freedom of assembly and association, stood suspended. On November 11, Article 14, the right to equality was suspended. These rights form the sheet anchor of Part III of the Constitution of India and their

¹⁶Article 352 of the Constitution deals with emergency provisions: 'If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by proclamation, make a declaration to that effect.' For later amendments to this article and analysis refer D.D. Basu, *The Shorter Constitution of India*, Thirteenth Edition, Nagpur: Wadhwa, 2002, pp. 1581–88.

suspension was in reality a declaration that the rule of law had been disbanded.

The Supreme Court, by declaring that a challenge to the preventive detention law can only be on the grounds of a violation of Article 22 and not on any other grounds, authorised restraint and forfeiture of liberty without invoking emergency powers. Despite this, a state of emergency was declared and communists were arrested on a large scale. They again approached the court, complaining that their detention under the Defence of India Act, 1963, and other rules was in contravention of Articles 14, 21 and 22.¹⁷ Liberty was once again outlawed. The judges held that a citizen's right to challenge the validity of a law accrued to him or her on account of the Constitution and the Fundamental Rights, which fortunately were included in the Constitution.

This reasoning is somewhat unhistorical. A constitution is a political document which gives legal content to a set of pre-existing rights, secured politically by peoples' struggles. Rights have always been acquired, never granted. Freedom was acquired by the people from the British and not granted to us by the Indian Independence Act of 1947. There was no effort made to redefine concepts in tune with the constitutional value system, and so we find the courts falling back on the colonial response to similar situations, whether the British were ruling us or their own country. Thus we find the court saying in *Makhan Singh*:

The right to challenge the validity of a statute on the ground that it contravenes the fundamental rights of the citizens has accrued to the citizens of this country only after and as a result of the provisions of the Constitution itself...¹⁸

It therefore follows that if the fundamental rights are suspended, or if the values written into the Constitution are abrogated, no

¹⁷*Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381.

¹⁸*Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381.

complaint can be made, because the Constitution which gave us these rights, has ceased to operate.¹⁹

So far as personal liberty is concerned, the courts validated executive unlawfulness, despite the injunction contained in Article 13(2), which reads:

The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of this contravention, be void.

Obviously relying on this provision, Shamrao Vishnu Parulekar, arguing his own case, contended that the court may not have the authority by virtue of a declaration of emergency and the consequent presidential order to order his release, but this need not prevent it from declaring that the detentions made were illegal.²⁰ The unqualified and unreservedly mandatory character of Article 13(2) did not make any difference to the court. It went on to say,

It appeared that as regards the validity of the impugned provisions of the Act and the Rules, he (the Attorney General) was not in a position to challenge the contention of the appellants that the Act contravened Articles 14, 21, and 22(4), (5) and (7). Even so, he (the Attorney General) strongly pressed before us his original contention that we would not reach the

¹⁹Our neighbour Pakistan arrived at this vacuous legality a few years earlier. The coup staged by Mohammed Ayub Khan was questioned in the Supreme Court of that country. The court examined the issue before it 'in the light of the juristic principles which determine the validity or otherwise of law creating organs of the state.' The court examined the characters of coups and revolutions, and concluded that the expressions were interchangeable, the form of social change and the motive for it being irrelevant. The court then upheld the validity of constitutional change through a coup or a revolution. When the court was ultimately confronted with the option of choosing between a coup and 'chaos', the court invariably ended by supporting the coup and the existing social order. That is, the role of the court at the time of a coup or the emergence of authoritarian rule was ordained by its earlier role.

²⁰*Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381.

stage of expressing our opinion on the validity of the Act if we were to uphold the preliminary objection that the applications made by the detainees were incompetent.²¹

The court upheld the preliminary objection, as according to the majority, that was the only course the court could logically and with propriety adopt. Perhaps this rule of procedure was originally conceived as a step towards reducing arbitrariness and eliminating whimsicality and caprice in the decision-making process. But it has been slowly subverted in its usage to supersede constitutional rights and to liberate the executive from the limitations imposed by the Constitution. This subversion became normal practice and also appeared logical. For Justice Subba Rao, the lone dissenter, the majority view appeared abnormal. He rightly pointed out:

I cannot for a moment attribute to the august body, the Parliament, the intention to make solemnly void laws. It may have made the present impugned Act *bona fide*, thinking that it is sanctioned by the provisions of the Constitution. Whatever it may be, the result is we have now a void Act on the statute book, and under that Act the appellants before us have been detained illegally...The tendency to ignore the rule of law is contagious, and, if our Parliament, which unwittingly made a void law, not only allows it to remain on the statute book, but also permits it to be administered by the executive, the contagion may spread to the people, and the habit of lawlessness, like other habits, dies hard.²²

The licence granted to state lawlessness was disturbing. Appearing for the appellants, Setalvad expressed the apprehension that legitimising this lawlessness might lead to abuse of power by the executive, an abuse against which the citizens may not have any remedy. The contention for the majority of the learned judges appeared to be a political question and its impact on constitutional questions was, according to them, at best indirect:

²¹*Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381.

²²*Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381.

In a democratic State the effective safeguard against abuse of executive powers, whether in peace or in emergency, is ultimately to be found in the existence of enlightened, vigilant and vocal public opinion.²³

Having said this, they discharged themselves from the responsibility of being an enlightened, vigilant and vocal institution set up to ensure that the rule of law and democracy informs all the activities of the state as well as society.

The members of the constituent assembly were not quite clear as to what role the Directives should be assigned, as they were declared not enforceable by the courts. Ambedkar alone felt that the Directives provided the minimum political programme for political parties competing for power, and added prophetically that the importance of these Directives would be realised in the event of a 'take over' by the right. These are in reality indispensable principles of governance around which administrative law ought to have been structured. This part of the Constitution never played its role and therefore, as early as the 1970s, justice in all its enumerated facets was non-existent.

While the court validated the policy of restraint on personal liberty, it took on the role of an adversary when the government tried to disarm the strong, as if to confirm what Anatole France said: 'Justice is the means by which established injustices are sanctioned.'²⁴ Immediately after the country secured independence, the government headed by the Congress wanted to dismantle rural India's feudal structure. Accordingly, several states enacted laws abolishing the zamindari system and the sub-feudal structures which the former gave rise to. The Patna High Court, however, struck down the state legislation. Before the matter was taken to the Supreme Court, the First Constitutional Amendment Act, 1951, was brought into force. This introduced Articles 31A and 31B, which grant immunity to any state legislation passed for the acquisition of any estate or any rights

²³*Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381.

²⁴Anatole France, *Craigneville*.

in such estate or which extinguishes or modifies any such right, from any attack in the courts on the grounds of violating Articles 14, 19 and 31. Article 31B, read with the Ninth Schedule, was unequivocal in its intention: namely, no act included in the Ninth Schedule can be invalidated on the ground that the law or any of its provisions are violative of any of the fundamental rights. The language used is of a much wider sweep than the emergency provisions, which suspended only some of the fundamental rights. Article 31B negates Article 13(2) of the Constitution, which declares as invalid all laws passed in contravention of the fundamental rights chapter. Despite this sweep in language, the Supreme Court, in *Kameshwar Singh*, struck down the principal provisions of the legislation, notwithstanding the First Constitutional Amendment Act of 1951.²⁵

Any attempt at restructuring the social order was stalled continuously from the beginning. Statutes were questioned and amendments to the Constitution were brought into force, and even these were questioned. By the time we enter the second decade of the Constitution, we find increasing signs of a totalitarian system of governance, for example the blocking of even minimal reform measures introduced by the government, without which the country could not be peacefully governed. In the words of Justice Hidayatullah in *Golak Nath*:

I am apprehensive that the erosion of the right to property may be practised against other Fundamental Rights...Small inroads lead to larger inroads...²⁶

This realisation came only when the right to property was put in issue. The Supreme Court waxed eloquent about democracy and the rule of law in the privy purses case.²⁷ While the right

²⁵*State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252.

²⁶*Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

²⁷*H.H. Maha Raja di Raja Madhava Rao Jivaji Rao v. Union of India*, 1971(3) SCR 9.

to property was registering victories in the courts, restraints on personal liberty had the approval of the courts.

Jawaharlal Nehru died in May 1964. Political leadership of the Congress party became problematic. Lal Bahadur Shastri, a compromise candidate, was chosen for a brief period of 19 months before he died in office in January 1966. Senior Congress leaders from the states, known as the Syndicate, presided over the selection of the next prime minister. Their choice fell on Nehru's daughter, Indira Gandhi, overlooking the strong contender Morarji Desai. In elections held within the parliamentary party, Desai was resoundingly defeated. Thus began a period of de-institutionalisation. Congress politics, equated with national politics from the British period, continued to remain so even after independence. When Nehru talked of India's 'tryst with destiny', he perhaps meant his party's tryst.²⁸ Indira Gandhi was elected the leader of the party. On 15 December 1966, Parliament passed the Preventive Detention (Continuance) Act, 1966, extending the life of the act up to 31 December 1969. In February 1967, the Congress, which had ruled there all along, lost elections in five states and its governments were toppled in three others following defections.

Despite these major reverses, Indira Gandhi consolidated her position within the party by driving out the Syndicate. This struggle for power was given the gloss of an ideological battle against reactionary forces, and the faction led by Indira Gandhi was described as progressive. The alliance with the Soviet Union provided a revolutionary edge to her populist rhetoric. Since it might have been politically disastrous for the Congress to continue implementing the preventive detention law legislated by Parliament after losing power in eight states, its government invited the views of the state governments. The central government was of the view that an extension of two years would suffice. All the state governments were in favour of extending

²⁸Morris-Jones quotes him as saying in 1953: 'The country is Congress and the Congress is the country.'

the act for a further period of three years. This included the left-wing governments of West Bengal and Kerala.²⁹ The central government later dropped the idea of continuing the act, as it was felt that the Unlawful Activities Prevention Act, 1967, could effectively take its place.

But the country was not free from preventive detention laws. After the electoral defeats of 1967, several states were instructed by the central government to pass their own preventive detention laws. To name a few, Rajasthan, Madhya Pradesh, Maharashtra, Andhra Pradesh and West Bengal had preventive detention acts passed in the year 1970. So far as the states of West Bengal and Andhra Pradesh were concerned, the ideological turmoil within the communist parties in power there ultimately led to the emergence of the Naxalbari movement, which brought onto the agenda the concept of armed revolution as the only answer to increasing exploitation and a corrupt social order. In response to the Naxalite movement, the state structure underwent a fascist transformation while at the same time maintaining a façade of rule by law. Thus we had the brutal practice of extra-judicial killings of the movement's activists. These two states also subverted the legal structure by invoking the conspiracy charge to rope in as many people as possible. Their preventive detention laws were in reality used for punitive detention. Short arrest periods became continuous when the courts validated repeated re-arrests of the detainees.

The stability of a government depends on the provision of economic justice, more specifically on distributive justice. But if these are deficient or progressively diminishing in quantity and content, the people will organise to secure for themselves the right to life and livelihood by exercising their constitutional right to free speech, assembly and association. Failure of governance leads to questioning the ways of the government, which if

²⁹"Marxist" Impostors Expose Themselves', Editorial, *Liberation*, III: 2, December 1969; reprinted in Suniti Kumar Ghosh, ed., *The Historic Turning Point: A Liberation Anthology*, Vol. II, Calcutta: S.K. Ghosh, 1993, pp. 197–199.

unattended, leads to collective action that may ultimately transform itself into total revolt. This collective assertion of rights by a people is viewed by the reigning power as a law and order or public order problem. The tension between power and the collective assertion of rights, the tension between *status quo* and change is described by authorities in terms such as 'law and order', 'public order' and 'security of state'. These expressions have never been defined. But they have held sway over the country ever since Independence.

The early years of Independence saw the dismantling of zamindari and other such feudal practices. But instead of suffering expropriation when their lands were taken over, the title-holders were adequately compensated and even allowed to continue to exercise political clout in their former fiefdoms. Their privileges were protected and they supplied 'representatives of the people' to our democracy. Laws were carefully drafted to avoid being struck down by the courts. Extreme care was taken to mollify a handful of people. Even so, the abolition of the estates was no easy matter. The legal talent that was available to these holders of unearned property was phenomenal. They even managed to get Dr. Ambedkar, who had authored and steered the Fundamental Rights chapter of the Constitution, to appear for one of the zamindars of Bihar! In fact, the drafting of the Constitution produced a crop of lawyers who halted or stalled the progress of the country towards its constitutional goal right from the beginning. No litigation over estates or private property provided as much wealth to lawyers as the Constitution of this democratic republic. The administrative system as a whole was not geared to perform the fundamental obligations of the state set out in the Directives chapter of the Constitution.

While the first two five-year plans met with some measure of success, problems started appearing from the third plan onwards. The concentration of economic power resulting from facilitation of the growth of big business spelt disaster to India's goal of distributive justice. The Mahalanobis Committee found that the benefits of a planned economy and increased governmental expenditure had increasingly flowed to the upper sector. The

economy was in near shambles, with fall in food production, suspension in 1965 of American aid, and a rise in population by 100 million by the end of the 1950s. The two wars against China and Pakistan in 1962 and 1965 added their own stresses to Indian democracy.³⁰ The economic crisis and the wars had their impact on the politics of the country, leading to the near collapse of liberal democracy. The fragmentation of the communist movement led to the emergence of the Naxalbari movement, JP's movement against corruption in politics, and the Gujarat Navnirman movement, all of which had to be contained.

It was under these circumstances that Mrs. Gandhi got the Maintenance of Internal Security Ordinance passed on 30 June 1971, followed by the Maintenance of Internal Security Act on 2 July 1971. We have already seen that a state of external emergency was declared in the context of the Indo-China war on 26 October 1962 under Article 352 of the Constitution. Simultaneously, the Defence of India Ordinance was brought into force. This later became the Defence of India Act, 1963. This was the subject matter of hot debate and contest in the Supreme Court.³¹ During the period of external emergency, both the Preventive Detention Act of 1950 (as extended from time to time) and the Defence of India Act of 1963 were in operation. Both these laws covered substantially the same field.

This raises the question not of competence but of the propriety of having more than one law covering the same field. When this was raised in *Makhan Singh*, Justice Gajendragadkar, expressing the opinion of the court, upheld the legislation and rejected the contention that Parliament conducted itself in bad faith. One of the cardinal principles of interpretation in our courts is that one cannot attribute *mala fides* to the legislature. The perpetuation of absolute power is covered by a series of such myths. Obviously, the theory of interpretation needs to be

³⁰Gobind Das, *Supreme Court in Quest of Identity*, Lucknow: Eastern Book Company, 1987, pp. 39–64.

³¹*Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381.

restructured in terms of the Constitution, its purposes and objectives.

Traditional theories of interpretation proceed on certain unverified assumptions. Non-elected judges are chosen as the persons to uncover legislative intent. By what mechanism do they achieve this? There is no dearth of instances to demonstrate that the overtly social purposes of some legislations, which should naturally form legislative intent, have been ignored while interpreting them. In the matter of personal liberty, the courts have by and large, as a matter of policy, validated the conferment of vast powers to the executive. On crucial issues, the courts' interpretations do not read like democratic responses. The legislative and interpretive history of the more than fifty years after Independence has been one of curtailing personal liberties, thus inhibiting the forces of social change from progressing towards constitutional objectives without violence and the consequent abuse of power and the construction of a repressive legal framework.

The provisions dealing with a state of emergency call for the suspension of Article 14 and also bar all enforcement of the other fundamental rights. The 44th Amendment made Articles 20 and 21 non-derogable, even during an emergency. We were able to arrive at this position, that even during a state of emergency certain basic rights are non-derogable, because of the realities of large-scale abuse of powers during the Emergency. The subsequent commission of enquiry conducted by Justice Shah laid bare the abuse of power by almost all branches of the executive, particularly the law-enforcing agencies.

Apart from principled doubts about the courts' conceptualisation of rights with constant emphasis on the power of the state, the decision-making process (involving the opinion of various judges from which a majority has to be culled out) lends itself to confusion. In countries guided by a constitution, a judge declares what a law means. Article 141 expressly states that the interpretation of the Supreme Court is the law of the land. This means, whatever may be the words used in a statute, the

interpretation given by the judges will alone matter in understanding it. But interpretation, even of words with ascertainable meanings, gives a large area of discretion to the judges. The first twenty-five years of interpreting the rights in Part III of the Constitution show an extraordinary divergence of views between the judges composing the court at the time of the principal decision and those interpreting it subsequently. The first decision tells us how to read and understand a statute or constitutional provision, and the subsequent decisions tell us how to understand the first decision and the meaning of the provision or statute interpreted by it. A caricatured conversation between a jurist and a legislator adequately illustrates the amount of discretion the courts have:

We neither know nor care what kind of laws you should make. That appertains to the art of legislation, which is foreign to us. Pass laws as you wish. Once you have done so, we shall explain to you in Latin what kind of law you have passed.³²

When the Preventive Detention Act of 1950 was challenged, it was not attacked in the context of the anti-colonial struggles or the principles which propelled these struggles. Liberalism and other principles, which formed the basis for the expositions of John Locke, John Stuart Mill and other philosophers against absolute monarchy, were used by the Indian National Congress during its insurgency. Motilal Nehru's presidential address at Amritsar in the year 1919, the undelivered address of C.R. Das at the Gaya Congress, Satyamurti's speech in the Central Legislative Assembly in February 1936, or Gandhi's speech at his sedition trial before Judge Broomfield are excellent sources for working out a system of jurisprudence and a theory of rights even at the commencement of the Constitution. What was subsequently discovered in *Maneka Gandhi*³³ in 1978 had

³²Evgeny B. Pashukanis, *Law and Marxism: A General Theory*, Worcester: Pluto Press, 1989, p. 52.

³³*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

already been spelt out in crystal-clear terms, particularly in Gandhi's speech mentioned above.

A people struggling against oppressive forms of governance will, in the process, become well versed in politics and the law. The first right a people under tyranny exercise is associational freedom, which alone gives them the capacity to articulate their problems and what according to them are the solutions. Thus, freedom of speech is a necessary adjunct to associational freedoms, especially the right to form associations and the right of assembly. In the 34th Congress at Amritsar in 1919, Motilal Nehru, in his presidential address after the Jalianwala Bagh massacre, referred among other issues to the brutality of General Dyer and the Rowlatt Acts, formulating in the process a rights thesis for the Indian people.³⁴ This was immediately after the Montague-Chelmsford reforms and the Government of India Act. Motilal Nehru makes an unequivocal demand for a declaration of rights:

No constitution can meet our needs unless it is accompanied with a guarantee and a clear declaration of our elementary rights, which have recently been so ruthlessly violated in the Punjab. No Indian can be blind to the fact that the protection of our fundamental civic liberties is a matter of the most urgent consequence. No statesman can shut his eyes to the supreme moral necessity of securing the faith of the Indian people in the inviolability of their rights of citizenship.³⁵

This was a demand by the colonised, in the context of the reforms introduced by the British administration in India, for rights they regarded as a moral imperative for the transformation of a 'subject' into a citizen. It was also realised that without a change in the status of a people, the conferment of rights may not be effective. As Motilal Nehru declared:

³⁴For his exposition and criticism of the Rowlatt Acts, see Chapter 6 in this volume.

³⁵Congress Presidential Addresses: Second Series, 1911–1934, Madras: G.A. Natesan & Co., 1934, p. 452.

Constitutional reform without free citizenship is like rich attire on a dead body. Better to breathe God's free air in rags than be a corpse in the finest raiment.³⁶

The concept of rights evolved in the course of struggles from slaves to subjects to free citizens. The parallel evolution of the means to control people has been from brutal and naked power to sophisticated methods. Power continues to be adversarial to rights. The history of rights has been a continuous attempt to restrain power and achieve a humane, mature society. The purpose of a theory of rights was not lost on Motilal Nehru:

But what is our ultimate goal? We want freedom of thought, freedom of action, freedom to fashion our own destiny and build up an India suited to the genius of her people.³⁷

He also etches out the purpose to which the exercise of these rights should be subjected:

We must aim at an India where all are free and have the fullest opportunities of development; where women have ceased to be in bondage, and the rigours of the caste system have disappeared; where there are no privileged classes or communities; where education is free and open to all; where the capitalist and the landlord do not oppress the labourer and the ryot; where labour is respected and well paid; and poverty, the nightmare of the present generation, is a thing of the past.³⁸

C.R. Das's undelivered presidential address to the Congress party's session at Gaya in 1922 contains a section on law and order that throws light on the theory of rights in a more fundamental manner. He emphasises that the enforcement of law and order must be the last resort of bureaucracies all over the world. The debate continues to this day. For the bureaucracy, passive obedience is the duty of a subject (citizen). Non-resistance is the least the government expects from a citizen,

³⁶Congress Presidential Addresses: Second Series, loc. cit., p. 449.

³⁷Congress Presidential Addresses: Second Series, loc. cit., p. 473.

³⁸Congress Presidential Addresses: Second Series, loc. cit., p. 474.

who might as well then be called a subject. After tracing the history of the British struggle against absolutism, he summarised the conceptual understanding of law and order and the rights of the people as follows:

It follows from the survey that I have made, firstly, that no regulation is law unless it is based on the consent of the people; secondly, where such consent is wanting, people are under no obligation to obey; thirdly, where such laws are not only based on the consent of the people but profess to attack their fundamental rights, the subjects are entitled to compel their withdrawal by force or insurrections; fourthly, that law and order is, and has always been, a plea for absolutism; and lastly, there can be neither law nor order before the real reign of law begins.³⁹

He refers to the report of the committee appointed to examine repressive laws, and suggests that the absence of consent by a people gives them the right to disobey laws; where the laws attack fundamental rights the obligation to them can be dispensed with. He was of the view that the Prevention of Seditious Meetings Act, 1917, and the Criminal Law Amendment Act, 1908, by themselves constituted breaches of law and order. He brings in the concept of 'lawless laws' and declares that the citizen has a right to 'defy the tyranny of lawless laws'.⁴⁰ While the U.S. Supreme Court looked towards the American Revolution and the British looked into their past struggles, our judges never examined what was written by our leaders during our freedom struggle.

Satyamurti, who was elected to the Central Legislative Assembly in 1934, introduced there the Repressive Laws Repealing and Amending Bill in February 1936. This non-official bill, which he introduced soon after his election, came up before the house in 1936. The statement of objects and reasons attached to the bill mentions the 'great constitutional changes taking place towards responsible government,' and therefore calls upon the assembly

³⁹Congress Presidential Addresses: Second Series, loc. cit., p. 560.

⁴⁰Congress Presidential Addresses: Second Series, loc. cit., p. 565.

to repeal all repressive laws. The approach was very innovative. He was persuading the British bureaucracy governing India to repeal all repressive laws, and to commence administration under the Government of India Act, 1935, with a clean slate. He argues for relegating the powers of law and order to the provinces, and therefore strongly pleads for the repeal of all those laws and to amend the provisions dealing with sedition and the powers under Section 144, CrPC.⁴¹ The Constituent Assembly, of course, did not either repeal or recommend repeal of all British laws passed to counter the struggle for independence.

The bill introduced by Satyamurti has a very interesting pattern. He takes Section 124A of the Indian Penal Code and traces all the decisions on the subject up to the date of debate in the Central Legislative Assembly. This was the section which was broadly interpreted and widely used against the principal leaders of the freedom movement. Gandhi called this section the 'prince among the penal code provisions'.⁴² Disaffection was defined as want of affection in Tilak's case. In the debate of those days, it was pointed out that this was like defining disease as want of ease! Satyamurti wanted to reduce the rigour of the section as interpreted by the courts. He wanted Section 124A to read: Whoever, *with the intention of promoting physical force or violence or public disorder*, by words either spoken or written, etc.⁴³ He was arguing that prosecution under this section should not be for the mere use of words, but for something more than that, something akin to the 'clear and present danger' enunciated by Justice Holmes.⁴⁴ Such a limitation should not be the consequence of a judicial interpretation but by means of an

⁴¹Mr. President, Sir: Parliamentary Speeches of S. Satyamurti, Madras: Satyamurti Foundation, 1988, p. 112.

⁴²Statement to Judge Broomfield. See Chapter 29 for a longer extract.

⁴³The words in italics were added by Satyamurti. Loc. cit., p. 116.

⁴⁴Dissenting opinion of J. Holmes, in *Abrams et al. vs. United States*, 250 U.S. 616, 40 Sup. Ct. 17, 63L. Ed. 1173 (1919), accepted in later cases. For a summary of the doctrine of 'clear and present danger' see Chapter 29, footnote 12.

amendment leading to the same result right from the start. His effort was to prevent forfeiture of liberty, not to secure acquittal after forfeiture.

Next, Satyamurti wanted to add Subsection 3A to CrPC Section 144 of 1898.⁴⁵ Then he deals with statutes passed between 1881 and 1932 and included in the schedule to the bill. He points out:

Sir, there is a method in this madness. All these laws are based on a distrust of the judiciary, and an anxiety to punish those against whom the executive have got suspicions, but against whom they have got no evidence, and on a desire to govern this country by barbaric Russian methods, as they used to be called, whereby they want to suppress freedom of person, freedom of the press, and freedom of association, in order that a foreign Government may go on in its own way...⁴⁶

Further, he asserts:

All thee Acts remain on the Statute-book for fifty years, and even 100 years. If, after so many years of your rule, you still want these Acts, that shows the rotten way in which you rule the country. You had better leave the country at once and we shall rule it much better. You get out at once!⁴⁷

⁴⁵Subsection 3A: 'Notwithstanding anything contained in this section, no order under this section shall be made by a magistrate so as to restrict the right of any person or persons to convene, attend or take part in any public or political meeting of any association, procession, demonstration or peaceful picketing, unless the magistrate finds on evidence duly recorded that such an order is necessary to prevent danger to human life or serious disturbance of the public tranquillity, provided that such order, if made *ex parte*, shall remain in force for a longer period than forty-eight hours, and provided further that, when any such order had been made *ex parte*, the subsequent enquiry shall not be held by him or any magistrate subordinate to him but by some other magistrate to whom the proceedings shall be transferred by a general order or special order of an authority competent to transfer cases from his file.' From *Mr. President, Sir, loc. cit.*, pp. 158–159.

⁴⁶*Mr. President, Sir, loc. cit.*, p. 171.

⁴⁷*Mr. President, Sir, loc. cit.*, p. 178.

He covers all these enactments and points out that not one of these acts could exist in a civilised country. He cites the report of the committee appointed by the British government to look into repressive laws. This committee recommended that all these special laws should be repealed, so that the Government of India Act, 1935, may proceed from a clean slate.⁴⁸ The attack was on the Prevention of Seditious Meetings Act, 1911, and the Criminal Amendment Acts of 1908 and 1932. This demonstrates that our law and order policy is a continuation of the colonial policy from which we were liberated on August 15, 1947!

Satyamurti's endeavour was to democratise British rule so that the freedom struggle was not totally obstructed by force. It could be seen as a propaganda exercise. Even so, whatever the result of his debate, the attempt to conceptualise sedition and public tranquillity in the thick of the freedom struggle has some use for the democratic reordering of our society after the attainment of freedom, since these provisions come into operation only during periods of public unrest. Protest and criticism of the state are very often disciplining agents and act to pre-empt the erosion of democracy.

The study of history, a reference to the freedom struggle, the political response to this struggle by the British, and their oppressive administrative and legal structures could have yielded intelligible jurisprudence for restructuring Indian institutions in terms of our own history and in terms of the Constitution. In fact, it did not inform interpretive exercises by the courts.

Using Gandhi's views on the rule of law, we will be in a position to look into the progress of our attitude to law and legal theory. Disaffection and non-cooperation, in Gandhi's view,

⁴⁸(1) Bengal State Prisoners Regulation III, 1818; (2) Madras State Prisoners Regulation, 1818; (3) Bombay Regulation XXV of 1827; (4) State Prisoners Act, 1850; (5) Mopla Outrages Act, 1858; (6) The Punjab Murderous Outrages Act, 1867; (7) The Prevention of Seditious Meeting Act, 1911; (8) The Criminal Law Amendment Act, 1908; (9) The Criminal Law Amendment Act, 1932.

were the duties of a person committed to the welfare of the poor and the downtrodden. His theory of free speech was obviously not a claim to say anything one pleased, for he never supported violence. Rather, it was always framed against the quality of governance and the administration of the legal system. He claimed the right, *inter alia*, to disaffection in the context of the Rowlatt bills, which he perceived as arbitrary and characterised as 'lawless laws'. The political slogan that was coined by him in this context was a well-known principle of the rule of law: 'No daleel no appeal'.⁴⁹

Gandhi and the others cited earlier had no doubts about the invalidity of the laws that governed the political activists in the country during colonial rule. Gandhi went a step ahead of the others, however. He acted on the firm belief that these laws need not be obeyed and that the practice of disaffection was valid and morally justified. Gandhi's position transcended the formulation by Dworkin while dealing with civil disobedience in the context of the American intervention in Vietnam.⁵⁰ Gandhi has given in brief outline the reasons for this disaffection. Socio-economic issues not only inform his political decision, but also define the content and quality of free speech. It was a charge of 'evil' governance. His stand on freedom and liberty were fully defined when he told the judge:

The only course open to you, the Judge, is either to resign your post, and thus dissociate from evil, if you feel that the law you are called upon to administer is an old evil and that in reality I am innocent, or inflict on me the severest penalty, if you believe that the system and law you are assisting to administer are good for the people.⁵¹

⁴⁹This principle has been summarised in most major texts in administrative law, for instance the works of de Smith and Wade.

⁵⁰Ronald Dworkin, *Taking Rights Seriously*, Harvard: Harvard University Press, 1978; Indian reprint, Delhi: Universal Book Traders, 1996, pp. 206–22.

⁵¹See K.L. Gauba, 'The Trial of Mahatma Gandhi', in *Famous and Historic Trials*, Lahore: Lion Press, 1946, p. 35.

Though the judge who tried him was confronted with a moral issue, the legal system he served had not given him the independence to adjudicate whether Gandhi's statement was evidence enough to fasten a conviction on him, or whether it also had evidentiary value as a defence in justification of sedition. The question is whether justification as defence should be permitted at all?

This excursion into the history of the freedom struggle is necessary because when a state of emergency was declared on 26 June 1975, the whole country was unprepared, though there had been popular movements before in Gujarat and Bihar, as also the expanding Naxalite movement, which had thrown a challenge to the constitutional system as interpreted by the courts. What was also in challenge was whether the colonial interpretation of the laws should be followed while interpreting the Constitution? Did the Constitution imply a break with the past, at least with reference to the people and the state and its government? Does the transformation of a person from the status of a 'subject' to that of 'citizen' mean anything at all when interpreting the scope of entrenched rights in the Constitution? These questions had come to the surface after the first decade of the Constitution.

The first decade after the Constitution was spent by the Supreme Court in defining the scope of the fundamental rights to personal liberty and property. This period was not innovative. The interpretive techniques adopted were colonial. In dealing with property litigation during the first decade, eleven matters concerning agrarian reforms came before the Supreme Court. Out of these eleven, *Kameshwar Singh* and *Raghbir Singh*⁵² resulted in the invalidation of some of the provisions of the impugned acts. Property continued to be expansively defined even in its liquid form, i.e. compensation. In *Virendra Singh*, the Supreme Court portrayed the consequences of the Constitution coming into force very succinctly:

⁵²*State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252; *Raghbir Singh v. Court of Wards, Ajmer* AIR 1953 SC 373.

Every vestige of sovereignty was abandoned by the Dominion of India and by the States and surrendered to the peoples of the land who, through their representatives in the Constituent Assembly, hammered out for themselves a new Constitution in which all were citizens in a new order having but one tie, and owing but one allegiance: devotion, loyalty, fidelity to the Sovereign Democratic Republic that is India. At one stroke, all other territorial allegiances were wiped out and the past obliterated except where expressly preserved; at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis: the sovereign will of the peoples of India, with no class, no caste, no race, no creed, no distinction, no reservation.⁵³

If these were the consequences of the Constitution, then the court could not have defined liberty and property in the way it did. But the courts never saw the inauguration of the Constitution as a severance. They saw the emergence of the Constitution as a continuance from where the British left off. In fact, in *Fiddali Badruddin Mithibarwala*,⁵⁴ the court was at pains to point out that on the midnight of 26 January 1950, no new institutions arose, that old institutions were continued with a slight renaming, and that power was transferred by the colonial rulers to the Indian representatives of the people by a proper legislation called the Indian Independence Act. This is perhaps the only country whose government at the commencement of its independent existence was lawfully and not politically established.

The link between the Constitution and the people was neatly excised, and the severance of this link led the court to think that the Constitution was a *svayambhu*, not obliged to the people for its birth. With this interpretation, they could easily conclude that personal liberty and the right to life had been granted by the

⁵³ *Virendra Singh & Ors. v. State of U.P.*, 1955 (1) SCR 415. See J. Bose, *loc. cit.*

⁵⁴ *State of Gujarat v. Fiddali Badruddin Mithibarwala*, AIR 1964 SC 1043. The view herein was confirmed later in *Ummaji*, AIR 1986 SC 1272.

Constitution, so that, by the same token, they could equally be withdrawn. With reference to the definition of property, a mere *ipse dixit* had the force of an imperative command, as the right to property has always been seen as an inalienable right, notwithstanding the grandiloquent objectives in the Preamble, which rule out any such presumption. The objectives of economic, political and social justice should have limited the property rights protected by the Constitution. An unlimited right to acquire property or wealth will lead to the enslavement of a large majority of the population, contrary to the objectives of the Constitution. The Constitution spells out the existence of an unequal society in India, and in that context, the interpretation of its provisions by the court need not have led to so many amendments to the Constitution. The crucial role that rights have in a society like ours for bringing about social transformation, for banishing social and economic deprivation, did not receive the primacy of attention it ought to have. Such a role is emphasised by the presence of a chapter called 'The Directive Principles of State Policy'.

The entire debate on personal liberty, from A.K. Gopalan onwards, has suffered distortions. To proceed on the very untenable assumption that Articles 19, 21 and 22 cannot be read together while construing one or the other has devalued the democratic content of the Constitution.

In the constitutional scheme, free speech and freedom of association and assembly are of crucial importance and are an integrated whole. In *A.K. Gopalan*, the contention was advanced and found acceptance by one judge, that Article 22 is a self-contained code. The immediate consequence was that the validity of any preventive detention law could not be assailed on the ground that it violates the other fundamental rights contained in that part. When a smuggler is detained preventively, his right to free speech may not be violated; but when Comrade Gopalan was arrested, his right to free speech, association and assembly were also simultaneously affected. While the majority did not subscribe to the view that Article 22

was a self-contained code, this interpretation was erroneously treated as the ruling ratio of the case.

The drafting history of the Constitution tells us an entirely different story. When Article 21 (Draft Article 15) was debated in the Constituent Assembly, the members were not willing to approve the formulation placed before them. In fact, they thought it was a blank cheque given to the executive to deal with personal liberty as it pleased. One member felt that the Assembly was being asked to draft a penal code instead of a constitution. It was to allay these fears that Article 22 (Draft Article 15A) was introduced. In this article, provision is made for arrest and production before a magistrate within 24 hours and for immediate legal advice. The rest of the article provides in fair detail the requirements to be complied with by any law dealing with preventive detention. The article provides detailed procedural safeguards for the citizen in the event of his being detained under a preventive detention law. By no stretch of the imagination can it be read as a complete code in itself, unrelated to other freedoms. This view ruled all subsequent decisions until the majority in the bank nationalisation case overruled it.⁵⁵

⁵⁵R.C. Cooper v. Union of India, AIR 1970 SC 564.

5

Progressive Decay of Democratic Institutions

A good policeman, it is said, remembers the rules only when he is in the witness box. Prior to that he takes the law into his own hands.

Tom Bowden¹

Introduction

The time is early morning, a couple of hours before daylight, August 18, 1983. The scene is the railway station of Warangal, a town with a 900-year-old history and the fifth largest population in Andhra Pradesh.

'The express train from Narsapur to Secunderabad is expected within a few minutes,' says the announcer. A large contingent of policemen forces the station master to bring the train onto the last platform, where they are waiting, because a steep descent on the other side will make all the passengers alight on the platform. The train enters the station. Normally full, it is even

¹Tom Bowden, *Beyond the Limits of the Law*, Harmondsworth: Penguin, 1978, p. 95.

more so that day, with hundreds of students traveling from coastal towns to Hyderabad, heading towards a students' rally. Their demands are innocuous: higher scholarships, better library facilities, cheaper textbooks, etc.

The policemen charge into the train, pull open the doors forcibly, and offload the passengers as if they were cargo. They catch hold of any person looking like a student, pull him out brutally and throw him onto the platform. Later they will pretend that those apprehended were ticketless travellers, but at the time they do not even try to check for tickets. About 100 to 200 students are thus detained.

The procedure is repeated with two more trains that come to Warangal from coastal towns: the Godavari Express and the Madras-Hyderabad Express. By dawn, some 300 to 400 students have been collected on the platform. They are forced to remove their shirts, handcuffed behind the back with their own shirts and made to sit in rows. As other travellers look on horrified, they are beaten savagely with long canes.

Public service buses are forcibly requisitioned by the police, and before the sun can rise and look down upon the ghastly scene, the boys are removed from the platform, marched in a file to the buses, and lodged in the five police stations in the town. There is no furore in the town that day, because there is nothing unusual about this dastardly act. The next day, the local press carries a bland report citing the Superintendent of Police of Warangal district, who said that it was suspected that 'hundreds of extremists were travelling by the trains that day to attend a rally at Hyderabad,' and that this was the reason for the arrests. This astonishing pronouncement also does not produce a reaction, as this too is not unusual. The arrest, torture and framing of false charges against students, peasants, tribals and mineworkers, and then labelling them 'extremists' to get away with it, is such a normal practice that nobody expects anything different. What happened that day was not an isolated incident. It is merely one anecdote in a tale of barbarity that has a long history. This essay will attempt to map aspects of that history,

tracing the ways in which the courts, the law-enforcing machinery, particularly the police, and the legislatures have dealt with questions of repression and public accountability, coming together in their endeavours sometimes, acting as checks on each other at other critical moments, and yet working at all times through the colonial and post-colonial period strictly within a colonial paradigm.

Continuing the Rowlatt Framework

It is interesting to look at the transformation of an Indian from a British subject to an independent citizen of a sovereign nation. After 15 August 1947, Indians continued to be subjects, with a promise of citizenship after the Constitution came into force. The Constitution, when it came into force, recognised that citizens have certain basic rights and enumerated some by way of illustration, leaving space for the articulation and progressive delineation of basic rights in the course of the country's development. Representative institutions were created to safeguard these rights and other enumerated non-justiciable rights; these safeguards were called the Directive Principles of State Policy. The courts were meant to discipline the legislatures as well as the executive and ensure scrupulous adherence to these principles.

In practice, however, what resulted was a mere transfer of subjecthood to elected representatives and to the very courts entrusted with the task of protecting citizens' rights through the interpretation of the law in consonance with the spirit of the Constitution. This was a direct consequence of the fact that the institutions retained after attaining independence were not restructured with the vision necessary to discharge the trust bestowed on them by the people. All the laws passed by colonial rulers were retained, specifically the penal laws that had been devised to suppress the movement for independence. Thus, a legal structure designed to buttress colonial rule now became the legal structure of independent India. An examination of the

criminal law of that period discloses the purposes for which powers were entrusted to administrators with no concern for any safeguards against abuse, since subjects could not claim rights within the colonial legal framework.

The statements spelling out the logic behind the three Criminal Law Amendment Acts of 1908, 1932 and 1938, which are still on our statute books, will adequately demonstrate the foregoing contention. The statement of objects and reasons for the 1908 act reads:

Recent events have demonstrated that it is expedient to provide for the more speedy trial of anarchical offence and for the suppression of associations dangerous to the public peace.²

This act, which bans certain associations, is still on the statute books. There was also a provision for a special procedure, which was repealed in the year 1922.

The statement of objects and reasons for the 1932 act reads:

The Civil Disobedience Movement has made it necessary to supplement the Criminal Law by means of certain Ordinances promulgated by the Governor-General... Though the Ordinances have enabled Local Governments and their officers to control the movement, its organisers have not yet abandoned their attempt to paralyse Government and to coerce law-abiding citizens. The experience of the last two years and of previous movements on the same lines shows that, in the absence of certain of the powers at present existing, it is no difficult matter to start or revive such subversive movements.³

The Criminal Law Amendment Act, 1938, was enacted to punish those who obstruct recruitment to the British Indian Army or who incite the members of the armed forces to mutiny. Its statement of objects reads:

A large number of public speeches designed to dissuade persons from enlisting in the Defence Forces or, in the alternative, to

² *The A.I.R. Manual: Unrepealed Central Acts*, 4th Edition, Vol. XII, p. 347.

³ *The A.I.R. Manual: Unrepealed Central Acts*, loc. cit., p. 360.

incite would-be recruits to commit acts of mutiny or insubordination after joining the Forces have come to notice during the past 18 months. The object of the speakers is clearly not the spread of pacifism, but to dissuade would-be recruits from taking part in any war in which the British Empire may become engaged.⁴

The Rowlatt bills were described by Gandhi as 'the unmistakable symptom of the deep-seated disease of the governing body.' C.R. Das's account of the politics of law and order in Gaya is even today one of the finest expositions on the subject. Referring to the two statutes still on our books, C.R. Das, in his presidential address at Gaya in 1922, pointed out:

Why are the Indian Criminal Law Amendment Act, 1908, and the Prevention of Seditious Meetings Act, 1911, to be retained on the Statute Book?... These Statutes in themselves constitute a breach of law and order, for law and order is the result of the rule of law; and where you deny the existence of the rule of law, you cannot turn round and say: 'it is your duty as law-abiding citizens to obey the law.'⁵

Over the past fifty years there has been a gradual erosion of rights discourse in all the principal institutions of the country, and this is glaringly reflected in the courts. One of the duties enumerated in Article 51A of the Constitution is 'to cherish and follow the noble ideals which inspired our national struggle for freedom.' Even after Independence, the government did not think that the continued existence of laws with such objectives was unconstitutional. On the contrary, many of the penal laws passed by the British to contain and repulse the struggle for

⁴ *The A.I.R. Manual: Unrepealed Central Acts*, loc. cit., p. 367.

⁵ *Congress Presidential Addresses: Second Series, 1911–1934*, Madras: G.A. Natesan & Co., 1934, p. 565. These statutes were part of the list appended by Satyamurti in his Private Member's Repressive Laws Repealing and Amending Bill tabled in the Central Legislative Assembly in February 1936. See Chapter 4.

independence are still on the books today. The executive, under Article 372, is required to modify all pre-constitutional legislation to bring older laws into conformity with the Constitution. What was required to be modified was not just the form, which they did to some extent, but also the quality and content, so as to bring these in tune with the constitutional scheme. But this exercise was avoided because both the party in power and the opposition supporting it by silence wanted to retain the repressive legal structure handed down to them by the British. After all, they did not themselves experience any discontinuity when the transition was effected. This is demonstrated by the fact that even after the Constitution came into force the emphasis did not shift from power to rights. Although several provincial acts and ordinances providing for preventive detention became unconstitutional as they were in conflict with Article 22 and were inconsistent with the other rights listed in Part III of the Constitution, the Preventive Detention Act was passed exactly one month after the Constitution came into force. When A.K. Gopalan contested the validity of the law in the Supreme Court, the debate was not with reference to the rights of the people but with reference to the power of the state against its own people. The discussion on rights focussed on the limitation of rights, an attitude fostered by the view that rights had no independent origin, that they had come into being only on account of the Constitution. It was only Justice Vivian Bose who consistently stressed the importance of a 'rights approach'.⁶

The courts, even while adjudicating the restraints imposed on liberty, did not recognise the political content of liberty in their discourses. The failure to recognise that the Preamble and every expression used therein, the rights enumerated in Part III and the fundamental obligations in Part IV are primarily political concepts has reduced rights discourse to a debate on legalities,

⁶See Chapter 4.

dwelling instead on the assumption that rights were granted by law and therefore could be withdrawn at will.⁷

What was never understood was that rights are acquired and that powers are granted. This misconception has displaced 'we the people', the grantors, to the status of 'we the other people', subjects rather than citizens in our own democracy.

While the executive and legislature failed to inculcate the norms set out in the Constitution as part of administrative culture, the court, when such matters were brought before it, was more biased towards public order than was either warranted or good for preserving and promoting a healthy democratic set-up. Thus began a slow decay. The persistence of the same system despite an avowedly democratic Constitution and value system is, to my mind, an indication of something wrong with the political administration. It also means that after Independence the Constitution played a secondary role in the day-to-day administration of the country. It is because of this total indifference to a document that embodies the aspirations and objectives of our struggle for independence that we have failed to restructure institutions in terms of the Constitution.

This decay has not gone unnoticed. Way back in 1962, Justice A.N. Mulla of the Allahabad High Court, while allowing a criminal appeal, issued a notice to the Station Officer of Shahabad, Mohammad Naim, asking why a complaint should not be instituted against him by the court under Section 195 of the Indian Penal Code. Mohammad Naim threw himself at the mercy of the court and begged forgiveness. The learned judge's observations are worth reproducing:

⁷During the external emergency declared at the time of India's China war, Articles 14, 21 and 22 were suspended. Several Marxists were arrested under the Preventive Detention Law/Defence of India Rules. When these arrests were questioned in *Makhan Singh*, the court pointed out that the right to challenge validity accrued to citizens only after and on account of the Constitution itself. Therefore, when rights were suspended, no complaint can be made, argued the court, basing itself on the very superficial logic that what is granted can always be withdrawn.

I issued the notice because I want to clean the public administration as far as possible, but an individual's efforts cannot go very far. If I had felt that with my lone efforts I could have cleaned this augean stable which is the police force, I would not have hesitated to wage this war single-handed. I am on the verge of retirement, and taking such steps for two months or three months more would not make any difference to the constitution and the character of the police force... Somehow, the police force in general, barring a few exceptions, seems to have come to the conclusion that crime cannot be investigated and security cannot be preserved by following the law, and this can only be achieved by breaking or circumventing the law. At least, the traditions of a hundred years indicate that this is what they believe. If this belief is not rooted out of their minds, there is hardly any chance of improvement... I say it with all sense of responsibility, that there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force. If the police force must be manned by officers like Mohammad Naim, then it is better that we tear up our Constitution, forget all about democracy and the rights of citizens, and change the meaning of law and other terms not only in our penal enactments but also in our dictionaries... Where every fish barring perhaps a few stinks, it is idle to pick out one or two and say that it stinks. I therefore discharge the notice issued against Sri Mohammad Naim.⁸

These words were uttered in sheer disgust by a judge who was to lay down his office shortly thereafter. The matter was carried to the Supreme Court for the deletion of these 'offensive remarks'. Justice Mulla, according to the Supreme Court, lacked a judicial approach. The Supreme Court was of the view that

...in his zeal and solicitude for the reform of the police force, the learned Judge allowed himself to make these very unfortunate remarks, which defeated the very purpose he had in mind.⁹

⁸State of Uttar Pradesh v. Mohd. Naim, AIR 1964 SC 703.

⁹State of Uttar Pradesh v. Mohd. Naim, AIR 1964 SC 703.

While deleting the remarks the Supreme Court further said:

It is difficult to avoid the reflection that unless an example is made of such officers by taking the most stringent action against them, no improvement in police administration is possible.¹⁰

If the Supreme Court had viewed this case from the perspective of the Constitution, its conclusions would have been entirely different. In Gandhi's India, where we have been taught that the means is as important as the ends, the Supreme Court was holding that illegality in investigation did not in any manner vitiate the trial. The legal procedure to be followed before a court orders forfeiture of life or liberty does not take into account the procedure followed during the investigative stage. In *Malkani and Pooran Mal*,¹¹ the Supreme Court reiterated that illegality in procuring evidence by the prosecution against the accused does not vitiate the trial. The court drew support and inspiration for the proposition from the observations of Sir Lawrence Jenkins in *Barindra Kumar Ghose* (Anusheelan Samithi). Responding to C.R. Das' contention that searches and seizures effected were in utter disregard of the provisions of the Code of Criminal Procedure, Jenkins, quoting *Jeemuthavahana*, held that facts discovered by illegal searches would still be admissible against the accused despite the illegality.¹² The elaborate procedures prescribed for investigation and trial are there so that fiction does not parade as fact in the courts. While 'a hundred texts may not alter a fact,' failure to follow prescribed procedure may result in the production of perjured evidence, and much more so in political trials. Proceeding on the assumption that the principles laid down by British courts and followed by British Indian courts, particularly with reference to the Indian Evidence Act, were correct, the judiciary sidestepped a critical examination of the whole question in terms of the constitutional

¹⁰State of Uttar Pradesh v. Mohd. Naim, AIR 1964 SC 703.

¹¹R.M. Malkani v. Maharashtra, AIR 1973 SC 157; Pooran Mal v. Director of Inspection, AIR 1974 SC 348.

¹²Barindra Kumar Ghose (1909) 37 Cal 467.

value system. This laxity of procedure led to arbitrariness and inefficiency in administration.

The principles laid down by Sir Lawrence Jenkins in *Barendra Kumar Ghosh* were merely reiterated. The question is not how the evidence was acquired but whether such evidence was relevant and admissible. Such an approach at once releases the establishment from the principle of disciplinary jurisdiction implied in judicial review. The procedural regimen prescribed for regulating governmental action is meant to prevent arbitrary actions by the government, its agencies and men. Very often, a procedural safeguard is the only bulwark of a citizen as a person, and courts are places where the government and its officials are called upon to publicly account for their conduct on proceedings initiated by citizens. The court in *Pooran Mal*¹³ reviewed the case law on this issue, where a reference was made to *Olmstead v. United States*. In the latter case, the minority view (that of Justice Brandeis) is in tune with our constitutional scheme, and it ought to have been accepted by the court:

Our Government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example...If the government becomes the law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.¹⁴

Premchand Paniwala proved how wrong the court was in following Sir Lawrence Jenkins' opinions. A stock witness for the prosecution in about 3,000 cases between 1959 and 1978, Paniwala was threatened with externment proceedings under the Delhi Police Act, 1978. When this externment order was carried to the Supreme Court, weird tales of how the police secured evidence in prosecutions came to light. He had been a witness to every possible offence on earth, and was invariably witness to search and seizure operations for arms, liquor, opium, etc. Premchand Paniwala at once demolished the logic of the Supreme

Court ruling that illegality in procuring evidence is irrelevant if the evidence is otherwise relevant and admissible. Justice Iyer, in the course of his judgement, was compelled to rely on Justice Brandeis' opinion in the *Olmstead* case referred to earlier.¹⁵

Our failure to evolve a new system of jurisprudence and the continuation of British Indian traditions was responsible for the characteristically colonial response of the Supreme Court to the declaration of a state of emergency and the Maintenance of Internal Security Act in *ADM Jabalpur*.¹⁶ The Shah Commission findings, the exposure of the police in the proceedings of the Bhargava Commission set up to investigate encounter deaths in A.P., the findings of the Muktaradar Commission set up to enquire into the rape of Rameeza Bee, the Bhagalpur blindings, the condition of undertrials in Bihar—all these exposed the anarchy and utter anomie that have set into the administrative structure. The courts' intervention did not and could not improve matters, for by then the inter-institutional discipline which is of critical significance to a constitutional system had irretrievably broken down.

The state of emergency declared in 1975 and the Maintenance of Internal Security Act were both validated by the court. The proclamation of emergency to contain internal disturbance was later thoroughly exposed as an obnoxious political act, and yet it left both the executive and the judiciary unreformed. Despite this the majority of the court proceeded on the assumption that the people and the state's institutions were adversaries, and that freedoms were granted to people and therefore subject to withdrawal.

The National Security Act of 1980 devised a method to validate incarceration of persons by a 'deemed' provision, a legal fiction. While it is said that procedure remains the last defence of a citizen as a person, by this act even that defence was taken away. The detaining authority's subjective satisfaction and a person's liberty are both governed by this legal fiction. Every

¹³*Pooran Mal v. Director of Inspection*, AIR 1974 SC 348.

¹⁴*Olmstead v. United States*, 277 US 438 (1928) 553.

¹⁵*Premchand Paniwala v. Union of India*, AIR 1981 SC 613.

¹⁶*ADM Jabalpur v. Shrikant Shukla*, 1976 SC 1207.

ground, whether relevant or irrelevant, was deemed to be the basis of a separate detention order. This legal structure diminished democracy. Any emphasis on rights was viewed as supporting anarchy, and once this view found acceptance, the abuse of law leading to violence by the state was looked upon as a valid exercise of power. This acquisition of enormous power produced an irresponsible and corrupt system of governance.

The courts have always acted as if the government and its men should not be dealt with harshly, that they should be treated as slow learners. But then, in implementing the constitutional scheme, pious homilies have no therapeutic value. They merely tend to make the executive more and more arbitrary. None of the courts' gentle admonitions have had any effect. The abuse of law has continued at every level. While in other areas the harm or injury this abuse causes may not be direct and physical, in the case of liberty, lawlessness on the part of government agents subjects persons to physical pain, indignity and humiliation and therefore needs urgent attention.

Political discontent, which was genuine to start with, has never since been examined and no attempts have been made to resolve it. Instead discontent has been allowed to fester until it could be dealt with later as a law and order issue. That is, discontent was outlawed *de facto* without overtly banning the activity. After the 44th Amendment it was no longer possible to invoke emergency provisions to contain internal disturbance. They can only be invoked when there is a threat of armed rebellion within. When this amendment was brought about, the obvious intention was to prevent the state from frequently and on the slightest pretext resorting to emergency provisions to impose an arbitrary, authoritarian rule.

Ironically, this amendment seems to have given more space to the executive to introduce repressive legislation without the necessity of suspending any of the fundamental rights. The Terrorist and Disruptive Activities (Prevention) Act, 1985, or TADA, took leave of the time-honoured principles of criminal jurisprudence. One major achievement of this piece of repressive legislation was that by extending the remand period to one year,

it appropriated the powers of preventive detention without attracting the limitations in Article 22 as also the publicity which a *habeas corpus* petition in a high court would invite. Arbitrary powers like this led to such widespread abuse that the National Human Rights Commission resented its continuance and so it was not revived. The Supreme Court validated the provisions of TADA and ruled that, as terrorism is not an enumerated category in any of the three lists in the Seventh Schedule, it falls within the residuary powers, which belong to Parliament. We notice in the validation of TADA¹⁷ the emergence of a disturbing trend where arbitrary laws passed by Parliament are validated by the court through the provision of guidelines for recording confessions by superintendents of police. Or where the validity of the Armed Forces (Special Powers) Act is strengthened through the acceptance of army instructions to subordinates, issued with a view to avoiding arbitrary actions, as adequate safeguards against violations of one's fundamental and human rights.

Such a course is not authorised by Article 21 as interpreted from *Maneka Gandhi*¹⁸ onwards. While judgements rendered by the court have the force of law, they suffer from the absence of publicity and so by and large remain ineffective. In fact, there is no way of communicating to the public the laws laid down by the courts. The length of these judgments and the difficulty in unravelling the ratio of the case are daunting obstacles which discourage any attempt at effective communication. If these guidelines are to be effective, they should be made known to the accused before he is charge-sheeted, and also to the public so that they may know what their rights are if arrested as suspected terrorists. Questioning the competence of Parliament and the validity of the Armed Forces (Special Powers) Act, several writ petitions were filed between the years 1980 and 1991 by the Naga Peoples' Movement for Human Rights and others. These came up for hearing before the Supreme Court in November 1997. The court issued a list of instructions as adequate

¹⁷ *Kartar Singh v. State of Punjab*, 1994 SCC (Cri) 899.

¹⁸ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

safeguards against abuse. These instructions have been elevated to the status of a procedure prescribed by law, the mandatory requirement of Article 21 as interpreted by the very same court in several decisions.

Can instructions take the place of law? Should not a law or a rule affecting liberty be published and made available for the public to inform themselves? Do the judges expect the arresting officer to hand over these instructions on demand? Mr. Tarkunde, a retired judge of the Maharashtra High Court, was mauled for merely asking an Additional Superintendent to name the provision which enabled the police to prevent photography as they brought under control a hundred demonstrators. This after he announced that he was a high court judge. These trends are questionable because they attempt to make up deficiencies in law by the exercise of power by the court under Articles 141 and 142.

The 44th Amendment to Article 352, instead of restricting the power of the executive, has in fact expanded the powers of Parliament to pass laws with reference to 'internal disturbances' without let or hindrance. TADA could not have become operative without invoking Article 352 prior to the 44th Amendment. After this amendment, it appears to be no longer necessary to comply with any of the fundamental rights so long as an act dealing with internal disturbance is of limited duration but with the option of unlimited extensions. The Preventive Detention Act has been extended year after year for eleven years and now we have it permanently. TADA was extended every two years for ten years. This too may become part of a permanent penal code. The Armed Forces (Special Powers) Act commenced its career as a temporary measure but gained permanent status in 1958.

Central legislation that can be broadly understood as security laws are possible when the centre is strong, which in a system of parliamentary democracy, means an absolute majority in Parliament. But now the government at the centre is weak, with no credible politics to offer to the people. Religion has never been a unifying force capable of converting the entire Hindu majority into a single vote bank. As the illusion of good governance wears thin, and people organise themselves against

this enveloping insecurity, they become a threat to the security of the state. The home minister, as Indira Gandhi did earlier, has now advised the states to make their own anti-terrorist laws. Thus, Tamil Nadu passed the Prevention of Terrorism Act (POTA) without allowing any debate. This act is now awaiting the assent of the President. It is a replication of TADA, 1985, unexpurgated. The contents of the latter act have already been held valid by the Supreme Court. The only question that remains is whether the Tamil Nadu Assembly has the right to legislate the control of terrorism, as this falls within the residuary power of the Union. The jurisprudence of power may this time yield a different interpretation and the court may find the law competent, as it is intended to deal with local terrorism under the ambit of public order, which is a state subject. Under Entry 2A of the Union list, the central government can deploy its armed forces to aid civil authorities, but always subject to its control, upholding the federal principle. Thus, fascism can be made a state's field of legislation.

The Police and the People

That the police in India has lamentably failed in accomplishing the ends for which it was established is a notorious fact, that it is all but useless for the prevention, and sadly inefficient for the detection of crime, is generally admitted. Unable to check crime, it is, with rare exceptions, unscrupulous as to its modes of wielding the authority with which it is armed for the functions it fails to fulfil and has very general character for corruption and oppression. [Despatch of the Court of Directors, 24 September 1856]

As political turbulence increases, the ways by which one may forfeit life and liberty are likely to be more arbitrary and brutal. Cases of torture, death and rape in custody continue unabated. These have been brought to public notice by various civil liberties and human rights organisations. Some cases where the people have reacted spontaneously to custodial violence are reported sympathetically in the press. Enlightened public

opinion has succeeded sometimes in wresting a decision from the Supreme Court after nearly two decades of waiting.¹⁹

In spite of the evidence presented in the Shah Commission reports, human rights organisation reports, and regular reports in newspapers on custodial violence and rape, neither the Law Commission nor the government has thought it fit to provide statutory measures to punish erring policemen. It was the judgement of the Supreme Court in 1985 which goaded the Law Commission into action and suggested the introduction of Section 114-B in the Evidence Act. The Law Commission made no reference to the Human Rights Covenant nor the U.N. Declaration against Torture, which our country ratified by filing a Unilateral Declaration against Torture in 1979. Nor did it suggest a comprehensive code to contain the homicidal habits of the police force.²⁰

¹⁹One such case is that of *Ram Sagar Yadav*, AIR 1985 SC 416. One Brijlal, who went to lodge a complaint against a police constable for demanding a bribe, was himself taken into custody by the Hussain Jung police station and subjected to violence resulting in death. The incident took place in August 1969. The criminal appeal was disposed of on 13 May 1974. The 1975 appeal to the Supreme Court was disposed of on 22 January 1985.

²⁰We have enough provisions in the Code of Criminal Procedure to reduce human rights violations considerably, provided strict compliance is insisted upon. They are:

- a) The person arrested should not be subjected to more restraint than is necessary to prevent escape (Section 49).
- b) The person arrested should be informed of the grounds of arrest by furnishing him full particulars of the charges (Section 50).
- c) The person arrested and subjected to search should be given a receipt for the articles confiscated from his person (Section 51).
- d) When weapons have been seized they should be deposited in the court before which the accused is produced (Section 52).
- e) The arrested person has the right to have himself examined medically on request to establish whether anyone else has inflicted wounds on his person while in custody (Section 54).
- f) A person arrested without warrant should be produced before a magistrate within 24 hours (Article 21(1) and Sections 56 and 57).
- g) The officers in charge of police stations should report to the District Magistrate or, if he so directs, to the Sub-Divisional Magistrate the cases (contd.)

When the police are called for an unnatural death, a first information report is registered, an investigation commences and ultimately a suspect is taken into custody. If the suspect survives custody he is produced before a magistrate and is remanded to judicial custody. But if a suspect dies due to violence employed by the police while in custody, practically nothing is done except to secure a tailored *post mortem* report. Under Section 176 CrPC, an Executive Magistrate, rarely someone who is outside the influence of the police, conducts a routine enquiry, and both the incident and subsequent report are forgotten very soon thereafter. If custodial death is taken note of by the public, a judicial commission is appointed, the beneficiary usually a retired judicial officer. He conducts an enquiry and submits a report. These reports—the executive magistrate's or those of the commission of enquiry—have no value. If the dead bodies have any political use, some noise is made in the Assembly or Parliament. These deaths are never perceived as crimes, nor are they seen as human rights and constitutional violations.

In 1980, Arun Shourie investigated 45 deaths in police custody in seven states. He found the patterns 'so uniform from one death to another, from one state to another, that generalisations are possible.' The victims were invariably poor. Several of them were hauled in on no charges at all. Even those who were formally arrested were charged, in an overwhelmingly large number of cases, with petty offences. In 7 out of the 45 cases investigated by him, the bodies were so badly mauled that it was not possible to hide the crime committed. Yet, the explanations for these deaths were 'snake bite', 'heart failure on the way to the hospital', 'suddenly took ill', etc. Some were said to have 'died for mysterious reasons'. All the rest 'committed suicide'. The methods of suicide reported are unchanging:

(contd.) of all persons arrested with or without a warrant, within the limits of their respective stations, whether such persons are eligible for bail or otherwise (Section 58). To this a proviso should be added laying down that where no such report is made to the District Magistrate it would amount to wrongful confinement.

hanging inside the lockup by means of a lungi or belt; jumping out of a window or in front of a bus; and other such ludicrous, unbelievable accounts. Judicial enquiry was ordered in 31 cases, the results usually of no consequence.²¹

Conclusion

The A.P. Civil Liberties Committee and more recently the Committee for Concerned Citizens have maintained a record of all custodial deaths and extra-judicial killings and have wherever possible participated in enquiries and investigations. My own experience of dealing with extra-judicial killings within the courts and in pressing for detailed investigation in each case has over three decades forced me to re-examine our legacy in the human rights field and more specifically our legacy of repressive legislation, that in a sense lays the ground for the present resilience of repressive and authoritarian structures, the untrammeled exercise of power and the perpetuation of impunity.

Andhra Pradesh, after Chief Minister Jalagam Venkateswara Rao of the Emergency period, has been a model police state. On account of the presence of a continuing left movement, this state has always been a forerunner in bringing about innovative pieces of legislation. When Mrs. Gandhi said the states could have their own preventive detention laws, the A.P. Preventive Detention Act, 1970, legislated that every ground of detention should be viewed as a detention order. This law was struck down by the A.P. High Court as violative of Article 22(5). Those were early days when fundamental rights were still not subordinated to the jurisprudence of power. This provision later found its place in the National Security Act, 1980, and its validity was not questioned. Andhra Pradesh established successfully that no law need be applied to control inconvenient political dissent. It also established yet another principle: that the constituent units of the Indian union need not comply with the provisions of the

various international covenants to which this country is signatory. The present legislation obliterates Part III of the Constitution. It may go through or it may suffer some modifications. The mind-set is what is important. A brochure brought out for study by Andhra's legislators includes all the British laws used to suppress the freedom struggle. While the Constitution's Article 51A makes it mandatory to cherish the ideals which inspired our freedom struggle, the state has always been cherishing the methods that were used by the British to suppress the freedom struggle, and its police have truly become the heirs of General Dyer of Jallianwala Bagh notoriety. It is not necessary to deal with all the provisions in the bill. One novel aspect of the legislation is sufficient to demonstrate the fascist inclinations of the government. We are all familiar with a legal category called a 'notified area'. But none of us may have ever heard of an individual being called a 'notified person'. It is not necessary that this person should be found in a notified area. He can be found anywhere. Once a person is notified, he cannot be given shelter or food. He cannot approach any doctor, nursing home or hospital for treatment. His parents and other relatives become suspect and will be subject to surveillance and repeated arrest. He is likely to be shot on being apprehended; even the announcement that he was killed in an encounter—a fig-leaf legality—can be dispensed with. The notified person epitomises and confers legality on over three decades of physical liquidation of radical dissent by the Andhra Pradesh police. It sets at naught all international covenants ensuring respect for human rights; it abrogates Article 21 primarily and the other freedoms as well. And yet it has not invited the protest it should. It is seen as a measure directed against the CPI (ML-PW) and other Naxalite parties and groups, but that is an irretrievable mistake. No one anticipated that the BJP-led coalition would stage a comeback as Mrs. Gandhi did, but now the emergence of a federal structure with fascist states has become a frightening prospect. The centre can supply forces to its constituent units and be satisfied with a limited role. It is becoming increasingly difficult (and therefore disturbing) to visualise a political programme or

²¹Arun Shourie, *Mrs. Gandhi's Second Reign*, New Delhi: Vikas Publishing House, 1983, pp. 317–21.

ideology spanning the entire country, nor is there a leader acceptable to all the people—a national leader.

The need of the hour then is a political vision that is committed to democracy and an institutional apparatus that is committed to the upholding of human rights. And adherence to human rights is only possible through an institutionalisation of procedure and accountability. As a first step in thinking in this direction, the following may be useful springboards:

1. The immunity enjoyed by public servants will not extend to the crimes set out in the penal code. The legislatures may, to set the matter at rest, introduce a provision to the effect that where the accusation is offences against the human body, no permission to prosecute will be necessary, and that such offences will not be regarded as acts performed in the exercise of duties.
2. Enquiries under Section 176 should be entrusted to the Chief Judicial Magistrate in the districts and the Chief Metropolitan Magistrates in the cities; enquiries by Executive Magistrates should be done away with. The latter may delegate their functions to the First Class Judicial Magistrates. Suitable amendments may be introduced to enable these magistrates to treat proceedings under Section 176 as committal proceedings, where there is material which *prima facie* informs them that a death or disappearance has been caused while in custody.
3. The principle of *constructive liability* and concomitant rules may be introduced so that superior officers may not join to fabricate a case of suicide or help in shielding offenders. Punishments under this provision could range from withholding increments and promotions to suspension and termination from service.
4. Rules must be introduced under Section 309 CrPC so that persons accused of offences are automatically suspended pending trial.

6

The State as Terrorist

The enactment of repressive laws does not need concern for human life and liberty; nor does it require intelligence. All repressive laws have certain characteristics. Their definitions are wide and vague; they are always designed to include in their purview the entire populace, if need be. Court processes are inevitably subverted and the much-trumpeted ‘rule of law’ is transformed into ‘rule by discretion’, which is a euphemism for ‘rule by caprice’.

Special courts are set up for terrorists, which immediately leads to the presumption in the minds of people that the men and women produced there are in fact terrorists. Since these courts are exclusively intended for terrorists, they are heavily armed and the public cannot enter them. They may not be located in the complex of court buildings. Separate premises are hired to ensure that the litigant population waiting in the corridors of the courts does not wander in to watch the proceedings. Despite this, however, there is usually a provision to exclude the public from such trials. Well-known and time-honoured principles of the criminal justice system may be dispensed with by such courts in the name of a speedy trial.

The reasons for enacting such laws have always been to contain violence and for the ‘preservation of democracy’. This is

as true for the notorious Rowlatt Acts as for the Terrorist and Disruptive Activities (Prevention) Act of 1985. Does the state really need a legislation to curb terrorism? Or is it simply enacting a new law to provide yet another framework within which it can unleash violence against dissidents?

Let us take a look at some recent encounters in Andhra Pradesh. In Narsapur, Warangal district, Kavatam Saraiah, 25, of Shalevai, an accused on bail in a criminal case, goes to the house of his lawyer, Prabhakar Reddy. The lawyer is leaving for Hyderabad that day, so he gives Saraiah the keys to his house and lets him stay there. Bhupati Reddy of Moranchapalli, 25, wanted by the police, decides to surrender in order to put an end to the harassment of his brother and father by the police. He too goes to the house of Prabhakar Reddy. The police raid the house and arrest both Reddy and Saraiah. They are later shot dead in an 'encounter'. The police did not need an anti-terrorist law to take such action. The political objective (not translated into law) of rooting out extremism seems to have been sufficient justification for acting beyond the limits of the law. However, a periodic renewal of legitimacy is required to maintain a semblance of democracy and, at the same time, to ensure minimum participation by citizens in the affairs of the state.

Modern states are the worst violators of human rights, and the Indian state is no exception. As Noam Chomsky and Edward Herman assert in their well-documented account of Third World fascism:

The numbers tormented and killed by official violence—wholesale as opposed to retail terror—during recent decades have exceeded those of unofficial terrorists by a factor running into thousands. But this is no terror.¹

'Law and order', 'public order', and 'security of state' are powerful semantic tools in what Chomsky and Herman call

¹Noam Chomsky and Edward S. Herman, *Political Economy of Human Rights, Volume 1: The Washington Connection and Third World Fascism*, Black Rose Books, 1999.

'atrocities management' by the modern state. These terms have never yet been defined. The Supreme Court attempted to define them in the Ram Manohar Lohia case, but ended up describing them as concentric circles, the innermost being the security of the state.² As the court is not concerned with the possibility of abuse of power, it ignored the reality of the crimes committed under the cover of these concepts. Discretionary powers over the life and liberty of people invariably degenerate into capricious judgments by the authority involved, with no accountability to anybody. This irresponsible use of force has become a substitute for political solutions.

Political solutions to deep-rooted socio-economic problems have never been attempted with any measure of sincerity. The Indian state cannot assert with confidence that it has ever paid serious attention to the fundamental obligations contained in the chapter called Directive Principles of State Policy in the Constitution. The electoral politics pursued first by the Congress and now by the Sangh Parivar have been largely responsible for all the linguistic, communal and caste violence in the country. The violence against the rural poor continues unabated. No steps have been taken to reduce this violence, which is inherent in the social, political and economic structures in the countryside.

This structural violence takes the form of unfair wages, usurious money-lending, highly unfavorable terms of sharecropping, bonded and child labor and untouchability. Any struggle against this violence is met with vigilante actions by landlords and the rural mafia, invariably assisted by violence by the state, which intervenes in the name of law and order.

Landlords control the village panchayats, the cooperatives and other institutional paraphernalia of development. Since the Green Revolution and the setting up of state-sponsored development schemes, these institutions have become potent tools of oppression in the hands of the rural rich. Instead of modernising medieval villages, these instruments of modernisation have themselves been medievalised.

²Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740.

The manipulation of elections and the use of force to contain discontent have been the major preoccupations of the Congress party for nearly two decades. The former produced distortions and led to the communalisation and criminalisation of politics, and the latter habituated the state to the subversion of legal processes and violations of human rights.

Indira Gandhi ultimately became a victim of the law and order syndrome which she so assiduously nurtured and promoted. Her death left long-standing problems unresolved and more aggravated. The recent detonation of violence in the north, a legacy of the era that ended, would have normally been met by a declaration of emergency, the imposition of which can be justified even under the 44th Constitutional Amendment. But 'emergency' has become a dirty word. The discredit it has earned still sticks to it. Fully understanding these connotations, the government introduced TADA in 1985. It was confident that it would not encounter any resistance, and in fact the bill passed without any significant protest. The only democratic issue debated was in the context of centre-state relations, when a Telugu Desam leader expressed his apprehension that the centre might infringe upon his party's right to state terrorism. Thus, we have, by consensus, opted for state terror, and have laid the foundation for the growth of an authoritarian structure without invoking emergency provisions.

What is important about the 1985 act is what it does not define and what has not been spelt out. As we ride into the 21st century, we have added a few more terms to the existing vocabulary of 'atrocities management'. 'Terror' and 'terrorist activity' would ordinarily include violence and intimidation by the state as well. But now the words have a restricted meaning, referring only to the retail violence of those who are opposed to the established order. And that is how people will begin to understand the word 'terrorist' in the future. These words become powerful symbols to manipulate the public. By defining terrorist activity in a restricted sense, the state legitimises state terror, which will always be characterised as responsive. The use of the mass media provides endless possibilities for dredging up

incidents of violence against the state and selectively publicising and projecting these to demonstrate their senselessness.

One such example, which has influenced the views of many in the country, was the telecasting of the recovery of arms from the Golden Temple after Operation Bluestar, repeated almost every day on television. That hundreds of innocent persons who had nothing to do with Sikh extremism were either killed or detained unlawfully and tortured was never in the news. The fact that children who had not even attained the age of discretion were detained as terrorists for long periods did not receive any attention until Kamaladevi Chattopadhyaya brought it to the notice of the Supreme Court by filing a writ. The government did not even file a counter-affidavit either denying the allegations or expressing regret.

The methods of torture used against young people did not come to light until, pursuant to a direction by the Supreme Court, District Judge Cheema of Patiala visited the prisons.³ These are treated as incidental and inevitable injustices in a major operation to contain a threat to the state. Thus, the articulate public is being lobotomised by the state.

Violence by the state while enforcing TADA is placed in a special category. State violence under the cover of 'law and order' and 'security of the state' has been far more extensive in scale and destructiveness than private violence. State violence does not come to an end with the abatement of private violence. It continues its course to ensure that there is no protest, because its purpose is political. The population must be reduced to apathy and conformism, because participation in decision-making is viewed as a 'threat to democracy'. Whether the state will succeed in this effort is another matter.

Human rights violations of the most abominable kind take place in this country. No union or group maintains its statistics. Killing in fake encounters, deaths in police custody, custodial

³Indian Express, March 2, 1985.

violence, rape, torture, the blinding of suspects and illegal detention are crimes not taken note of, or if noticed, are handled with clinical detachment. A state that responds to terrorist violence with speed has never corrected the lawlessness of its own law-enforcing agencies. On the contrary, it confers awards and distributes rewards to the perpetrators of this violence. The security of the state, which TADA seeks to ensure, seems incompatible with the stability of the people.

The state has not been particularly concerned with terrorist crime proper, nor has it been concerned with broad terrorist programmes or specific deeds. The terrorist has been far more important as a bogeyman. Once having created the scare, it is tempting to extend it to legitimate activities. Hysteria about dissidence becomes so great that those honestly protesting against the abuse of TADA can be accused of being terrorists.

This is already taking place in Andhra Pradesh. Civil liberties activists who protest against the lawless conduct of the police are branded as Naxalites. They are arrested and intimidated and charged with supporting criminals and murderers. By doing this, the state is attempting to enlist public support for its activities, deliberately sidestepping the real issue, namely, whether the police are entitled to act as self-appointed executioners and dispensers of justice.

Panic, fear and violence have always been the breeding ground for these repressive measures. There is nothing redeeming or democratic about them. Justice S.T. Rowlatt, who headed the Indian Sedition Committee of 1917, found conspiracies all over the country. All forms of protest against misrule were seen as conspiratorial and seditious.

Motilal Nehru talked about the Rowlatt Act in his presidential address to the Amritsar Congress in 1919. His exposition and criticism of it is relevant to a study of TADA. He says:

Part I of the Act supersedes the ordinary mode of trial by a special procedure...to provide for a speedy trial...This speed is attained by doing away with commitment proceedings and the

right of appeal, which in one word means speed at the expense of justice.⁴

Parts II and III of the Rowlatt Act deal with two classes— anarchical and revolutionary movements. Of these parts Motilal Nehru says:

The fact that a person is concerned in any movement of either kind is in the first instance to be determined behind his back and later on, when his case is referred to the investigating authority, he is to be given an opportunity at *some stage* (not all the stages) of the proceedings, which are to be held in camera. The unfortunate person is not to be allowed to be represented by counsel, he may not be told the name of his accuser, nor even all the facts on which the accusation is based, and is not entitled as a matter of right to examine any witness, or produce any document if the investigating authority considers it unnecessary. To crown all this the investigating authority shall not be bound to observe the rules of the law of evidence and there shall be no appeal from its finding.⁵

He further asserts:

But repression and terrorism have never yet killed the life of a nation, they but increase the disaffection and drive it underground to pursue an unhealthy course, breaking out occasionally into crimes of violence. And this brings further repression and so the vicious circle goes on. No one can but deplore violence and political crime. But let us not forget that this is the direct outcome of continued repression. It is due to the perversity of the executive which blinds itself to the causes of the discontent and, like a mad bull, goes about attacking all who dare stand up against it.⁶

The similarity between the Rowlatt Act and TADA is not unexpected. The argument in favour of such measures, then as

⁴Congress Presidential Addresses: Second Series, 1911–1934, Madras: G.A. Natesan & Co., 1934, p. 427.

⁵Congress Presidential Addresses: Second Series, loc. cit., p. 428

⁶Congress Presidential Addresses: Second Series, loc. cit., p. 420.

now, is that they do not affect the innocent and the law abiding. But the emasculated legal formality of a trial under TADA ensures a drumhead court-martial, where apprehension inevitably means conviction.

In the centenary of the Indian National Congress, there has been a reversal of roles, and this needs emphasis. Terrorism in the late 20th century is not merely romantic idealism. It appears to be the only way to focus the attention of the public and the state on issues which require urgent resolution. The modern state, particularly after World War II, has become a technology-oriented power structure with a vast capacity for manipulating public opinion.

Through its control over the media, it is able to maintain and protect an exploitative and unjust system against any attacks from traditional forms of organised protest. It has rendered all traditional forms of protest ineffectual by its impervious brutality and Dyer-like unconcern for human life and values.

It is this systematic frustration of legitimate forms of protest by the modern state and its success (over the short run) in distorting and maligning the legitimacy of such protest that leads to terrorism. The state may arm itself with more extensive and more efficient means of repression, and it may seek to define more stringently the area of legitimate dissent, but it cannot contain dissent. It would be naïve to imagine that TADA will reduce terrorism or terrorist activity. The law may at best mitigate but can never abrogate social disequilibrium.

7

TADA: More Repressive than Rowlett

There has often been a demand for the repeal of the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA). Even the National Human Rights Commission has been demanding its repeal. Governance, if it implies justice and fairness, should attempt to move towards accountability of the state, and any review of this act should be alive to the possibility and the magnitude of its abuse by various agencies. This approach entails a political vision rooted in democracy, and one that does not suspect the motives of critics, whether they be politicians or human rights activists.

Merely decrying TADA as a 'black' or 'Draconian law' may not evoke any response. It will be treated as a slogan of the political parties, on the presumption that the issue has its advantages for them. This temporary enactment went through renewal without any protests whatsoever within Parliament, because the opposition parties feared that objection might lead to loss of credibility and credentials as well. Only the human rights groups opposed this measure. For them, calling the act a black law, Draconian, repressive or comparing it to the Rowlett

Act is not a political slogan. It conveys the quality and content of the law in its essential form. Broadly stated, it is more repressive in character than the Rowlatt law, which was subjected to violence criticism and protest. It is pertinent at this point to take a closer look at our 'fundamental duties', as enacted in Article 51A of the Constitution. Part (b) of this article asks us 'to cherish and follow the noble ideas which inspire our national struggle for independence.' We are also made aware that it is a fundamental duty 'to uphold and protect the sovereignty, unity and integrity of India.' But this cannot be so performed as to render meaningless our value system, our rights, the fundamental obligations of the state and the rest of the duties enumerated in the article.

TADA came into existence exactly ten years after the imposition of a state of emergency in June 1975, and followed the assassination of Prime Minister Indira Gandhi in 1984. The act is structured for abuse. It has very few provisions, only about a score, but the size of the statute conveys the misleading impression that it is directed only against terrorists and for curbing terrorism. Terrorism and terrorists have been so well portrayed that ordinary citizens feel that neither the act nor the manner of its enforcement deserves any scrutiny. This indifference has brutalised the institutions of society. Public ignorance of the law and the manner in which it is enforced ensures and perpetuates its abuse. The very force of the law depends on ignorance about its specifications.

The TADA suspect is not dealt with according to the acts he is alleged to have committed, but the politics he professes, or the group he socialises with and therefore is assumed to sympathise with. Thus a Sikh, a youth from the Telangana districts of Andhra Pradesh, a Tamil from the deep south and a Muslim from Kashmir, Bombay, Madras or other places, qualify as TADA suspects merely because of their regional or religious affiliations. This is how TADA is administered, but these methods will not encourage or foster the unity and integrity of India.

Let us look more closely at the act. The penal provisions are

divided into three sections. Section 3 contains fifteen independent offences. This section deals with 'terrorist' and other ancillary acts. It is a rearrangement of the offences against the state enumerated in Macaulay's penal code. But when the investigating agency registers the crime, it does not set out which of the fifteen offences in Section 3 the accused is suspected to have committed, nor does the designated judge insist it do so.

The Supreme Court, in *Kartar Singh*, upheld the constitutional validity of TADA, virtually proceeding on the assumption that the act is more fundamental than the Constitution.¹ In fact, the Constitution Bench did not feel it was necessary to submit the act to detailed scrutiny. They embarked on a peroration against terrorism which showed they had been impressed by the speeches made in Parliament on this subject. The bench skirted scrutiny and confirmed the validity of the enactment. Thus, conforming to post-Independence practice, the legislature, executive and judiciary in unison mandated the 'absolute reign of law', overlooking the fact that this is often synonymous with 'absolute reign of lawlessness'.

Section 4 deals with 'disruptive activities'. Basically, it deals with the unity and integrity of India as constituted, obviously to discourage assassinations of constitutional appointees (persons who while entering office swear an oath to uphold the Constitution) and the killing of public servants. The acts that have been defined as offences have Kafkaesque dimensions. For instance, under Subclause 3 of Section 4, 'prophecy', 'prediction' and 'pronouncement' have been made offences. In other words, the astrologers that our cabinet members frequent may qualify for being contingent terrorists should they dilate on the members' longevity.

Section 5 of the act declares that persons who are in possession of arms, ammunition, bombs, dynamite or other explosive substances unauthorisedly in a notified area are offenders. The

¹ *Kartar Singh v. State of Punjab*, 1994 SCC (Cri) 899.

movie actor, Sunjay Dutt, has been caught in the vice-like grip of this provision.² Wherever this act has been invoked, the entire area has been declared notified. A country-made bomb or a gun or a gelatine stick can easily be planted and the seizure effected. Once this is achieved, the accused has no chance to come out on bail. This provision has been extensively abused. The Supreme Court ruled in the Sanjay Dutt case that mere conscious possession is sufficient to shift the burden onto the accused. What is conscious possession? One does not find any light thrown on this aspect. Of course, the learned judges, in their mercy, have granted the accused the liberty of leading the defence's evidence.

Section 16 enables the prosecution to conceal the identities of witnesses produced against a person accused under the act. This is on the ground that witnesses will be afraid to depose against a terrorist. That witnesses against police atrocities are equally afraid to depose against the police is easily forgotten. While such assumptions are made with reference to terrorists, a similar assumption, though none the less real is not available for defence witnesses against the police. The right to lead defence evidence against the accusation so quickly conceded by the learned judges remains only a theoretical possibility and is illusory.

These provisions and the words used in them are born of a paranoid response by the government to the dissidence for which it is responsible. This kind of response is neither effective nor efficient. This is exemplified by the trial of Jinda and Sukha for the killing of General Vaidya. Despite (or perhaps because of) the blanket powers entrusted to the investigating agency, the entire evidence produced by the prosecution to prove a 'terrorist act' was disbelieved by the designated judge who tried the case. This evidence included a photograph of one of the accused which bore no resemblance to him. Both were convicted and sentenced to death on their own statements, not for an offence under TADA but for murder

²See Chapter 13.

under Section 302 IPC. This example provides sufficient reasons for repealing the act.³

The act itself does not provide any procedure for conduct of cases up to the trial stage. The Code of Criminal Procedure (CrPC) generally has no application. In these circumstances, each designated judge evolves his own procedure, but as he is accustomed to it, this follows the CrPC route. This does not mean that the procedure set down in the CrPC is in tune with Article 21 as defined by the Supreme Court in *Maneka Gandhi*.⁴ It still suffers from a colonial hangover. If Article 21 is to be a reality, the procedure prescribed by law should be made known to the accused from the time of the initial accusation and arrest up to the end. Even a copy of the First Information Report (FIR) is not made available to the accused on his arrest and production before the court for purposes of remand. He is also not supplied with a copy of the remand report, which details the progress of the investigation, and is filed in court every time the accused is produced for extending judicial remand.

In a case under TADA, the accused is kept in the dark about the facts which led to his arrest, except for the 'seizures' recorded in his presence, which are never voluntary. The remand period was originally one year. Under amendments introduced by Act 43 of 1993, this period was not reduced. Instead, there was an initial period of 180 days within which the charge-sheet had to be filed, with the discretion left to the judge for further extension, subject to the overall period of one year. If the prosecution did not file before the 180th day, the accused had an indefeasible right to be released on bail. However, the amended provision further states that if it is not possible to complete the investigation within the given period, the designated court can extend the period up to one year, on a report of the public prosecutor indicating the progress of the investigation and the specific reasons for detaining the accused beyond 180 days. This provision was first interpreted by Justice

³See also Chapter 8.

⁴*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

Anand and another judge of the Supreme Court as including notice to the accused on the filing of such a report.⁵ That bench also held that the public prosecutor should prepare a report independently, and not merely forward that of the investigating agency.

This progressive rendering of the law that gave the accused an opportunity to be heard before extension of remand after the initial 180 days, was watered down by a later Constitution Bench in Sunjay Dutt's case, which held that specific notice in writing was not necessary, as the accused would in any event be produced before the court for further extension of the remand period, which by itself would constitute notice!⁶ A statement made in their capacity as law-givers rather than as judges functioning under a constitutional value system! Very often, the accused is not produced for various reasons, and now the accused is not even entitled to a copy of the report in order to contest the extension.

How this provision is abused is an interesting study in itself. After the completion of 180 days, when the accused is brought before the judge, the latter seldom informs him that his 180 days are over and that he can apply for release on bail. Even if the accused does file an application, the procedure is to grant the prosecution time to file its reply. The process actually undergoes a few more adjournments while waiting for the prosecution to file its counter. After a few such adjournments, the prosecution lodges in the court some sort of a charge-sheet. This is just a formal compliance with the provisions and is intended to defeat the right of the accused to be enlarged on bail. The charge-sheet so filed is very often returned for rectification of defects and for proper compliance with the provisions of the act. Thus the charge-sheet makes its exit and is not made available to the court and the question of the accused securing copies of it does not arise. This is not taken serious note of by the designated judges

⁵Hitendra Thakur v. State of Maharashtra, AIR 1994 SC 2623.

⁶Sanjay Dutt v. State through CBI, Bombay, (1994) 5 SCC 410.

because they have always held the view that in a criminal trial the prosecution enjoys a preferred position. Needless to say, the accused remains a helpless spectator to this kind of abuse of process, which is, however, not seen by the other participants as an abuse, including by the judge.

The net result is that the accused is kept in the dark about his detention for the first 180 days, and thereafter, if a charge-sheet is filed, the question of the accused managing to get out on bail till the completion of trial is impossible. Thus the accused, though he is acquitted in most cases, is pre-emptively punished by incarceration during the remand period and until acquittal, a period most times being nothing less than two to three years.

The prescription of a remand period, Machiavellian in its conception, is the most disingenuous achievement of this enactment. Section 167 of the Criminal Procedure Code is by reference incorporated into the act and modified. Originally, a remand period of one year was introduced. This really did not receive the attention and scrutiny it deserved. It was always presumed that it was just a procedure prescribed for the trial of a terrorist. But then it was noticed that this remand period of a year was, in effect, akin to introducing the provisions of preventive detention laws through the back door.

The practice of using preventive detention having come in for severe criticism thanks to Emergency abuses, arrest under TADA is infinitely more advantageous and less bothersome than say, the National Security Act. For under a preventive detention law, a person cannot be detained beyond a period of three months without referring the case to a duly constituted advisory board, which has the authority to release the detainee if the grounds are irrelevant. The detainee also has a right to represent against his detention. And the entire proceedings, including the grounds of his detention, are subject to judicial review by the High Court and the Supreme Court under Articles 226 and 32, respectively. The maximum period of detention cannot be for more than a year.

This elaborate system of checks and accountability is totally

avoided by a mere amendment of Section 167 of the Criminal Procedure Code as applicable to TADA. The total period of pre-trial detentions is one year. This is not subject to judicial review. As no material has been made available, the accused has to wait 180 days to even know why he has been arrested. Even at the end of this period, he is not entitled to notice or a copy of the public prosecutor's report. The right to life of the accused is litigated between the court and the prosecution; the accused has no role to play, and the entire process is hidden from public scrutiny and debate, an important check in democratic systems.

Prosecution under TADA seldom leads to the filing of writs of *habeas corpus* in the high courts, where the proceedings are highly visible and will sooner or later attract media attention. With a view to avoiding such a situation, the act has eliminated the jurisdiction of the high courts totally by excluding the application of the Criminal Procedure Code. Appeals are only to the Supreme Court, and there is no appeal against interlocutory orders. The Supreme Court has ruled that orders on bail applications are interlocutory orders. They hold on to this position despite patent perversity in the orders of the designated courts. Only in rare cases can the accused invoke the powers of the High Court under Article 226. By a mere statute and by interpretation, the powers we have under Articles 226 and 227 have suffered unwarranted diminution.

District and sessions judges are the designated judges under the act. Consequently, no one notices the way the act is being administered. Cases in designated courts are not covered by the press unless a Kondapalli Seetharamaiah figures as the accused.⁷ The prosecution in designated courts is spread all over the state. Even if local newspapers cover the case, it may not be news for the major media, so the abuse, though present, is invisible.

The day-to-day work of a sessions judge does not train him to comprehend semantic distinctions and constitutional questions of law. This is not a criticism against members of the

⁷Kondapalli Seetharamaiah was a well-known communist leader in Andhra Pradesh and founder of the Naxalite group, CPI (ML-People's War).

subordinate judiciary but against a system which does not equip them with the ability to understand and implement the constitutional value system in their day-to-day administration of justice. In a Draconian measure such as TADA, one would have expected a government under a constitutional system to set down meticulously the qualifications necessary for being appointed as a designated judge, particularly when the first and only appellate court is the Supreme Court. Under this act, a fresh promotee who has spent one day as a sessions judge is eligible for being appointed as a designated judge. No order passed by him at the interlocutory stage is subject to judicial review. Only in the rarest of cases can high courts deliberate on the Constitution, says the Supreme Court.

Punishments under TADA are equally arbitrary and harsh. Excepting a terrorist act resulting in death, all other offences are punishable with a term of imprisonment ranging from five years to life. The designated judge has the discretion to pass sentences of over five years, say ten, thirty, forty or fifty years, depending on the judge's assessment of the longevity of the accused standing trial.

Apart from this, as the Criminal Procedure Code is not followed under TADA unless specifically made applicable, if an accused is found guilty of more than one offence, the court can sentence him severally. As a designated judge is not empowered to direct the sentences to run concurrently, the accused will have to suffer the sentences consecutively. Such prolonged periods of incarceration reminds one of the Bastille. They can only lead to jail breaks and violence within jails.

The act cannot really be retained with cosmetic embellishments. In any event, the history of amendments to this statute informs us that every subsequent change has made the act more repressive and regressive.

TADA has, for the first time since Independence, made confession to a police officer (not below the rank of a superintendent of police) admissible in evidence. This is a major departure from accepted tenets of criminal jurisprudence banning admissibility of such confessions. The provision dealing

with admissibility of confessions made to police officers was introduced by the Indian Evidence Act, 1872, after the report of the Madras Commission which enquired into police abuses. Here there is a reversal. Notwithstanding the Shah Commission revelations and constant exposure of police atrocities in the media, the police has been entrusted the power of recording admissible confessions. In *Kartar Singh* the Supreme Court set down guidelines, to be promulgated as rules, to prevent abuse of these powers by the police. But these guidelines have still not been noticed by the executive.⁸ Section 21 raised certain presumptions against the other accused in this case. The superintendent of police was entrusted with the power to record confessions, which were exercised by the magistrate. This is how the principle of separation of the judiciary from the executive as set out in the Directives, is being honored.

The 1993 amendment to TADA made it even more repressive and arbitrary. The superintendent of police became the authority who could approve the introduction of TADA provisions in his First Information Report. A police commissioner or inspector general were given the power to sanction prosecution under the act, thus dispensing with the supervisory jurisdiction hitherto exercised by the government. If the power to appoint a designated judge is also entrusted to a director general of police, the picture will be complete.

Basically a political measure, TADA was invoked to deal with the situation in Punjab, and was later extended to Kashmir, Andhra and Assam, and to counter the LTTE in Tamil Nadu and the Muslims after the demolition of the Babri Masjid. The government systematically abuses the act and uses it to shield state atrocity. As the legal structure gets more rigid and arbitrary, the resistance to it gives up democratic forms of protest, and laws devised to control such resistance movements serve to drive them underground. The escalation of terrorism is in direct proportion to increased repression. When all avenues of negotiation,

reconciliation and redress are closed, violence becomes endemic, and neither TADA nor any other penal measures will help the government cope with or resolve the issues confronting our society. We need to confront not only violence but our role in exacerbating the violence. The repeal of repressive measures is tied to the political will to promote constitutional goals. The repeal of TADA would be a reversal of a policy that has dragged the country down from its position as one of the world's best democracies, to an authoritarian regime that is impervious to the will of the people.

⁸*Kartar Singh v. State of Punjab*, 1994 SCC (Cri) 899.

8

Crime and Punishment

On the morning of 10 August 1986, General A.S. Vaidya, the Chief of the Armed Forces, who had 'flushed' the militants out of the Golden Temple in Amritsar, was shot dead by two militants in broad daylight in Pune as he drove his car. He had gone out shopping. His wife, seated beside him, also sustained injuries. The bodyguard sitting in the rear seat was a helpless witness to the attack. Riding a red motorbike, the gunmen came abreast of the car on the driver's side and the pillion rider pumped three bullets into Vaidya at close range. The assailants were later identified as Sukhdev Singh (Sukha) and Harjinder Singh (Jinda). They and three others were charge-sheeted on 14 August 1987 for offences under Section 120B (conspiracy), 302 (murder), 307 (attempt to murder), 212 (harbouring an offender), 465, 468, 471D (offences of forgery and the use of such documents) of the Indian Penal Code, and Sections 3 and 4 of TADA, 1985. Earlier, Indira Gandhi's assassination had been the immediate sequel to Operation Bluestar against the Golden Temple, which General Vaidya had commanded. Satwant Singh (mainly on his own confession) and Kehar Singh were hanged subsequently on charges of conspiracy in the latter case.

The Vaidya judgment of the Supreme Court shows that

around 200 witnesses were examined and about 1,000 documents were exhibited. Figuring as witnesses were prostitutes with whom the accused were alleged to have spent time when they were not plotting to kill the general. The propaganda against political dissent is never complete unless dissenters are portrayed as completely degenerate. The conviction and sentence were not based on the evidence produced by the prosecution. Even the photograph of Jinda produced by the prosecution was rejected by the designated court. The judge said:

Firstly, in my opinion, this photograph does not appear to be that of Harjinder Singh alias Jinda...at all...How can I hold that this is the photograph of Jinda...when obviously, to the naked eye, it does not look similar to the face of Jinda...¹

But then how were they convicted and sentenced to death? Jinda and Sukha argued for their own execution. Sukha filed two statements admitting that he killed Vaidya because he had attacked and destroyed the Akal Takht in the Golden Temple. Jinda too filed a statement along the same lines. He claimed that he was driving the motorcycle and Sukha was the pillion rider. They declared at the trial that they were proud of their act, were not afraid of death and were prepared to sacrifice their lives for their cause, namely, the realisation of a separate state of Khalistan. There was no remorse or repentance. Even if they had repented, would the gallows be deprived of the 'rarest of rare' cases, which alone maintains it from falling into disuse?

Both of them were sentenced, but not for offences under TADA. They were convicted and sentenced to death for murder and attempt to murder under Sections 302 and 307 of the Indian Penal Code. Under the Criminal Procedure Code, a death sentence has to be confirmed by a bench of two judges of the High Court. Such is the concern shown by the law where forfeiture of life is the penalty. Imprisonment for life is the rule for capital offences, and the death sentence is an exception. In

¹State of Maharashtra v. Sukhdeo Singh and Anr., AIR 1992 SC 2100.

the words of the Supreme Court, it should be imposed in the rarest of rare cases.² However, if General Vaidya's killing was part of a terrorist act, under TADA the only punishment that could be imposed was the death penalty.

They were charged with offences under Sections 3 and 4 of TADA, along with similar and other offences under the Indian Penal Code. So they had to be tried under TADA and not under the Criminal Procedure Code. Having been tried under the procedure prescribed for terrorist offences, Jinda and Sukha lost their right to a retrial before confirmation of the death sentences. Then the High Court could have reheard the entire case afresh, including the question of sentence. Section 10 of TADA empowers the designated court constituted under the act to try any other offence that is connected with those triable under TADA, and if such a joint trial is permissible under the 1973 Criminal Procedure Code. Conspiracy, abetment, attempt to murder and homicide, if they are part of a terrorist act, are offences specifically set out in TADA. Charging a person comprehensively under Sections 3 and 4 of the act, and for the very same offences under the Penal Code, has always been used to prevent the accused from going free on bail. This course enables the prosecution to avail the shortened trial and appellate procedure under the act. The attack on Vaidya's wife and the other offences such as forgery could be tried under the Penal Code as offences connected with a terrorist act. But to also frame a charge of murder under Section 302 means charging someone in the alternative, which course is not open under Section 10. It would be double jeopardy and can only be supported by the adage 'heads I win, tails you lose.' The act, which even according to the Supreme Court is Draconian, does not permit the kind of subversion it is subjected to. While the Supreme Court held that this was one of those rarest of rare cases where the death penalty would be proper, both the learned judges and the designated court showed a lot of concern during sentencing. But

what did not engage their attention is Section 15 of TADA, which mandates the designated court to transfer the trial of any offence if, after taking cognizance, it comes to the opinion that it is not triable by it. The case should then go to a court competent to try it, i.e., one that can continue the trial under the Criminal Procedure Code. If the killing of General Vaidya is itself a terrorist act, it looks too far-fetched to frame an alternative charge of murder connected with a terrorist offence. This course has led to deprivation of life without following the procedure prescribed by law. Taking this position is not to justify the dastardly act. It is possible to argue that the sessions judge, two judges of the High Court and the Supreme Court would have arrived at the same finding.

The major focus in the defense of a citizen as a person has always been procedure, and this is quintessentially set down in Article 21 of the Constitution. The penal law to contain terrorism is not a categorical imperative. The act itself is temporary and its life is being extended from time to time without any debate. But these legislative measures are not solutions to the problems facing the country. A formal and almost mechanical approach to such issues may lead to the dehumanisation of the courts, a danger we are duty-bound to guard against. It has to be recognised that we often become unwitting victims of brain-washing. This drives us to suspend our sense of justice and fairness at a time its presence is crucial for the preservation of a value system that results from protracted struggle. In this case, we have manufactured martyrs for a cause and alienated a community. It should be said that even at the last stage there was no repentance or remorse in these two. But we must be equally uncompromising in administering the value system we believe in, even to those who do not believe in it and who doubt it can survive their onslaughts. Our Supreme Court has never been able to achieve the poise needed to function effectively as a 'sentinel on the qui vive'.³

²Chief Justice Patanjali Sastri in *State of Madras v. V.G. Row*, AIR 1952 SC 196.

³Bachan Singh v. State of Punjab, AIR 1980 SC 898.

9

The Weird Jurisprudence of a Dead Act

The history of tackling dissidence and crime shows that torture and confession have been the twin engines of the legal system. Confessions have always been considered the best mode of proof in criminal cases. In fact, Bentham supported the regulated use of torture to make a person disclose his accomplices. It was the Milanese, Cesare Beccaria, who, at the instance of Pietro Verri, an aristocrat and intellectual, wrote a book in 1764 entitled *On Crimes and Punishments*, which campaigned for the abolition of torture and is still considered a classic denunciation of it. The primary use of torture has been to secure confessions from the accused of their guilt and the names and other particulars of the accomplices who participated in the crime. Confession has always had a relationship with power and authority, whether it was canonical or secular. It always emanates from a captive who stands accused of a crime and knows what the investigation is all about. In that mental state nothing the accused says can ever be voluntary. In her excellent essay on the literature of political imprisonment, Kate Millet points out:

For captivity is an absolute state. Once captive, one can be

treated in any manner the captor chooses: this is the physical fact of capture. There are no guarantees in captivity: power need not concede anything at all. One is physically at the mercy of the captor; every potentiality is on one side, none on the other. There may be mercy or there may be none. It is beyond the captive's power to make or unmake any aspect of his captivity. Captivity is an entire state; entire helplessness before entire power.¹

In captivity, volition and voluntariness are the immediate casualties. The dictionary meaning of these words seem to be wholly irrelevant when assessing the state of mind of a prisoner in a criminal case.

The general disbelief of confessions made in captivity has a historical justification. Confession began to be looked upon with suspicion as the Anglo-Saxon legal system evolved beyond the absolutism of the Tudor and Stuart monarchs and the Star Chamber. Confession, a major exception to hearsay evidence, had to cross several hurdles before it became admissible. All of these have been set out in Section 24 of the Indian Evidence Act. These hurdles recognise the fact of dominance of a person by an authority that represents a human collective, whatever its name. To tone down the law's violence and make it invisible, certain procedural safeguards were evolved over a period of time. The burden was on the state or authority to prove beyond reasonable doubt that no form of inducement or coercion was used to secure a confession. The Indian Evidence Act goes even further, stating that no confession made to a police officer is admissible in evidence. Nor is a statement made in police custody admissible unless the one making it did so in the immediate presence of a magistrate. Confessions made to a police officer and a statement made while in police custody are totally excluded from the category of extra-judicial confessions.

The English rules of evidence had their evolution in jury trials. These rules of relevance and exclusion sprang from the

¹Kate Millet, *The Politics of Cruelty: An Essay on the Literature of Political Imprisonment*, Harmondsworth: Penguin, 1994, p. 114.

realisation that human tribunals were fallible and could be arbitrary in their pursuit of a just resolution of issues placed before them. Mandatory procedural requirements are a restraint on authority, and it is these limitations on power that define the of history of democracy and the rule of law. Malise Ruthven, while tracing the history of torture during the British period, refers to the report of the commission of inquiry set up in 1854 by the Governor of Madras to enquire into complaints that torture was widespread in his Presidency.² Perhaps it was the fall-out of this report that led to the statutory exclusion of confessions made to a police officer as evidence in the trial of criminal cases. It did not stop there. Statements made while in police custody to any other person were also excluded if there was no magistrate present. These provisions proceed on the assumption that any statement made to a police officer or while in police custody could never be voluntary. Whatever may be the origin of these exclusionary provisions, set out in Sections 25 and 26 of the Indian Evidence Act, they have over a century and more justified their continued existence. A particular justification is the abuse of authority during the period of the 1975 Emergency as revealed by the Shah Commission, and at other times too, as revealed by investigative journalists.

Torture occurs world-wide and no country is an exception, as confirmed by the Convention against Torture. That torture and confession go hand in hand does not need any further explanation. An extension of this is the constitutional principle that an accused cannot be compelled to be a witness against himself. These ideas have evolved over time, and are part of the effort to stem the erosion of rights by authority. This constant tension between our rights and authority's design to employ violence through law is reflected in the adjudicatory process. The principle contained in Sections 25 and 26 of the Indian Evidence Act finds its justification in the International Covenant against Torture.

²Malise Ruthven, *Torture: the Grand Conspiracy*, London: Weidenfeld and Nicholson, 1978.

But then, when a state is engulfed by political crisis, there has always been an attempt to resort to emergency legislation, which may change the rules of evidence and reduce the discretion of the courts. The executive may be empowered to detain persons preventively, by making the conditions for bail very stringent and/or arresting them under specially enacted detention laws that covertly reverse the presumption of innocence, the ruling principle in the administration of criminal justice. Almost every country has witnessed this process when faced with a political crisis. We too have witnessed it during the 1975 Emergency. Another example is the increasing violence in Punjab that led to Operation Bluestar and the consequent assassination of Indira Gandhi, which in turn led to the passing of the Terrorist and Disruptive Activities (Prevention) Act, 1985.

This temporary legislation was extended five times between 1985 and 1993. Several writ petitions were filed during this period challenging the validity of the act which came up for hearing in March 1994. In May 1993 certain amendments were made to TADA, 1987. The court upheld the validity of the 1985 and 1987 acts, confirming its view that the possibility of abuse of law can never be an argument against the validity of legislation.³ There were large-scale abuses and even the National Human Rights Commission, a statutory body, complained against the act. It was allowed to lapse, but the proceedings under it that had already been initiated would continue to be governed by the dead act. The desire to bring forth a more Draconian piece of legislation as part of the permanent penal code may find its support in the principles laid down by the apex court in cases governed by the dead act.

The dead act is making jurisprudence which it was prevented by strong public opinion from doing when alive. All these temporary laws have a fixed tenure and all pending actions should lapse on the expiry of the act. A saving clause, however, enables the completion of proceedings commenced while the act

³Kartar Singh v. State of Punjab, 1994 SCC (Cri) 899.

was in force. The clause also makes irrevocable all acts completed while the act was in force. We are here concerned with pending proceedings that are giving birth to a very malevolent jurisprudence centred around the evidentiary value of a confession made by an accused in his own trial and the effect this has on others facing trial along with him. Section 15 of the dead act makes confessions to police officers admissible in evidence. This was the breakthrough the police yearned for. In fact, the Police Commission felt that the ban on the admissibility of confessions made to police officers was a stigma. It was unable to understand why the police department alone was singled out to suffer this disability while other enforcing agencies were not. The musings of the Police Commission are subjective and have a self-pitying, even psychopathic quality about them. As it is the people who run the government and not the other way about, it is necessary now and then to remind ourselves that the government is not constituted to erode our right to life and liberty.

In *Kartar Singh*,⁴ confessions made to designated police officers became admissible. But the court was mindful of the history of the abuse of power to secure confessions. In its concern to prevent confessions secured under duress, physical coercion and such other elements that taint their voluntary character, the court laid down certain guidelines. Even now, confessions made before a magistrate are subject to very stringent tests to establish that they are voluntary before they can be admitted in evidence. The Supreme Court pointed out in *Kartar Singh* that the norms accepted for recording confessions under normal law applied also to those recorded by police officers under TADA. The accused cannot be produced from police custody, he should be sent to judicial remand and time should be given for reflection. His remand should be free from police or any other intervention. The magistrate is bound to put clarificatory questions to assure himself that the confession the

accused is about to make is voluntary. If after confessing the accused is handed over to police custody, the inference is that the confession was not voluntary.

But these very norms were wholly ignored by the Supreme Court in matters which came up for hearing after the lapse of the act. While the act was alive, by contrast, the court had ensured that the changes brought in by it did not sully in any manner the rule of law. Despite constant caution and admonition, however, there were complaints of abuse, and the NHRC had to object to the act being continued. Strangely, after the lapse of the act, the court is producing a weird jurisprudence which is escaping the scrutiny that it deserves because the act is dead. The principles governing these cases may become the basis of any intended legislation to structure what is called an 'effective state'.

Gurdeep Singh, who had terrorist antecedents, was involved in a bomb explosion in NOIDA, near Delhi, on 6 October 1990, resulting in the death of three persons. He was also suspected of involvement in an explosion in a cinema hall in Bidar in the state of Karnataka. In the latter case he was produced before the superintendent of police, who recorded his confession under Section 15 of TADA. He seems to have admitted therein his complicity in causing the NOIDA explosion as well. The Delhi police then prosecuted Gurdeep Singh under TADA for the bomb in NOIDA. This bomb had gone off accidentally, although it was intended to blow up a bus with the travelling public in it. That was how he came to be prosecuted under TADA along with others. However Gurdeep Singh alone chose to make an appeal to the Supreme Court.⁵

A confession in any criminal proceeding has to be shown as voluntary before it can be relied on to convict the accused. In Gurdeep Singh's case it was pointed out that (a) the statement was made while the accused was in handcuffs; (b) while recording the confession a policeman was present holding on to the prisoner by his chains; and (c) while he was confessing the

⁴*Kartar Singh v. State of Punjab*, 1994 SCC (Cri) 899.

⁵*Gurdeep Singh alias Deep v. the State (Delhi Admn.)*, AIR 1999 SC 3646.

room was surrounded by armed guards. These aspects of the case were not disputed. The court had to decide on their basis whether the confession was voluntary. This decision became crucial to sustain the conviction of Gurdeep Singh, because his confession was the only piece of evidence against him.

The court referred to the law lexicon and dictionaries to expound on the meaning of the word 'voluntary'. But they were talking about a person who had been incarcerated for long periods and classified by the police as a high-security prisoner, to be held in handcuffs and chains for most of the day, every day. Arrest and confinement would be coercive enough; but the denial of freedom to move, the freedom to meet people and talk to them for long periods, were sufficient to destroy both volition and will. Lexicons will never help one to understand what incarceration is all about and what effect it has on the mind. Classifying the accused as a high-security prisoner and parading him in chains dehumanised him and destroyed his volition and will. Thereafter, nothing remained of his person that could perform a voluntary act.

On the basis of their lexical enlightenment, the judges proceeded to lay down the law. They found that the voluntary character of the accused's statement was not affected in any manner by his being held in handcuffs and chains and with armed guards always around. The latter was for reasons of security and therefore permissible. Henceforth, by this precedent, a confession can be made before either a magistrate or a designated police officer, surrounded by armed guards. The accused may be produced before the authority straight from police custody, having been given time to reflect in the presence of armed guards. The ruling dispenses with many of the provisions of the chapter on investigation in the Criminal Procedure Code. It will reduce the time spent on the investigation, trial and appeals enormously. Speedy 'disposal' of criminal cases can be achieved. The court's view of the confession was as follows:

Since it comes through the core of heart through repentance, where such accused is even ready to undertake the consequential

punishment under the law, it is this area which needs some encouragement to such an accused through some respite maybe by reducing the period of punishment, such incentive would transform more incoming such accused to confess and speak the truth. This may help to transform an accused, to reach the truth and bring to an end successfully the prosecution of the case.⁶

They recommend a legislative provision offering such an incentive. A legislative inducement does not suffer from the same infirmities as an executive inducement. This principle and the prescription that followed hold the promise of overcoming disorder on our road towards becoming an effective state. Nobody would support Gurdeep's terrorist violence, but such decisions announce a major shift towards a regressive legal structure, one that works against the rule of law and democracy.

⁶Gurdeep Singh alias Deep v. the State (Delhi Admn.), AIR 1999 SC 3646.

10

The Armed Forces (Special Powers) Act, 1958

There are a large number of laws in operation in the field of public order. Every state has its own preventive detention laws, apart from four or five central statutes operating in the same field. We still have on the statute books the laws passed by the British to repress the non-cooperation and civil disobedience movements, notorious among them being the Criminal Law Amendment Act, 1908, and the Prevention of Seditious Meetings Act, 1916. If these laws are all put together to examine the extent of our freedom, one may conclude that not much is left to the citizen. One could say that the Indian state has been in perpetual struggle against its own people. For a better understanding of this issue, we will now review the Armed Forces (Special Powers) Act, 1958, and the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983.

These are post-Independence statutes, the first confined mainly to the North-Eastern region. The second followed the Punjab Disturbed Areas Act, 1983, and the Chandigarh Disturbed Areas Act, 1983. A decade before the 1958 act, the Madras Suppression of Disturbances Act was introduced to stop

the communist movement, which was waging an armed struggle in Telangana, from spreading to the neighbouring Madras Presidency. The Madras act was adopted by the state of Andhra Pradesh in 1961. Disturbed areas were notified under this statute and the government began faking 'encounters' in these areas. This fig leaf is no longer necessary; extra-judicial killings take place right in the heart of cities and towns, with a whole population as silent witness. We now have a mockery of the rule of law and the constitutional value system.

Such laws enable the government to impose what can justifiably be called martial law, for which there is no provision in the Constitution. In the notified areas there is no possibility of exercising any of the fundamental rights meaningfully. The act of notification depends on the subjective opinion of the Governor, after which he is relieved of his responsibilities towards that area. The citizen is then abjectly dependent upon the subjective whims of the local commissioned officer, warrant officer or non-commissioned officer, who defines what 'order' means in his area and determines the steps needed to maintain it. The discretion entrusted to them is absolute once it has been notified that the assembly of five or more persons is prohibited. In the course of maintaining order, these officers have the right to use force, even to the extent of causing death. Does this satisfy the definition of the words 'procedure established by law' given in *Maneka Gandhi*¹ and thereafter? Should there not be explicit safeguards in the statute when the power to deprive one of life and liberty is entrusted to such petty officials? Can the power to take someone's life be entrusted to the executive or any of its minions at all? This power has to be examined in the light of the change brought about by the 44th Constitutional Amendment to Article 359, which disables the President from suspending Articles 20 and 21. When the President himself is denied the power to take away life and liberty during a period of emergency, can a mere public order statute entrust such a power to lesser

¹*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

officials? After the 44th Amendment, promulgating a state of emergency has been made more difficult. In place of 'internal disturbance', the term 'armed rebellion' has been introduced, and for successful promulgation a special majority is required. Does not the Armed Forces (Special Powers) Act enable governments to impose emergency by other means? These questions must be answered from the human rights perspective and not by resort to legal quibbling. Every public order law needs to be interpreted in terms of human rights.

It is now fairly settled that it is not the objective of the law that impairs the citizen's rights nor the form of action that determines the protection he can claim. It is the effect of the law and the action upon his rights which should attract the jurisdiction of the courts when asked to grant relief. The direct operation of the act upon rights forms the real test.² Long periods of abuse should be taken into account while considering the validity of any law. Such persistent abuse constitutes evidence of unguided discretion and therefore violative of Article 14.

Lastly, human rights institutions should recognise that political unrest cannot be resolved by law-and-order methods. Societal imbalances cannot be corrected by resort to regressive penal structures, enforced lawfully or unlawfully. Conflict resolution is part of human rights activity. The readiness to resolve political issues will alone enable the National Human Rights Commission to check and control rights violations. This commission, unlike the courts, which are fettered by encrusted traditions, colonial or otherwise, is free to formulate its own procedure, and is quite competent to suggest ways and means of bringing about a resolution of conflict. In the course of this process, the NHRC is free to hold discussions with all parties concerned. This suggestion may appear novel or impossible to accept only to those who think that an institution staffed with members of the judiciary should replicate court proceedings, or in other words, become a counterfeit court.

²R.C. Cooper v. Union of India, AIR 1970 SC 564 (called the bank nationalisation case).

Even if the courts should declare all such acts invalid, the government will put forward yet another series of laws which will as usual exacerbate the situation. Political turbulence always leads to human rights violations, and unless we address the issues giving rise to the turbulence, we cannot bring about an atmosphere where human rights are respected.

11

A Lament for the Constitution

Events repeat themselves in history. In 1967, Indira Gandhi's party lost in five states, seriously undermining her power. In the course of her attempts at regaining absolute power, she realised that the judiciary, apart from being opposed to socialist and communist ideologies of transformation, was also apprehensive about her ambitions. *Golak Nath*, the bank nationalisation case and *Kesavananda Bharati* made the judiciary's stand on constitutionalism clear.¹ Yet, she was able to successfully shift the focus from the electoral crisis and the consequent bankruptcy of her party's political ideology, by converting the entire discourse into one about a confrontation between Parliament (representing progressive forces) and the judiciary (representing reactionary forces). This strategy worked, as she was able to enlist the support of a large number of intellectuals and quite a few judges. The tactics used against the judiciary included the transfer of

judges and the waiving of seniority in the appointment of the Chief Justice, with the aim of undermining its independence.

For a long time now, dissident political movements have provided the excuse for corruption. The 'nation-in-danger' theme that began with Indira Gandhi has even provided the cover for plunder. The forces of law and order have been abused and corrupted with ease, achieving a neat division of labour. Keeping dissidence at bay through brazen human rights violations, the political rulers have plundered the exchequer and resources of the country with impunity. Dubious arms purchases are one indication of their utter disregard for the national interest and defence preparedness.

After the Emergency period, Indians rediscovered the value of personal liberty and began to uncover administrative practices that inflicted misery and privation on the poor and defenseless. The courts strengthened this effort by departing from the procedure-ridden, actor-oriented, adversarial culture of the justice system, and thus public interest litigation was born. The cases of the Bihar undertrials and Bhagalpur blindings² are two results of this activism that immediately come to mind.

Atrocities of various kinds have been exposed through public interest litigation. Judges trained to self-emasculation—euphemistically called judicial self-restraint—found in public interest litigation a source of self-expression, and discovered the possibility of making the judiciary function in a socially relevant manner. But public interest litigation (PIL) really did not help restructure the institution, since the orthodox within the system were unwilling to leave its traditional moorings.

For the people, this novel redressal mechanism has given some hope for setting wrongs right. The succession of bad governments had anyway driven people to the courts in search of redressal, even good governance, in the belief that the state could be made accountable through judicial intervention. It is in this process that the people discovered that PILs could be used

¹*Golak Nath v. State of Punjab*, AIR 1967, SC 1643; *R.C. Cooper v. Union of India*, AIR 1970 SC 564 (bank nationalisation case); *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1641.

²*Khatri v. State of Bihar*, AIR 1981 SC 928; *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369.

to reduce the role of corruption in governance. Corruption as a crime committed by specific officials can be proceeded against by a proper complaint, investigation and trial. But corruption as a habit of governance that impedes the exercise of every fundamental right cannot be contained by the penal or other ancillary code. Public servants have guaranteed themselves shields of immunity of various kinds, using both special and general laws which bar any attempt to prosecute them: the old colonial practice of shielding officers against the native population.

Public interest litigation enables the courts to transcend their immunities and subject the misdeeds of public servants to exposure, thereby compelling otherwise unwilling and pliant investigating agencies to perform their duties effectively and 'without fear or favour'. In short, the courts enforce the rule of law against public servants. In this way they have exposed crimes committed by senior members of parliament, a former prime minister and various union ministers, chief ministers and bureaucrats.

How should a government deal with this situation? Indira Gandhi proclaimed Emergency, suspended key fundamental rights, barred access to justice by making preventive detention laws inscrutable, and also mounted an assault on the judiciary. After her, even feeble governments incapable of assuming absolute power have made brazen attempts to exclude elected representatives from the category of public servants, and have blocked access to justice and public interest litigation by legislation. They invoke constituent powers and amend the Constitution, assuming the power of appointing judges without reference to the Chief Justice in order to rein in the judiciary. The reactions of political parties that appear in the press indicate that there is broad agreement in principle for the proposals made; they only object to the timing.

The judiciary too has blocked all measures aimed at realising the Directive Principles of State Policy at various tiers of the judicial system. They have confirmed authoritarian power in government. Their interweaving of human rights concepts into

the Sunil Batra, Charles Sobhraj and Auto Shankar cases,³ notwithstanding its undoubted merit for jurisprudence, is like 'canonising scoundrels'. Despite such innovative exercises, the absence of an agreed vision and a sense of direction results in a lack of uniformity in court responses. Perhaps this is why no chief justice has ever been able to provide leadership to the courts. Leadership is not merely the extension of a protective umbrella over courts at various levels or the wresting from the executive of the perquisites needed to enhance the quality of their lives. It means a constitutional vision and a collective assurance to the poor that the objectives of the Constitution will unceasingly be translated into reality. The judiciary's prescribed role is to direct the government to work to bring about the society visualised by the Preamble. Judicial activism is meaningless in the absence of vision. In searching for an identity, the Supreme Court has likened itself to the Vatican and compared the Chief Justice to the Pope. Archaic and authoritarian illusions of this kind can only exist alongside the frequent resort to the contempt jurisdiction, and the battle tank called Article 142. The contenders for power are then an authoritarian judiciary prescribing the rule of law on one side, and an anarchic parliamentary system trying to establish that it can still call the shots on the other!

Indira Gandhi wanted to exclude the election of the prime minister from the purview of the Representation of Peoples Act, 1951. Narasimha Rao attempted to exclude all his colleagues in Parliament and the Legislatures, all representatives of the people, from the category of public servants. They were removed thereby from the jurisdiction of ordinary courts and could only be tried by a special tribunal, under special legislations.

All institutions of governance, it seems, have ganged up

³*Sunil Batra (1) v. Delhi Admn.*, AIR 1978 SC 1675; *Sunil Batra (2) v. Delhi Admn.*, AIR 1980 SC 1579; *Charles Sobhraj v. Supdt.*, AIR 1978 SC 1675; *Charles Sobhraj v. Supdt., Central Jail, New Delhi*, AIR 1978 SC 1514; *Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *Shankar alias Gaurishankar v. State of Tamil Nadu*, 1994 Cri LT 3071 SC.

against the people. Criticism of the government or participation in protest will lead to prosecution for sedition and other offences against the state, or even arrest under preventive detention or a more regressive law. Criticism of Parliament while it is in session invites contempt for breach of privilege. Speaking or arguing loudly in a court invites contempt. And yet, a corrupt and callous bureaucracy cannot be called to account because the government of which they are the key players must permit prosecution.

Ultimately, it is these various forces that have ganged up to put an end to the Constitution, with nobody even prepared to lament its demise. What we as citizens have really been guaranteed is the fundamental right to be spectators, and to be taxed directly and indirectly for witnessing this entertainment.

12

Why a Human Rights Commission?

The eruptions which are intended to blow open the rigidities of an *ancien régime* take place when they have become inevitable, not when some bearded leader says so.

Ralf Dahrendorf¹

The government is seriously considering setting up a human rights commission to look into rights violations. The government is keen on demonstrating that it views such violations seriously. Officials feel that the reports of prominent human rights bodies like Amnesty International are one-sided, and that there is a necessity for an impartial body to look into these complaints and, if found to be true, to take deterrent action against the guilty. A consummation devoutly to be wished for.

But why a human rights commission? Are the courts, including the Supreme Court, not adequate to the task? Is the government going to bring forth a statute enumerating human

¹Ralph Dahrendorf, 'Society and Liberty,' in *Law and Order* (The Hamlyn Lectures), London: Stevens & Sons, 1985, p. 39.

rights and then create a body to look into complaints and punish transgressors? Or is the government thinking of bringing about an appropriate amendment to the Constitution, as was done when tax and service tribunals were set up? Is the government going to curtail the writ jurisdiction of the high courts and also prevent access to the magistrates' courts? Is it at all possible to reduce human rights violations without bringing about a social order which is just, equitable and humane?

Setting up a human rights commission is a major departure from the constitutional scheme. A little history of the evolution of rights and their subsequent incorporation in the Constitution will not be out of place here. All of us are mandated by the Constitution 'to cherish and follow the noble ideas which inspired our national struggle for freedom.' All our actions in the public sphere should receive their justification from this fundamental duty. An examination from this angle will demonstrate that these steps, if permitted, would lead to the *de facto* abrogation of the Constitution.

The rights which are now called fundamental have a long history. As early as 1895, the Home Rule Bill envisaged for India a constitution guaranteeing to every one of its citizens the freedom of expression, the inviolability of one's house, the right to property, equality before the law and for appointment to public office, and the right to personal liberty. Following the publication of the Montague-Chelmsford Report in August 1918, the Indian National Congress demanded at a special session that the 1919 Rowlatt Act should include 'a declaration of the rights of the people of India as British citizens'.²

At the Madras session of the Congress it was stipulated that the future constitution of India must include a declaration of fundamental rights. The Nehru Committee appointed by the All-Parties Conference in 1928 laid down in its report:

Our first care should be to have our fundamental rights

²See Chapter 4.

guaranteed in a manner that will not permit their withdrawal under any circumstances.

The right to keep and bear arms was also included in the rights enumerated in this report. These declarations were made in the context of continuing repression by the British.

As the freedom struggle was drawing to a close, the Constituent Assembly was busy using the experience of this struggle in shaping a constitution for the country. The chapter on fundamental rights, the setting down of the objectives in the Preamble, and the enumeration of non-justiciable rights in the form of fundamental obligations are the result of our experiences during the freedom struggle. The Fundamental Rights and the Directive Principles were designed as instruments to bring about social transformation, and the judiciary was assigned the special role of functioning as the arm of a social revolution.

Fundamental rights are political in nature and their free exercise ought to be ensured by the courts. While the Directive Principles are non-justiciable, they are politically enforceable, even if not necessarily through the electoral process. We are party to the Universal Declaration of Human Rights. Most of the articles in the international covenants on economic, social, cultural, civil and political rights have their equivalents in one or the other of the Fundamental Rights and the Directive Principles in the Indian Constitution. There was nothing therefore that prevented the government from giving effect to these, for the government is under an obligation under Article 51(C) to 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another.'

There is no dearth of legal provisions to check human rights violations. Rather, we have the unwillingness of successive governments to put an end to inhuman and brutal forms of state violence. The government, having failed to perform its fundamental obligations even after four decades, has no right to complain or be surprised when people organise themselves to

compel it to perform its duties. There inheres in the people the right to even overthrow the government in the process.

The setting up of a human rights commission will not humanise the state agencies. A political system which guards and supervises an exploitative order cannot survive without preventive detention laws, laws to contain terrorism, and other such laws. A system which totally sets aside all hitherto accepted notions of criminal jurisprudence and allows its police force to kill and maim people by torture, to rape women and unleash brutalities on the people, is not going to call off these operations and submit delinquents in the police establishment or the army to enquiry by a human rights commission. Viewed from this angle, it appears pointless to try and persuade such governments to be more humane in the means they employ in tackling political turbulence. In fact, public pressure may drive these governments to find other devices to silence criticism without in any manner reducing the violence they employ. However, it looks as though Amnesty International's report on custodial deaths has finally succeeded in driving the government to search for other means that would be less susceptible to criticism and maybe even more effective for oppressing people.

Most of our human rights violations, translated into the language of the Penal Code, would be murder, rape, grievous hurt, and other offences relating to the human body. These crimes are committed by the armed forces (the army), paramilitary forces and the police in the course of both routine and other operations connected with maintaining law and order and ensuring the security of the state. However, no laws authorise the state to commit any of these crimes. They cannot be claimed as acts done in the exercise or purported exercise of one's duties. To kill, maim, rape or otherwise physically harm people is no part of the duty of either the police or the army. The underlying presumption and justification for the use of violence by these forces is self-defense. But the legal presumption is otherwise. In a plea of self-defense the offence is presumed. All these crimes are also violations of Articles 21 and 22(1). Yet they are not seen as crimes, nor are they debated as crimes. Thus,

crimes committed by public servants are accorded a status which puts them beyond the reach of citizens and the ordinary legal processes.

The immunity granted to authority needs to be dismantled, but the setting up of a human rights commission may not be the answer. Their crimes may be euphemistically called human rights violations, but they are not stray acts of violence by the aberrant among the armed forces or the police. The methods used in apprehending persons or torturing them are the same, whether in the west or the third world. In Australia, for example, evidence has been tendered before a Royal Commission enquiring into the deaths of aboriginal people in police custody showing that in most cases they are suicides. This is so familiar! These methods are used invariably against the poor and the deprived. If the policy of the government is to contain political and protest movements by force, then inarticulate premises will be deterrence. If a policy of deterrence is to be used against a political movement, a whole community will have to be punished, for deterrence is at once punitive and pre-emptive.

The government obviously does not propose to give up its present policy. That means the proposal to set up a human rights commission is one of those familiar political sleight-of-hand devices, like the appointment of commissions under the ineffective and overworked Commissions of Inquiry Act, 1952. A human rights commission cannot resolve political crises. Until these are resolved, violence by the state is bound to continue.

The proposal needs to be examined from yet another angle. Why not entrust the courts with the task of protecting human rights? Seeing the condition in which the courts are today, many of us may vote for a human rights commission having a constitutional basis. Before we cast our vote, it may be necessary to review the history and the habits of the state. When we regarded the institutions of justice as places where justice could be obtained, there was a live connection with the people. But when tax evaders, smugglers and such others hijacked the institutions, and when the institutions gave priority to the disposal of cases, the people became largely irrelevant. Insistence

on form has taken over and the proceedings have become a caricature of the substantive purpose which was originally the major premise. Henceforth, ritual in the form of procedure and rules has become an insurmountable obstacle. Procedure, instead of acting as a check on arbitrariness, operates as an impediment to adjudication and relief. This state of affairs is a creation of populist politics, which have heightened tensions between an independent judiciary and the party in power.

Jefferson complained that the federalists,

by fraudulent use of the constitution, which has made judges irremovable, have multiplied useless judges merely to strengthen their phalanx.

That is how it started. Such practices have their own inexorable logic. First you pack the judiciary with your men. Later you just do not care who is in it. Thereafter, it becomes a free-for-all for manipulators. Thus, all the institutions set up to protect the rights of citizens, to check the state's arbitrariness and to preserve democratic processes are manned by persons who are mere status-seekers and office-holders.

There are those who practice straightforward compliance with norms, whether thoughtless or fearful. They lack the imagination or the courage even to consider deviance. Needless to say, they are not the stuff from which the citizens of a free society are made. They leave norms without meaning and drain the lifeblood of institutions...Norms are separated from institutions, and the world that emerges from such a course combines formal compliance with a profound depreciation of all things social.³

Thus, while weakening the courts from within, the executive kept shearing the power and jurisdiction the high courts had when the Constitution came into force by transferring certain defined functions. The tribunals set up under Articles 323A and 371D are service tribunals. Article 323B provides for the setting

³Ralph Dahrendorf, *loc. cit.*, pp. 151–152.

up of tax tribunals, foreign exchange and custom tribunals, land reform and ceiling on urban property tribunals, industrial and labour tribunals, etc. Once these tribunals came into existence, the courts' jurisdiction over these matters, including that of the high courts, is ousted. Only the jurisdiction of the Supreme Court under Article 136 is preserved. The jurisdiction of the high courts is getting increasingly confined to the private sphere of social life.

The tribunals set up under these provisions are run by retired civil servants and judicial officers. The chairman has to be a former high court judge. His age of retirement is 65 years and that of the rest is 62 years. One has to examine how the tribunals are chosen to realise how we have trivialised all values and systems. We find judges manoeuvring to be chairmen of tribunals as they approach retirement. District judges too compete for secure positions on the tribunals after retirement, as do civil servants and police officers. Nobody knows how the selections are made. The government is the appointing authority. There is no procedure prescribed to ensure, if not excellence, at least competence. There is nothing to ensure the tribunals' independence. The staffing policy, as revealed by the respective statutes and practices, ensure subordination of the tribunals to the executive, and so the transfer of powers hitherto enjoyed by the high courts to these tribunals is bound to be ineffective. Articles 323A and 323B have marginalised the role of the high courts and also made justice inaccessible. Orders passed by tribunals set up under these articles can only be appealed to the Supreme Court.

Public servants and the working class will be the worst hit if the proposed Industrial Relations Bill goes through. The provisions introduced by the 42nd Amendment were not omitted by the 45th Amendment for want of a majority in the Rajya Sabha. The Terrorist and Disruptive Activities (Prevention) Act, without the aid of these amendments, completely eliminates the jurisdiction of the high courts. Appeals against sentence and conviction are to the Supreme Court. The remand period is one year, and bail applications can be made

only to the designated courts. The people arrested in rural areas come from very poor and backward sections of the population. In any event, the hardcore resisters are shot in encounters.

This legislative history and practice has to be borne in mind while examining the proposal for a human rights commission. Now the government is moving into a crucial field. More importantly, it is a field already occupied by Articles 19, 21 and 22. Meanwhile, human rights violations take place in the areas of freedom of speech and expression, freedom of association, freedom of assembly and movement, and freedom to reside or settle in any part of the country. The assertion of all or any of these rights results in forfeiture of life or liberty, which are guaranteed by Articles 21 and 22. If these are entrusted to a human rights commission, the present government can claim to have achieved what Indira Gandhi could not.

If the government is really concerned about correcting its human rights record, it has to take serious steps to rebuild existing institutions, namely the courts, instead of merely creating yet another institution. It is equally the responsibility of those who interact regularly with these institutions, such as lawyers, public interest and human rights groups, jurists and academics to exert pressure on them. Human rights can never be realised by the setting up of a commission without changing the existing social order. Establishing such a commission in response to criticism of the government's human rights record will at best be a formal act. Rather than reducing human rights violations, it may be used to cover up such violations. The debate on the setting up of a human rights commission should lead to a review of the functioning of the justice system, and attempts have to be made to rebuild our judicial institutions.

13

Granting the Freedom to Misuse Freedom: Secularism and Minority Rights

Introduction

How came it that English supremacy was established in India? The paramount power of the Great Moghul was broken by the Moghul viceroys. The power of the viceroys was broken by the Marathas. The power of the Marathas was broken by the Afghans, and while all were struggling against all, the British rushed in and were enabled to subdue them all. A country not only divided between Mohammedan and Hindu, but between tribe and tribe, between caste and caste; a society whose framework was based on a sort of equilibrium, resulting from a general repulsion and constitutional exclusiveness between all its members—such a country and such a society, were they not predestined prey of conquest?¹

We began our journey as an independent country with a secular state which stood for social, economic and political justice,

¹Karl Marx, 'The future results of British Rule in India,' July 22, 1853.

informed by the values of human dignity, equality and fraternity, decisively discarding obnoxious religious and caste practices which sanctioned the oppression of the vast majority of the people—the bonded labourer, the child worker, people who were not allowed access to wells, tanks, bathing ghats, roads, places of public resort, people who were not allowed access to shops, restaurants, hotels and places of public entertainment. Ironically, access was denied in the name of the Hindu religion and the caste system it supported, despite decades of struggle by crusading social reformers. This chapter examines the history of debates on secularism in India and the practice of fundamentalism today.

Early Debates

The Constituent Assembly wanted to ensure that religion would have no role to play in the governance of society. The right to freedom of religion and conscience contained in the Fundamental Rights chapter ensures equality to all religions, whether of the minorities or of the majority. It affirms the right of the state to prohibit practices such as denying Dalits access to religious institutions and places of worship, attempting a restructuring of the entire social order in the process. Political freedoms become the primary instruments for the realisation of the objectives and value system set out in the Preamble and the Fundamental Rights chapter of the Constitution. Our attachment to secular values is as deep as is our attachment to personal liberty and other related fundamental rights. The propagation of secular values will undoubtedly propel the forces of social transformation forward. The Congress session in Haripura in February 1938 declared that it was its

primary duty as well as its fundamental policy to protect the religious, linguistic, cultural and the other rights of the minorities in India, so as to assure for them in any scheme of government to which the Congress would be a party, the widest scope for their development and their participation in

the fullest measure in the political, economic and cultural life of the nation.²

Gobind Ballabh Pant, moving a resolution to set up an advisory committee on the fundamental rights of minorities and tribals in 'excluded and partially excluded areas', stressed the importance of the issue when he told the members of the Constituent Assembly:

The question of minorities everywhere looms large in constitutional discussions. Many a constitution has foundered on this rock. A satisfactory solution of questions pertaining to minorities will ensure the health, vitality and strength of the free State of India that will come into existence as a result of our discussions here. The question of minorities cannot possibly be overrated. It has been used so far for creating strife, distrust and cleavage between the different sections of the Indian Nation. Imperialism thrives on such strife. It is interested in fomenting such tendencies. So far, the minorities have been incited and have been influenced in a manner which has hampered the growth of cohesion and unity. But now it is necessary that a new chapter should start and we should all realise our responsibility. Unless the minorities are fully satisfied, we cannot make any progress: we cannot even maintain peace in an undisturbed manner.³

While the members of the majority community were always alive to the Indian reality, the perception has generally been that the minorities could be incited to misbehave, to undo the efforts of the majority to build a cohesive society, and to thwart all possibility of maintaining lasting peace. Ambedkar, however, never relented. In his explanatory note he pointed out:

To be brief, the administration in India is completely in the hands of the Hindus. It is their monopoly. From top to bottom it is controlled by them. There is no department which is not dominated by them. They dominate the police, the magistracy

²B. Shiva Rao, *The Framing of India's Constitution: A Study*, New Delhi: IIPA, 1968, p. 746.

³B. Shiva Rao, *loc. cit.*, p. 746.

and the revenue services, indeed any and every branch of the administration. The next point to remember is that the Hindus in the administration have the same positively anti-social and inimical attitude to the untouchables which the Hindus outside the administration have. Their one aim is to discriminate against the untouchables and to deny and deprive them not only of the benefits of law but also of the protection of the law against tyranny and oppression. The result is that the untouchables are placed between the Hindu population and the Hindu-ridden administration, the one committing wrongs against them and the other protecting the wrongdoer instead of helping the victims.

He also pointed out:

A communal majority will be free to run the administration according to its own ideas of what is good for the minorities.

Such a state of affairs, he pointed out, could not be called democracy. It would have to be called imperialism.

Muslim members of the Constituent Assembly were asking for separate electorates or for proportional representation. Mohammed Ismail Saheb from Madras argued for a system of separate electorates. He said that, instead of acting as a divisive device, this would bring harmony among the people:

The Muslims as well as the other communities want to contribute effectively and efficiently towards the harmony, prosperity and happiness of the country, which is their motherland, and for that purpose they want to have equal opportunities with other people. They want to be an honourable section of the people of the land, as honourable as any other section; in the days of freedom they also want to have freedom of expressing their views. Sir, it may be said that they may express their views through the representatives elected by all the people put together. Supposing there is a difference of opinion between the minority community and the majority community, then will the representative of the majority community represent the different views of the minority, Sir?⁴

⁴Constituent Assembly Debates: Official Report, Book 3, Vol. VIII, New Delhi: Lok Sabha Secretariat, 1989, p. 280.

Z.H. Lahri a Muslim member from the United Provinces, proposed proportional representation to safeguard the interests of the minorities. Taking the case of his own province, he said the ten per cent of Muslims there could easily be ignored:

The test of a system is to be made at critical times, at a time when passions are running high—not when things are smooth. Therefore my submission is that you should coolly consider the question whether, apart from reservation of seats, apart from separate electorates, there is any democratic method which can ensure due rights to minorities—be it political, social or religious.⁵

Referring to the spirit of accommodation displayed by the house, he pointed out:

Only the other day, by endorsing the London decision, you accepted the King as the link—a King whom you previously regarded as a symbol of Imperialism and oppression of our rights....Should you not display that spirit of accommodation when you are dealing with a section of your own, whom you have agreed you cannot but have as an integral part of the nation?⁶

Vallabh Bhai Patel while introducing the report of the Advisory Committee on Minorities, etc. for the consideration of the Constituent Assembly, prospectively overruled the issues that were later raised by the representatives of the minorities. He said:

It is not our intention to commit the minorities to a particular position in a hurry. If they really have come honestly to the conclusion that in the changed conditions of this country, it is in the interests of all to lay down real and genuine foundations of a secular State, then nothing is better for the minorities than to trust the good-sense and sense of fairness of the majority, and to place confidence in them. So also it is for us who happen to be in a majority to think about what the minorities feel, and how

⁵Constituent Assembly Debates, Book 3, Vol. VIII, loc. cit., p. 287.

⁶Constituent Assembly Debates, Book 3, Vol. VIII, loc. cit., p. 287.

we in their position would feel if we were treated in the manner in which they are treated.⁷

Ujjal Singh of Punjab, a Sikh, brought to the notice of the Constituent Assembly the Congress resolution of December 1929 relating to Sikhs and minorities, which read:

No solution thereof (i.e., the communal problem) in any future constitution of India will be acceptable to the Congress which does not give full satisfaction to the Muslims, Sikhs and other minorities.⁸

He pointed out that a resolution had been passed by the Sikhs to boycott participation in the Constituent Assembly initially, but that thanks to the efforts of Vallabh Bhai Patel, the Sikh community had rescinded its earlier decision. He informed the Assembly that the Sikhs wanted their separate identity and position to be maintained and strengthened so that they could contribute their full quota to the service of the country.

Hansa Mehta of Bombay pointed out how the average woman had for centuries suffered from inequalities heaped upon her by laws, custom and religious practices. Women had been denied ordinary human rights. Mehta did not press for a separate electorate, reservations or quotas, but argued for equality:

What we have asked for is social justice, economic justice, and political justice. We have asked for that equality which can alone be the basis of mutual respect and understanding and without which real co-operation is not possible between man and woman. Women form one half of the population of this country and, therefore, men cannot go very far without the co-operation of women.⁹

Jaipal Singh of Bihar, representing more than thirty million adivasis, pointed out that for over six thousand years his people had been treated disgracefully and neglected:

⁷Constituent Assembly Debates, Book 3, Vol. VIII, *loc. cit.*, p. 272.

⁸Constituent Assembly Debates, Book 1, Vol. V-VI, *loc. cit.*, p. 105.

⁹Constituent Assembly Debates, Book 1, Vol. V-VI, *loc. cit.*, p. 138.

The whole history of my people is one of continuous exploitation and dispossession by the non-aboriginals of India, punctuated by rebellions and disorder...

If history had to teach me anything at all, I should distrust this Resolution, but I do not. Now we are on a new road. Now we have simply got to learn to trust each other.¹⁰

These extracts from the debates are illustrative of the anxieties, doubts and fears which haunted the minorities and the response of the leaders of the majority community. The Preamble, the Fundamental Rights chapter, the chapter on Directive Principles, and the provisions granting autonomy and governance free from exploitation to the tribal areas cover the issues raised, and these form the core of the Constitution. Most of these provisions reflected the social conditions prevalent in the country that needed urgent and continuing attention. Certain social evils had to be banished and unequivocally declared unconstitutional. The attempt was to have a Constitution which would enable the people to cope with and transform India's social reality within a liberal framework. The concepts of social, economic and political justice are not only objectives set down in the Preamble but are also fundamental obligations in the governance of the country. Further, the Constitution represents the majority's assurance to the minorities that their claims to equality and dignity will be respected. Implied in this claim for equality are the right to treatment as equals and the right to equal treatment. The latter deals with the formal aspects of equality: for example, that everyone has a right to vote, that all have equal access to opportunities. Generally, it is an assertion that, other things being equal, there will be no discrimination between similarly placed persons, nor will there be a grouping of unequal or dissimilar categories of persons while dealing with distributive justice. The right to treatment as an equal has in it the transformative potential necessary to realise the objectives set out in the Preamble. Equality has been the major premise in all

¹⁰Constituent Assembly Debates Book 1, Vol. V-VI, *loc. cit.*, p. 144.

written arrangements for the governance of societies. When this premise is extended to the minorities, it means not only one person, one value; it also includes the rights of the minorities as collectives to maintain their identity in dignity. It extends to them a sense of participation in the management of the affairs of society by integrating them as equals in reality, not merely in form.

The draft Directives contained two articles which deal with women and communal discord. Draft Article 42 reads:

The state shall endeavour to secure that marriage shall be based only on the mutual consent of both sexes and shall be maintained through mutual co-operation, with the equal rights of husband and wife as a basis. The State shall also recognise that motherhood has a special claim upon its care and protection.¹¹

This article was dropped without any debate for reasons that are quite obvious. Draft Article 45 reads:

The state shall promote internal peace and security by the elimination of every cause of communal discord.¹²

This article too was dropped without any debate, although its retention would have compelled the state to take effective steps to prevent the continuation and growth of communal organisations and politics.

While the first clause in Article 15 declares equal treatment for all, Subclauses (a) and (b) reflect the existing social practices that had to be banished. While these provisions should normally aid our understanding of equality while interpreting Clause 1 of Article 15, the courts have been blind to this possibility, leading to an avoidable amendment of the Constitution. Clause 2 of Article 15 reads:

No citizen can, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to —

¹¹B. Shiva Rao, *loc. cit.*, p. 323.

¹²B. Shiva Rao, *loc. cit.*, p. 323.

- (a) access to shops, public restaurants, hotels, and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

Clearly, this clause only refers to the obnoxious practices of the Hindu caste system. Reservations in educational institutions and in government services are another aspect of the principle of equality.

Article 17 abolishes untouchability, and the practice of it in any form is declared a punishable offence. Articles 23 and 24 prohibit bonded labour and child labour, and the practice of the former is declared an offence. Articles 25 to 30 deal with the rights of minorities with reference to their religion, language and culture. Freedom of religion is guaranteed, subject to public order, morality and health. All are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion (Article 25). No person can be compelled to pay taxes for the promotion or maintenance of any particular religious denomination (Article 27). Article 28 embodies the principle that state funds may not be used to promote religion; that no religious instruction shall be offered by any institution wholly maintained by the state; no pupil shall be compelled to receive any religious instruction in any institution which is either recognised by or gets aid from the state. Article 30 guarantees to the minorities the right to establish and administer their own educational institutions; the amount fixed for acquiring the properties of these institutions should not restrict or abrogate the right guaranteed. Articles 330 to 337 provide for reservation of seats to Scheduled Castes and Tribes and the Anglo-Indian community in Parliament and the State Legislatures. Article 338 provides for the appointment of a special officer for the Scheduled Castes and Tribes who will investigate the working of the safeguards provided to them and submit his report to the President. Articles 339 and 340 make it his responsibility to supervise the scheduled areas and determine whether the

administration and governance there are in accordance with constitutional objectives. The President should satisfy himself regarding the progress made by the backward classes. Towards this end he is authorised to appoint commissions to assist him in appraising the progress made by the tribals and other deprived classes. The chapter 'Directive Principles of State Policy' contains a minimum programme which no government, whatever its politics, can ignore. These directives have been described as pious homilies. For the lawyers gathered there, what was not litigable was not useful. For Ambedkar, however, the directives had their insurgent use. He pointed out:

But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these Instruments or Instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time. *What great value these directive principles possess will be realised better when the forces of the right contrive to capture power.*¹³

We are in the thick of such a venture. In fact, an election is defined in the Representation of the People Act, 1951, to mean filling the seats in the houses of Parliament or those of the Legislatures, not as a process by which citizens choose their representatives to participate in the management of the affairs of the society. Filling seats, we have realised in recent times, no longer requires the participation of the people.

Between 1969 and 1975, political justice and political freedoms were under assault, resulting in the notorious declaration of a state of emergency in June 1975. Along the way, the principles of governance set out in Part IV were abandoned and the desirability of social transformation separated from political freedoms and political justice, the latter increasingly viewed as an inconvenience and an obstacle to governance itself. That arbitrariness and opacity are indispensable for governance

¹³B. Shiva Rao, *loc. cit.*, p. 329 (emphasis added).

has since become received wisdom in the entire institutional apparatus of the state.

The next three decades witnessed systematic assaults on the very secular structure of our society by theocratic politics in consistent opposition to agendas of social transformation—from the Rath Yatra and the demolition of the Babri Masjid on 6 December 1992 to the overthrow of the V.P. Singh government for daring to uphold two core principles of the Constitution: secularism and reservation. This was also a period when political parties based their strategies on the religion of the majority, spelling disaster to the political system structured by the Constitution. The laws governing our electoral processes are not equipped to prevent the entry or contending for power of anti-secular parties into Parliament or the Legislatures. This has led to an entrenchment of such politics within Parliament, the fall of the V.P. Singh government being a direct result. While Ambedkar was not shrewd enough to anticipate the way the upper castes would deal with his document, the provisions outlined above should still enable us to define secularism in our fight against religious fundamentalism and fascist trends.

The Uniform Civil Code

A judge sometimes has to play the role of a legislator. His independence is assured to him so that he may look at issues arising before him in an objective manner and ensure that the process of arriving at a decision is fair. Implied is an obligation to deal equally with all the minority communities. The judiciary can initiate changes in society without violent blows to custom or tradition. This is particularly true in cases where minorities live under threat and assert their identity through absolute adherence to personal laws. For example, we have the issue of a uniform civil code as opposed to Muslim men's right to divorce orally. The Tilhari judgment immediately comes to mind.

Although the issue of divorce was not directly before the judge at all in this case, the question being one of land, he declared

the divorce invalid and the woman's entitlement to the land was lost, since it was declared surplus.¹⁴ At the time that Shah Bano brought her case before the court, the stand of the government on the question of Muslim personal law was this:

We would not like to interfere with the customary law of Muslims through the Criminal Procedure Code. If there is a demand for change in the Muslim personal law, it should actually come from the Muslim community itself and we should wait for the Muslim public opinion on these matters to crystallise before we try to change this customary right or make changes in their personal law.¹⁵

Arguing that injustice must stop, and that the courts must take the initiative in the absence of other concerted efforts, the judge assumed the role of reformer and went ahead with his interpretation of the Koran, without explaining what he meant by a 'uniform civil code'. Is the reference to similar but different statutes operating in the field now covered by the personal laws of the respective minorities? Or is it a common civil code where all the communities will forgo their religious and ethnic identities and be governed by one statute that replaces all their personal laws? Is this going to be achieved by a democratic process of working out a consensus? Is it going to be statutorily imposed? Or is it going to be judicially declared?

Judge Tilhari, like many Hindus, feels that Muslims are backward and need to be reformed, forgetting that changes in the Hindu community were brought about by social reform movements led by Hindus. To get a proper perspective on issues

¹⁴There have been many Hindus who produced collusive decrees of divorce to save properties from the land reform laws. In none of these cases has the constitutional validity of the forms of divorce prevailing in the personal laws been questioned. Further, under the present dispensation, the man's entitlement can never be declared surplus. *Rahmat Ullah v. State of U.P.*, Writ Petition No. 45 of 1993 and *Khatoon Nisa v. State of U.P.*, Writ Petition No. 57 of 1993 (unreported).

¹⁵Ram Nivas Mirdha, then Minister of State for Home, in a discussion on the CrPC, 1973.

like these, we must examine the codification of Hindu laws, the resultant laws and their secular character, and the judicial policy and its breach.

The Hindu Widow Remarriage Act, 1856, removed the barriers that prevented widows from marrying again. The Hindu Inheritance (Removal of Disabilities) Act, 1928, was passed to remove the obstacles to inheritance based on disease, deformity or certain types of mental or physical defects. The Women's Right to Property Act, 1937, improved to some extent the position of Hindu women in the matter of succession. All these legislative interventions were made after deliberation with and within the Hindu community. By 1941, several amendments to women's right to property were pending consideration. The government of India, by a resolution dated January 25, 1941, appointed a committee consisting of B.N. Rau as chairman and Dwarkanath Miter, J.R. Gharpure and Rajaratna Vasudeo Vinayak Joshi as members to examine the various bills seeking to amend the Hindu Women's Right to Property Act and to suggest such amendments as would resolve doubts and remove any injustice that may have been done by this 1937 act to daughters. They were also to examine and advise on the amendment to the Hindu Law of Inheritance, a bill promoted by K. Santhanam, and the Hindu Women's Rights to Separate Residence and Maintenance Bill, introduced by G.V. Deshmukh. All these amendments had been introduced by Hindu members of the central legislature.

The Rau Committee held that the various Hindu customs and practices needed study, and that an attempt should be made to codify Hindu law. The two draft bills on inheritance and marriage were however introduced and they were referred to another committee, which suggested that the Rau Committee should be resuscitated and encouraged to complete the task of bringing about a comprehensive Hindu code as suggested by it. Accordingly, by a resolution dated January 20, 1944, the Hindu Law Committee was revived, with T.R. Venkatrama Sastri in the place of R.V. Joshi, this being the only change.

This committee set about its work in right earnest and published a draft code with an explanatory note on August 5, 1944. The explanatory statement said:

One of the objects of the Committee is to evolve a Uniform Civil Code of Hindu Law which will apply to all Hindus by blending the most progressive elements in the various schools of law which prevail in the different parts of the country. The achievement of uniformity necessarily involves the adoption of one view in preference to others on particular matters. The Committee's desire is that the code should be regarded as an integral whole, and that no part should be judged as if it stood by itself.

The Hindu Law Committee then travelled all over the country, meeting with a cross-section of the people and recording their views. The final draft of its report was ready by February 1947, and it was introduced as a bill in the Constituent Assembly (Legislative), which in turn referred it to a select committee in 1948.

This committee was chaired by B.R. Ambedkar, the law minister. The other members were K.Y. Bhandarkar and G.R. Rajagopal of the ministry of law and S.V. Gupte of the Bombay bar. This select committee revised the bill without making substantial changes. However, before it could come up in the Constituent Assembly (Legislative), the publicity it had received gave rise to a controversy, with a cry of religion in danger. Ambedkar immediately convened a conference in 1950 to which he invited scholars, well-read persons and pundits from Benares and other places to canvass support for the steps initiated towards codifying Hindu law. He held another conference at Trivandrum to consider whether the Marumakathayam and Aliyasanthana laws could be made part of the proposed Hindu code. Despite all these efforts, the draft code met with rough weather when it came up for consideration in the Assembly on February 5, 1951. Its passage was blocked by amendments galore. The debate, which was inconclusive, was taken up again in September 1951, but the differences could not be

resolved. With the coming of the regular parliament after the elections of 1952, the Hindu Code Bill lapsed. It was followed by four piecemeal legislations codifying certain areas of Hindu law.

Under the Hindu Marriage Act, 1956, conversion from the Hindu religion immediately provides a ground for divorce for the other spouse. The question of reconciliation during the pendency of proceedings as a step to avert divorce is of no avail; neither is judicial separation as an interim measure to enable couples to rethink their stand and come back together. No doubt a difference in religion creates incompatibility, but such a statutory provision encouraging divorce is both anti-secular and in derogation of Article 25. Under the Hindu Adoption and Maintenance Act, one must be a Hindu to be able to adopt and the adoptee should also be a Hindu. Thus the principle that persons belonging to two religions can live together is not even tolerated. Under the Hindu Minority and Guardianship Act, ceasing to be a Hindu deprives either spouse from claiming guardianship over their children. The law of succession does not deprive a convert the right of succession, but his or her children and descendants are denied the right to succeed to the property of a Hindu relative unless they are Hindu when succession opens. Equal property rights for women were opposed on the ground that Hindu women always get a substantial share in the family property in the shape of jewellery and as dowry at the time of marriage. Also, giving a woman property rights would lead to the introduction of a stranger into the family, the son-in-law. This was considered very undesirable as it could lead to friction between brother and sister and to fragmentation of the estate. Finally, since a woman's affections get transferred to her husband's family, it was not desirable to give her a share in her father's property.

This experience ought to have informed us that the formulation of a uniform civil code cannot be a mere majoritarian legislative exercise.

Community Rights in Independent India

The courts have not till now struck down any provision or rule, either enacted or otherwise, in any personal law. In the first few years of the Constitution, enactments prohibiting bigamy were challenged in some state high courts. One such case came up in the Bombay High Court when Chagla was the Chief Justice. The Bombay Prevention of Hindu Bigamous Marriages Act, 1946, was under challenge. The argument was that a son is an absolute necessity if a Hindu is to attain spiritual salvation and that therefore a Hindu becomes polygamous in pursuit of a son and not for any other reason. Another argument was that only the Hindu community had been targeted by this act, while the Muslims had been left free to practise polygamy.

Chagla embarked on the discussion by saying, 'It is only with a considerable amount of hesitation that I would like to speak about the Hindu religion.' On the issue of discrimination, Chagla held:

The institution of marriage is differently looked upon by the Hindus and the Muslims. Whereas to the former it is a sacrament, to the latter it is a matter of contract. That is also the reason why the question of dissolution of marriage is differently tackled. While Muslim law admits of easy divorce, Hindu marriage is considered indissoluble and it is only recently that the state passed legislation permitting divorce among Hindus. The state was also entitled to consider the educational development of the two communities. One community might be prepared to accept and work for social reform, another may not be yet prepared for it; and Article 14 does not lay down that any legislation that the state may embark upon must be of an all-embracing character. The state may bring about legislation by stages, and the stages may be territorial or they may be community-wise.¹⁶

Gajendragadkar, who was later to be the Chief Justice of India, more or less reiterated this view. Both held that personal laws

¹⁶*State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 85.

do not come within the meaning of 'laws in force' under Article 13(1) of the Constitution.

Towards the end of 1979, the Supreme Court had before it the question whether the High Court had been right in holding that

the strict rule enjoined by the Smriti writers, as a result of which sudras were considered to be incapable of entering the order of 'yati' or 'sanyasi', has ceased to be valid because of the Fundamental Rights guaranteed under Part III of the Constitution.¹⁷

The Supreme Court overruled this judgement, arguing that the High Court had failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties. The Supreme Court held that laws derived from recognised and authoritative sources of Hindu principles such as the *Smritis* and other commentaries, must be enforced except where such principles have been altered by usage or custom, or modified or abrogated by statute. The court held that judges could not introduce modern concepts into religious law; that Hindu scriptures and religious texts have never been subject to judicial review.

In the Shah Bano case, however, the court interpreted the Koran at a time when the minority community was under threat, prompting the government to take the stand that customary Muslim law cannot be interfered with through the Criminal Procedure Code, and that it was necessary to wait till Muslim public opinion on such matters changed before attempting to change their personal laws.¹⁸ And yet, donning the reformer's garb with reference to Muslims, Justice Tilhari pitted the Code of Criminal Procedure against the Koran:

A beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts, because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable.

¹⁷*Krishna Singh v. Mathura Abir*, AIR 1980 SC 707.

¹⁸*Mohammed Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 495.

So saying, he struck down the Shariat Act of 1937 and also oral divorce.¹⁹ In the present climate, a few more judgments like Judge Tilhari's may lead to situations that could well become irretrievable. Some may welcome such decisions on the ground that they are, after all, just. However, as Cardozo puts it so well. 'That might result in benevolent despotism if the judges were benevolent men. It would put an end to the reign of law.'²⁰

This was the first time after the failure of the politics and jurisprudence of social justice that we witnessed the orchestration of the Hindu world view through the superimposition of the majority religion on the constitutional value system.

Secularism and the Judiciary

Judges are apt to be naïve, simple-minded men, who need to learn to transcend (their) own convictions. [Oliver Wendell Holmes]

Religious practices—minority and majority—reinforce the *status quo*. Any criticism of religious bigotry is inevitably countered by shifting the focus from the religion's obscurantist practices which fuel fundamentalist politics to its metaphysical, philosophical foundations. This enables a vicarious entry of religion into politics.

Fortunately, however, there are some positive exceptions to this trend. The demolition of the Babri Masjid and the subsequent violence led to considerable judicial introspection. The result was a redefinition of secularism and its role in the political processes of the country in *S.R. Bommai*.²¹ Seven of the nine judges on the Constitution Bench elaborated on the principles of secularism which should guide the court in adjudicating Sections 123(3) and 123(3a) of the Representation of the People Act, 1951. There was no dissent.²² The majority held that secularism was a basic feature of the Constitution and

¹⁹Rahmat Ullah v. State of U.P., Writ Petition No. 45 of 1993 and Khatoon Nisa v. State of U.P., Writ Petition No. 57 of 1993 (unreported).

²⁰Cardozo, *The Nature of the Judicial Process*, New Haven and London: Yale University Press, 1921.

²¹S.R. Bommai v. Union of India, AIR 1994 SC 1918.

²²Justices Verma and (the late) Yogeswar Dayal did not express any opinion.

any step inconsistent with this was unconstitutional; that the encroachment of religion into the secular activities of the state was to be strictly prohibited; that secularism was part of the fundamental law and that the Indian political system must fulfil the socio-economic needs essential for material and moral prosperity and political justice for all citizens. To describe secularism as a vacuous or phantom concept, the court held, was absolutely erroneous. Linking secularism to the electoral process, the majority held that no government could promote any particular religion as the state religion and therefore all political parties were enjoined to maintain neutrality of religious beliefs and prohibit practices derogatory to the Constitution and the laws; the introduction of religion into politics was expressly prohibited both by the Constitution and by the Representation of the People Act, 1951. Political parties, groups of persons or individuals who sought to influence the electoral process with a view to coming to power should abide by the Constitution and the laws, including secularism. Section 123(3) could not be circumvented by resort to technical arguments as to its interpretation.²³ The court pointed out that no party or organisation could be simultaneously religious and political. At the time of registration for allotment of an electoral symbol, every party must file a declaration affirming its faith in the principles of 'socialism, secularism and democracy'.

The judiciary, in this decision, for the first time declared that secularism is an indispensable premise which should inform not only governance but all the other institutions of society. This was a declaration that ought to have become the guiding principle for all future interpretive endeavours by the courts. Unfortunately, this was not to be. For example, in *Manohar Joshi*

²³For instance, Ram Jethmalani argued that Sections 123(3) and 123(3A) should be confined to cases in which an individual candidate offends the religion of a rival candidate and that ratio could not be extended to a political party espousing its stand in similar terms. Jethmalani also argued that the partition of the country had been on the basis of religion, and urged the acceptance of the theocratic principle.

and other cases,²⁴ the High Court formulated the proposition correctly in line with the pronouncements of the Supreme Court in *Kihota Hollohan and S.R. Bommai*,²⁵ saying:

It must be noted that this election petition is not based on individual acts of respondent or his election agent or any other person with his consent. This petition is based upon the above mentioned plank and/or policy decision of the Shiv Sena and the BJP and the campaigning by the party and respondent on the basis of plank.²⁶

But then, Justice Verma of the Supreme Court faulted the High Court judge, pointing out that the requisite consent of the candidate cannot be assumed merely from the fact that he belonged to the same political party of which the wrongdoer was a leader, since there can be no presumption in law that there is consent of every candidate of the political party for every act done by every acknowledged leader of that party. Clearly, this view is totally divergent from the views of the Supreme Court on the party system, secularism and the limitations imposed by their decisions on the role of religion in political processes.

The impact of this decision is even starker when we examine excerpts from the election speeches of Bal Thackeray during the Shiv Sena's campaign, as quoted by the petitioner in this case:

We are fighting this election for the protection of Hinduism. Therefore we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so.

Hinduism will triumph in this election and we must become the honourable recipients of this victory to ward off the danger to Hinduism... You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be sho(w)ered or worshipped with shoes.

We have come with the ideology of Hinduism. Shiv Sena will

²⁴Manohar Joshi v. Nitin Bhauraao Patil (1996) 1 SCC 189.

²⁵Kihota Hollohan v. Zachilbu, AIR 1993 SC 412; S.R. Bommai v. Union of India, AIR 1994 SC 1918.

²⁶Manohar Joshi v. Nitin Bhauraao Patil (1996) 1 SCC 189.

implement this ideology. Though this country belongs to Hindus, Rama and Krishna are insulted.

The result of these elections will not depend on the solution to the problem of food, cloth, but the same will decide whether in the State the flame of Hindutva will grow or will be extinguished. If in Maharashtra the flame of Hinduism is extinguished, then anti-national Muslims will be powerful and they will convert Hindustan into Pakistan. In the flame of Hindutva...the anti-national Muslims will be reduced to ashes.

Rajiv Gandhi speaking on Hindutva is like a prostitute lecturing on fidelity... His wife is a Christian, mother Hindu, father a Parsi and therefore himself without any (Hindu) culture/teaching.²⁷

Although there is a conflation of Hinduism with Hindutva, with parties and judges taking convenient recourse to Hinduism in the abstract as the carrier of true meaning, the extracts given by the election petitioner leave no one in doubt that Bal Thackeray and his colleagues were not expounding Hindu philosophy in its transcendental dimension. The passages put on record clearly demonstrate that what was being expounded was vulgar Hindu nationalism and an anti-minority diatribe. Yet the judgment canonised Bal Thackeray as a Hindu saint; naming him for corrupt practices did not alter the character of the judgment. True, the consequence was unintended, but nonetheless it is a consequence we will have to live with and suffer for.

Bal Thackeray and the Law

Public demand for a proper enquiry into the communal carnage in Mumbai resulted in the setting up of the Srikrishna Commission.²⁸ Bal Thackeray was among those indicted, and the ruling Democratic Front decided to go ahead with the prosecution.

²⁷Manohar Joshi v. Nitin Bhauraao Patil (1996) 1 SCC 189.

²⁸This commission was appointed on January 25, 1993 and scrapped on January 23, 1996. It was re-established on May 28, 1996 and submitted a report on February 16, 1998 based on public hearings in which it examined 502 witnesses. The report was tabled six months later in August 1998.

However, indicting Bal Thackeray spells trouble. The state government asked for a three thousand-strong police force from the centre, a demand the latter pleaded unable to meet. Instead, signals went out from all sides that the state would be held to ransom and that the NDA government at the centre would collapse if the Shiv Sena withdrew its support.

For people to continue their faith in political processes and in the Constitution, governance cannot merely be a circus of balancing the political forces operating the system. It is time to pause and reflect on our colonial legacy that distances governance from the people and their aspirations. The abuse of electoral processes almost to the breaking point, both by individuals (tyranny) and by groups (gangster 'democracy'), is now commonplace. In such a system one would be hesitant to prosecute a crime when the offender is a political colleague or ally. Let us not forget that the carnage led by Bal Thackeray was the aftermath of the Rath Yatra and Ayodhya. The crimes for which these persons stood indicted were not just crimes as defined by the Indian Penal Code. Attacking a targeted group, whether religious or political, cannot be equated to individual crimes. A group plans and attacks a targeted community at various places and in different localities. The simultaneity of these occurrences convinces us that these are not unconnected offences committed by offenders unconnected to each other. Macaulay's penal code describes these offences inadequately, and is therefore totally ineffective. Subsequent amendments did not anticipate the chilling precision with which such crimes would be planned and executed. These collective crimes have led to the total collapse of the system and all its institutions.

A new amendment or the enactment of a new penal code is not always necessary. What is needed is a redefinition of existing provisions, bringing them in line with recent trends in criminality. Offences seldom change, only the manner in which they are committed changes. And while this may have relevance for the imposition of punishment, it does not make the offence new. Take the definition of terrorism, for instance. Before a communal riot takes place, reports of stray violent incidents

overawes a vast section of the people, bringing them within the definition of a terrorist act. But when entire communities live in terror, this state of fear is often intended, not merely a consequence. The legal definition is partisan. Knives and kerosene are not terrorist weapons; the Rath Yatra which inflamed communal passions became a major factor in the country's politics, but these did not entail the permanent introduction of anti-terrorist laws. Meanwhile, the Law Commission views the Coimbatore bomb blasts as a signal of the growth of terrorism.

A secular approach is indispensable to the formulation of penal law, for it is always penal law and the criminal justice process that serves as an index of the nature and character of our polity. A careful examination of existing law by the Law Commission might have pointed to the possibility of enhancing punishments provided for by Sections 153A and 153B of the Penal Code, since they contain the rudiments of 'genocide' as defined by the Genocide Convention, and can be read as applicable to crimes that come under the definition of genocide.²⁹

The Srikrishna Commission found that while the immediate cause for the communal riots—a spontaneous outburst—was the destruction of the Babri Masjid, the riots that then took place from 18 January 1993 were organised by the Shiv Sena and incited by the speeches of its leaders and their writings in communal newspapers like *Samna* and *Navakal*. The commission named Bal Thackeray, Sirpotdar and Manohar Joshi. Yet we look at the findings of the commission as unimportant, and hold that the crimes committed by the persons indicted are time-barred—crimes that left a thousand people dead, a thousand injured, another thousand homeless, and destroyed property worth four thousand crore rupees. It is a strange interpretation of human rights to say the indictment is time-barred when the riots that took place were a systematic,

²⁹For a definition of genocide, see Chapter 16.

pre-planned and concerted attack on specific groups of people and a challenge to the system as a whole. There has never been a limitation for initiating a prosecution for capital crimes, or for crimes against a targeted group, racial, religious, ethnic or otherwise. The punishment provided under the law may not be deterrent, but the prosecution of persons like Bal Thackeray, who have always believed that they are above the law and are armed with tremendous proclivities to unleash disorder, would certainly have a deterrent effect.

Mandal-Masjid-Mandir: 6 December 1992

The destruction of the Babri Masjid, the construction of a Ram temple in Ayodhya and the Mandal Commission's report raise yet again the issue of equality. Was the opposition to reservations and the insistence in erecting a mandir in place of a masjid at Ayodhya constitutional?

By undertaking the Rath Yatra, by repeated declarations of the intention to rebuild a temple at the location of the mosque, and by linking these with an assertion that secularism has only meant appeasing the minorities, the latter, who number 110 million, are informed that this country is no longer their home and that their continued stay in it can never be on the basis of the guarantees extended to them by the Constitution. This is the stand taken by a political party whose elected members have sworn to uphold the Constitution. It is in this context that the destruction of that 'dilapidated structure' assumes importance. It symbolises the right to survival of the Muslim minority in particular, and other minorities in general.

The destruction of the Babri Masjid marked the beginning of a very ugly trend in Indian politics. The assumption by the Hindu majority of the role of conquerors setting out to redress the wrongs of the past, starting with those of Mahmud Ghazni, negated with one stroke everything we had fought for in the making of the nation. Toynbee's words of caution are particularly relevant:

We must be on our guard against 'historical sentiment'; that is arguments taken from conditions which once existed or were supposed to exist, but which are no longer real at the present moment. They are most easily illustrated by extreme examples. Italian newspapers have described the annexation of Tripoli as recovering the soil of the fatherland because once it was a province of the Roman Empire; and the entire region of Macedonia is claimed by Greek chauvinists on the one hand, because it contains the site of Pella, the cradle of Alexander the Great in the fourth century B.C., and Bulgarians on the other, because Ochrida, in the opposite corner, was the capital of the Bulgarian Tzardom in the tenth century A.D., though the drift of time has buried the tradition of the latter almost as deep as the achievements of the Emathian Conqueror on which the modern Greek nationalists insist so strongly.³⁰

The decision of the V.P. Singh government to enforce the Mandal Commission recommendations and to oppose the fundamentalist approach to the Ayodhya issue were attempts at ensuring the continuance of secularism in a society that is being rent asunder by religious fundamentalism. V.P. Singh's motive was obviously to gain political mileage in an adversarial system where competition for votes has become the centrepiece of our definition of democracy, but the merit of his stand cannot therefore be dismissed. Of course, the same adversarial system made a reversal possible by overthrowing his government. Thus, both Ram and secularism are mere pawns in a political game, with the citizens as passive spectators.

The popular image of the BJP, RSS, VHP and such other related outfits internalised by the middle classes is that they comprise dedicated, disciplined and law-abiding members who are not votaries of violence and abjure from the practice of skullduggery and deceit. In the second phase of the Ayodhya issue, Narasimha Rao, a pious Hindu who worships both gods

³⁰Arnold Toynbee, cited in Babasaheb Ambedkar, Reprint of 'Pakistan or the Partition of India', in *Writings and Speeches*, Vol. 8, Government of Maharashtra, p. 54.

and godmen, could not reject this image, particularly when it was linked with Ram. He could fight the BJP but he could not fight Ram, he declared.³¹ Predictably therefore, he decided to appease the majority sentiment with the object of appropriating the Hindu vote in the event of a mid-term poll. Thus we saw him following the terms laid down by an assortment of saffron-clad sadhus, and declaring his trust in L.K. Advani and Murli Manohar Joshi, making a mockery of the largest democracy in the world. When at the penultimate stage the matter came before the court, the latter failed to take account of the political context in which the Rath Yatra had taken place, especially its aftermath of widespread communal violence. Thus, it threw away a chance to prevent the carnage and massacre that followed the demolition of the Babri Masjid.

Democracy and the Electoral System

While we opted for parliamentary democracy, the party system as such is not referred to anywhere in the Constitution. Nor is there any mention of it anywhere in the Representation of the People Act, 1951. Sections 3 and 3(1A) of this act bar appeals to one's religion, race, caste, community or language and prohibits the promotion of enmity or hatred between different classes. Even an attempt to do so is declared corrupt practice. However, these injunctions are against the individual and not against a party formed on the basis of religion, caste or community, or which has for its agenda the promotion of hatred based on religion, caste, community, etc.

³¹In the absence of a strong and cohesive political movement committed to social change, the field has been cleared for godmen and religious cults to enter the political space. Worshippers are increasingly strident and aggressive, both in appearance and behaviour. Some members of the Ayyappa cult wore black clothes and went barefoot, toting guns in the old city of Hyderabad during communal riots. We have even seen the President, the Prime Minister, Chief Ministers, Governors, and judges of the Supreme Court and high courts sitting at the feet of Satya Sai Baba in their official capacity, and using other official facilities to interact with him.

A political party formed for anti-secular purposes has free play in the political arena. A member of such a party who contests elections is viewed by the above provisions as an individual, and is seldom held accountable for his party's conduct. Thus, a party's large-scale corrupt practices and anti-secular propaganda go largely unchecked. This is only compounded by the fact that our political parties have never sought to improve the electoral process; they have no faith in democracy or in abiding by the law, practising instead an adherence to mere form. The judiciary, although set up with the primary objective of enforcing accountability and preserving the democratic values enshrined in the Constitution, has been halting in implementing its assigned role, acting at crucial moments against a citizen's right to liberty and ambivalent when secular values are under threat.

This prevarication is consistently visible in the decisions rendered in election disputes. The court treats an election trial as quasi-criminal, and an elected candidate is likened to an accused. These two premises give room for enormous legal sophistry. In fact, the benefits of interpretation and lack of conclusive evidence that rarely accrue to an ordinary citizen accused of a criminal offence, are easily available to a candidate whose election has been challenged. In the former case, almost every lapse of the prosecution is condoned by the court unless prejudice is shown to have occurred, while a varied assortment of technical pleas and defective pleadings, apart from the court's own definition of crucial words like 'consent', let candidates off the hook in cases where an election has been challenged. Both these trends are undemocratic. It is theoretically unsound to equate an accused person to an elected candidate, and derogatory of the rights of the accused to a fair trial when his defences are watered down on the one hand, while extending to the elected person privileges which are denied to the accused.³²

³²The criminal justice system has a long history, and its evolution symbolises a struggle against arbitrary and authoritarian power. The electoral system has no such history. In the case of a criminal prosecution, the (*contd.*)

Democracy, though a basic structure of the Constitution, was never reckoned as the ultimate determinant of either the validity of penal laws or of the laws and rules governing election trials. Parliament's indifference to the degeneration of the electoral process, the court's refusal to take notice of this degeneration, and the consequent failure to review and update the principles laid down while interpreting electoral laws has resulted in elections getting distanced from representation; the elected do not represent either the people or the constitutional value system.

While the debate on the Tenth Schedule centred on the conduct of the elected representatives of a political party inside Parliament, the entire party system was (had to be) discussed. A political party, the court reiterated, functions on the strength of its shared beliefs, and neither the party system nor parliamentary democracy contemplates concerted action by the members to speak against declared party policy. As the court reiterated, quoting Griffith and Ryles:

Loyalty to party is the norm, being based on shared beliefs. A divided party is looked upon with suspicion by the electorate. It is natural for members to accept the opinion of their leaders and spokesmen on a wide variety of matters on which those members have no specialist knowledge. Generally, members will accept the majority decisions even when they disagree.³³

Loyalty to the party in the context of a party system is a necessity, even a compulsion, for the party to be functionally relevant and stable. But if the shared beliefs contain theocratic

(contd.) accused has the possibility of forfeiting his life or liberty according to the offence he is charged with. In the case of an elected candidate, no such possibility exists. The right to vote or the right to contest an election, according to the courts, are mere statutory rights and therefore do not possess that character of inalienability which an accused has. The dispute in an election trial is between the contesting candidates, and though there is a myth that the entire constituency is interested, no such consideration plays any role in the ultimate result of the case.

³³*Manohar Joshi v. Nitin Bhaurao Patil*, 1996 1 SCC 189.

ambitions or aspirations, as in the case of *Manohar Joshi*, they must be declared corrupt practices, since such political activities have the potential of undermining the Constitution from within. Constitutional limitations do not operate on the state alone; they operate even against political parties. But the latter limitations generally manifest themselves through statutory provisions, mainly penal. When it comes to election law, despite the fact that elected members become the chosen representatives who will implement the Constitution, the key provisions are never interpreted in consonance with the Constitution.

Conclusion

The common thread running through apparently disconnected issues is the rise of religion as a political force. In an adversarial political system operating in a plural society, this process cannot but be violent, the attempt always being to subjugate minority communities. When translated into law, this kind of violence becomes the crime of genocide. We have recently witnessed a carnage in Gujarat that was worse than the slaughter of Sikhs in the aftermath of Indira Gandhi's assassination. Neither the killings of Sikhs in Delhi and other places nor the Mumbai riots of 1992–93 have taught our governments any lessons. The fact that such large-scale violence can take place in the country with impunity, with all the institutions of the state totally paralysed into inaction, shows the extent of anomie that has come to characterise governance in India today. Ralph Dahrendorf describes the scenes of disorder after rumours spread of the Führer's death towards the end of April 1945. Shopkeepers fled out of fright; people helped themselves to what was available in the shops; in the bookshops, people took books home and Dahrendorf himself took some. From these incidents he delves into the concept of anomie, which according to him is not a state of mind but a state of society where restrictions get progressively weakened and impunity becomes the order of the day. Those in charge withhold punishments, and individuals and

groups are exempted from conformity to law. Dahrendorf paraphrases Lambarde's description of anomia:

Anomia 'brings disorder, doubt and uncertainty over all.' People can no longer predict whether their neighbour is going to kill them or give them his horse. Norms no longer seem to exist, or if they are invoked they turn out to be toothless. All sanctions seem to have withered away. This in turn refers to the disappearance of power or, more technically, a re-transformation of legitimate authority into crude and arbitrary power. This is hardly a state in which anyone would wish to live.³⁴

This is precisely the position we are in now. The uncritical acceptance of the vulgar play of power politics as valid exercises in democracy has led to the complete degeneration of our democracy. In this vulgarised state of affairs the concept of Hindutva³⁵ has been thrown in with a promise of cleansing politics. The breach with the Constitution is now complete. Thus, an untested new trend has been introduced, resulting in a breakdown in culture at a time when there was an acute disjunction between cultural norms and secular goals. The violence today has official sanction from within the government—from incumbents in elected positions to the members of the administrative and police bureaucracy. This sanction dispenses with the need to rely on the metamorality of religion to justify the violence. The country was on the road to anomie right from 1968, and almost all our institutions had been destroyed by the 1980s. The destruction of the Babri Masjid signalled the demise of secularism and the rise of Hindu nationalism for the second time, this time demonstrating its genocidal inclination.

With what happened in Gujarat is everything irretrievably

³⁴Ralph Dahrendorf, 'The Road to Anomia', in *Law and Order* (The Hamlyn Lectures), London: Stevens & Sons, 1985, p. 27.

³⁵Hindutva, an aggressive political tenet, does not refer to Hindu philosophy. It is unfortunate that religious communities, which operated as institutions of social security and harmony, have emerged as combating armies seeking to retain power, inflicting terror and fear in the minorities, and terrorising political dissent.

lost? Secularism is an alien word; as a concept it has no Indian equivalent. But the same is true of the Westminster model followed by our democracy, as also the concepts of contempt of court and independence of the judiciary. Yet we have internalised the latter two and not secularism. There were advantages in this, for it helped in the unprincipled manipulation of power with a view to maintaining a caste-oriented, low-profile Hindu state. There is now an urgent need to redefine secularism and delimit the role of religion in temporal areas. Secularism has to be understood as inter-religious understanding, where equality and human dignity should inform all religious practices within each religion and between religions. The problem is that neither Parliament nor the courts try to understand the ideas of secularism in terms of the Constitution, and hence there is no uniform exposition of these expressions. While the Supreme Court equated Hinduism to Hindutva and gave legitimacy to the bigotry of Bal Thackeray, the same bench, by a queer quibbling, held an elected candidate guilty for his party's Hindutva bigotry. This course of justice, which lets the top leaders off the hook, has in fact given impetus to a theocratic politics that threatens to destroy democratic values. The observations in the subsequent case have to be understood as mere lip service to the secular values of the Constitution. After the damage had been done, the Supreme Court exhibited the correct perspective in its understanding of what is bigotry and what is not, by pointing out:

It is difficult to appreciate how the term 'Hindutva', or Hinduism per se in the abstract, can be assumed to mean and equated with narrow Hindu fundamentalist bigotry. Ordinarily, Hindutva is understood as a way of life or a state of mind and it is not to be equated with or understood as religious Hindu fundamentalism...The word Hindutva is used as synonym of 'Indianisation', i.e. development of a uniform culture by obliterating the differences between the cultures co-existing in the country.³⁶

³⁶R.Y. Prabhu v. P.K. Kunte, AIR 1996 SC 1113.

That was how the courts have fouled the values of democracy in moments of crisis. The failure to discuss the ratio on secularism set out elaborately in *S.R. Bommai* in these election cases is part of the same trend.

Liberalisation has now stepped into the vacuum created by loss of faith in the philosophy and processes of social transformation. By emptying the contents of constitutional principles like equality, political, economic and social justice, secularism and integrity, it has unleashed market forces and brought in a new awareness of acquisitive power. It is this thrust of aggressive individualism which is responsible in a sense for the breakdown of our social institutions. Courts structured on the dichotomy between justiciable and non-justiciable rights—the enforcement of the latter being the fundamental responsibility of the government—cannot comprehend the disjunction between liberalisation and constitutional policy in this country. The move away from the pursuit of stated objectives has led to an intense struggle to access resources. The attempt to bring forth centralised governance is sought to be achieved by rallying people of the Hindu majority, not on a platform of social equity but on a theocratic basis. Hindu society is divided on the basis of an iniquitous hierarchical structure, and the struggle to end this is ongoing. Despite this the current political leadership has erected a monolithic religious structure, and this can be done only by rallying the oppressed castes together to attack the minorities in the country on the one hand, and to continue a low-intensity war on our Muslim neighbour on the other. Subordinating the minorities appears to be the primary objective. The repetition in Gujarat of genocidal trends is a pointer.

14

Sanjay Dutt in the First Person

Mr. Judge,

I am no Gandhi or Tilak or Castro, yet I think I have a right to make a statement. I am not like them, though I am as well known as they were in their days, but I am not as great. I am an actor in commercial cinema and in the course of our calling and in our assigned roles we do portray violence and brutalities. But that has always been make-believe. All of us have been trading on make-believe of one kind or another. My make-believe world was shattered on 6 December 1992 when a huge army of *kar sevaks* descended on Ayodhya and demolished Babri Masjid and razed it to the ground. This mindless act of destruction led to disturbances all over the country. In Bombay city it brought Muslims out on to the streets protesting against this outrage, and I think they had a right to protest against this vandalism. Like all such protests, this one was directed against the government, with people expressing their wrath against state-owned properties. The state police forces opened fire in response. When a four hundred and odd year-old mosque was destroyed, not a shot was fired. The state forces displayed exemplary

restraint, the like of which we have never witnessed in free India. I am not pleading for the absence of restraint but only wish to emphasise how inconsistent our respect for human rights is. In the December phase of the riots, 307 Muslims and 123 others were injured in police firing. A further 236 Muslims and 293 others were injured in mob violence. The coroner of the city conducted 227 riot related *post mortems* as of December 16.

The riots continued into the New Year, i.e., 1993. Everywhere one heard of mobs going on a rampage. All of us have heard the awful shrieks, all of us witnessed the billowing smoke and heard the crackling noise of buildings on fire. The police was standing by, disinterested, watching the lynching and arson by lumpen gangs harnessed into service openly by the Shiv Sena and not so openly by the fundamentalists among Muslims. While the Muslims are accused of preparing for a riot in the mosques, for the Shiv Sena, *Maha Aratis* openly held in various localities were a convenient way of organising a riot and unleashing rioters on targeted people and localities.

Sir, do you know that on January 22, 1993, the police reported that 456 people were killed in the riots between January 6 and 18 and later admitted that the death toll was 557: 175 in firing, 309 in assaults, and 73 in arson? This does not include the injured. There was heavy loss of property. Thousands were rendered homeless, and they became refugees in the city where they had lived all their lives.

Those targeted were not only the members of the minority community but also persons who spoke out against communalism. My father, Sunil Dutt, was a popular actor two decades ago, and he is among the few stars with a world view. This drew him into politics, and he was a Member of Parliament until he resigned his membership after the recent communal riots. He is opposed to communal politics and he proclaimed his opposition quite openly, unmindful of the consequences such an unequivocal stand might lead to. He was declared anti-national. Of course this was not an official declaration. There is no necessity for one. Your stand makes you a marked man. Once you take a position publicly, you must

fend for yourself. Even Gandhiji was not spared. That was in 1947. If my father survived this carnage, it is by the sheerest of accidents.

It was during this period that I secured one AK 56, and I am now produced before you as a terrorist under the Terrorist and Disruptive Activities (Prevention) Act, 1987. From the time I have been arrested, a lot has been written about me and the AK 56 I secured. My grief-stricken father told the press that as a child I was sensitive, and that was seized upon and interpreted to my disadvantage. Some have called me a drug addict; others have portrayed me as degenerate, someone who keeps company with smugglers who are also the producers of some of the films I have acted in. Everybody claimed they knew more about me than I do. Some of my well-meaning friends, like Shatrughan Sinha, have portrayed me as a congenital idiot and project this viewpoint in defence of my innocence. Shatrughan does not realise that it is the cancerous outburst of his brand of politics that has driven me to secure the assault rifle. To confuse the issue further, my acquiring the firearm and my subsequent effort to hide the acquisition is linked to the subsequent bomb blasts in the city. Once the act is linked to the bomb blasts, all of you will suspend your powers of reasoning and will no longer recognise the bias.

They have thus prepared the background, so that you, Sir, may adjudge me a terrorist in a trial that is legislated to be a muted affair. The witnesses to the muted proceedings will be the security staff, their officers and the intelligence officers, all of whom have together created the myth of the foreign hand to identify the newly defined offence. Claiming to combat the offence, these officers act arbitrarily and capriciously, usurping the powers of the judge and executioner. They would have dealt with me no differently had I not been rich and famous. Fortunately for me, my fame and affluence earned me my right to life.

My being in possession of one or more than one AK 56 is itself a terrorist act. My friendship or acquaintance with Dawood Ibrahim and my drug addiction become relevant facts to prove that I am a terrorist. You will not entertain any reference to the

communal riots, as in your view all these riots have no relevance to the issues which will come up for trial. In any event, the Justice Srikrishna Commission is entrusted with the task of enquiring into it. This short submission would exclude my defence. However, you will entertain evidence to prove that I am an utterly degenerate person, for no trial of a terrorist is complete unless, in the course of the trial, he is depicted as totally immoral. A trial is an exercise in media manipulation as well.

Sir, if you only leave my addiction and my sensitivity and all that crap alone, and stand the topsy turvy Rule of Law to which you are used on its legs, you will realise that my securing an assault rifle is a legitimate act of private defence against the admittedly terrorist acts of Bal Thackeray and his men. I believe that the Right to Life implies a right to private defence and is in specific terms guaranteed under the Penal Code. This right to private defence is available also against property and this right arises the moment there is a reasonable apprehension of danger to person or property from an attempt or a threat of an assault, and this right continues as long as the apprehension of danger continues. During the January riots, hospitals in Bombay admitted 1,160 persons: 397 were dead on arrival and 169 died after admission; thousands migrated and nearly two lakhs were rendered homeless. If this scale of violence does not raise a presumption in my favour of a reasonable apprehension of danger, God help the people who believe that you and the others who operate these institutions are going to dispense even-handed justice!

Sir, the January riots began on 2 January 1993, and by all accounts the riots were not spontaneous. The targets and the areas were listed out carefully. There was an agreement within the Shiv Sena to start a riot; there was preparation for the riot at the various *Maha Aratis* that were staged. Between the idea and the overt act, several offences have been enumerated in the Act as well as the Penal Code, and Bal Thackeray and his men have committed all these offences. The mobs used swords, spears, lances, knives, khukris, battle axes and blades longer than 9 inches and wider than 2 inches, all of which are arms under

the Arms Act, 1959. They used petrol and other inflammable substances enumerated in the Terrorist And Disruptive Activities (Prevention) Act, 1985. Bal Thackeray has proudly declared that his boys were responsible for the riots. They wanted to teach the Muslims a lesson. He proclaims Muslims have no place in this country. He describes the riots as a fight against injustice and boasts that the mobs are under his control. He asserts his right to extort money. He made all these statements with impunity in an interview to the press. He is the Genghiz Khan and Calvin of Bombay city.

Sir, during the riots the police merely watched the lynching, looting and arson. The power struggle between Sudhakar Rao Naik and Sharad Pawar prevented the army from effective intervention. Respect for law and authority collapsed and the government was stricken with paralysis, and all written arrangements became meaningless. And the sense of cohesion which is so necessary to live in a community was fatally weakened. In such situations, one either submits to violence or decides to fight. My securing firearms was an act of preparation for my defence. The entire city was in the grip of criminals.

I bought the assault rifle to defend myself and my neighbours against any possible attack by these mobs. This was in exercise of my basic right to private defence. This right revives when the state fails in its primary obligation to defend the lives and properties of its citizens. Proof of no other circumstance is necessary to assert this right of private defence in my case. I could not have effectively defended myself against the mobs without an assault rifle and these unfortunately are not available in the superbazaars of Bombay. These are available with narcotics peddlers and smugglers, who are also gun-runners.

These few days of incarceration have made me realise that the criminal who was hitherto producing crime, criminal law and the whole apparatus of the criminal justice system—the police, the courts and the judges, has also in the late 20th century been producing politics, politicians and the government. It is the ascendancy of the criminal over governance—of whom Bal Thackeray and his men are only partial manifestations.

15

Can Anti-Secular Parties Govern?

Can any party govern India without subscribing to secular values? Is democratic governance possible without recognising the claims to equality by the minorities? Can they be accorded the status of citizenship in a theocratic state? The Constituent Assembly grappled with these and related questions.¹ The consensus that emerged was that India should continue to be a plural society and that its governance should recognise the plurality of religions, both within the Hindu system and outside of it. They were concerned that the identity of the minorities and other ethnic groups should be preserved. H.V. Kamath proposed an amendment prefixing 'In the name of God' to the draft Preamble. It was one of those rare occasions when the Assembly actually divided by show of hands. The ayes eventually lost 41 to 68, after the opponents pointed out that the invocation of God was inconsistent with freedom of faith, which was not only promised in the Preamble, but was also guaranteed

¹Of course, neither the RSS nor its political front was a significant part of the independence struggle, nor did they participate in the deliberations of the Constituent Assembly.

as a fundamental right. Later, when a similar proposal was made for an invocation in the Universal Declaration on Human Rights, India and other countries voted against it.

With the recent examples before them of the Nazi and fascist dictatorships and their unimaginable and merciless destruction of human lives, India voted against a presidential type of executive so as to avoid the possibility of dictators surfacing. Parliamentary democracy, a colonial legacy, was a more familiar option. The founding fathers bequeathed a sovereign democratic republic to future generations. Twenty-five years after Independence, however, our democratic republic is almost lost.

A degenerate electoral system and a weakened revolutionary movement have made the courts an arena for political struggle. It is interesting how the struggle between authoritarian trends and the democratic forces rallying against these trends have been deftly portrayed as a confrontation between the courts and Parliament. Repeated amendments to the Constitution, the courts feared, would change the nation into a periodically elected monarchy, with the elected representatives becoming representatives of despotism. The court therefore evolved the doctrine of 'prospective overruling'.² Five years thereafter, when democracy had almost disappeared, another property litigation led to a re-examination of amendment powers, specifically the earlier doctrine of prospective overruling. *Kesavananda Bharati* gave us the all-encompassing doctrine of 'Basic Structure of the Constitution' and the related doctrine of 'Implied Limitation'.³ Although the court joined the authoritarian regime in incarcerating liberty, it simultaneously ensured that no future amendments could change the Constitution to the disadvantage of the people.

Liberated from authoritarian rule, we are now in the clutches of theocratic forces. These same forces sided with Jaya Prakash Narayan during Emergency. Wearing the garb of liberal

²Golak Nath v. State of Punjab, AIR 1967 SC 1331. See Chapter 21 for a discussion on both these principles.

³Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

democrats, they entered the power structure of the anarchic Janata leadership. This anarchy in governance and parliamentary politics in the post-Rajiv Gandhi era was perpetuated by successive governments, headed in turn by P.V. Narasimha Rao, Deve Gowda and I.K. Gujral. After the political burlesque enacted in Parliament by Deve Gowda and Gujral, secularism as a political value was so devalued that the ground was cleared for the theocratic forces to make an entry into parliamentary politics as a major player. Again it was during this period, when secularism became trivialised to minor status in politics, that it became a major issue before the Supreme Court. In *S.R. Bommai*,⁴ two issues, both central to democratic governance, came up for adjudication: (1) the extent of permissible judicial review of the satisfaction of the President in matters of dismissal of state governments and the imposition of President's rule; and (2) the scope and ambit of secularism and its role in governance. The court pointed out that despite the absence of the words 'socialist' and 'secular' in the Preamble, the Constitution was secular. What was implicit was made explicit and thus put beyond debate. The character of the polity and the role of contending political parties in matters of its governance was clearly set out. No ruling party could, by this argument, bring a theocratic state into existence, either directly or indirectly.

The secular state that is structured by the Constitution has to accord equal treatment to all religions and religious sects, and the state is strictly barred from showing any bias towards any religion or sect. Similarly, the encroachment of religion into secular activity is equally prohibited. The learned judges pointed out:

The Founding Fathers could not have countenanced the idea of treating minorities as second-class citizens. On the contrary, the dominant thinking appears to be that the majority community, Hindus, must be secular and thereby help the minorities to become secular. For it is the majority community alone that can provide the sense of security for others.⁵

⁴*S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

⁵*S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

The purpose of law in plural societies, the Court went on to point out,

is not the progressive assimilation of minorities in the majoritarian milieu. This would not solve the problem, but would vainly seek to dissolve it.⁶

The Court warned that if religion is overemphasised, social disunity is bound to erupt, leading to national disintegration:

Secularism therefore is part of the fundamental law and the basic structure of the Indian political system to secure all its people socio-economic needs essential for man's excellence and moral well-being, fulfilment of material prosperity and political justice.⁷

This ruling was rendered in the backdrop of Ayodhya, the Rath Yatra, and the Babri Masjid and ensuing riots in Mumbai and other places. The court referred to Section 123, Subsections 3 and 3A, of the Representation of the People Act, 1951, and pointed out that election law also bars religion as the basis of electoral politics.

It is in the context of the law as expounded by the Supreme Court in *S.R. Bommai* that the competence and legitimacy of the BJP, its outfits and the Shiv Sena to participate in this country's politics must be questioned. Professing theocratic principles or propounding the Hindu religion as the ruling religion of the state disentitles these parties from continuing in power. Both the religious majority and the religious minorities are prohibited from using religion-based politics for secular purposes, which of course would include elections to all the representative institutions:

It [secularism] enables people to see the imperative requirements for human progress in all aspects and cultural and social advancement, and indeed for human survival itself. It also not only improves the material conditions of human life, but also liberates the human spirit from the bondage of ignorance,

⁶*S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

⁷*S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

suppression, irrationality, injustice, fraud, hypocrisy and oppressive exploitation.⁸

Not so vacuous after all. In the light of such an exposition of secularism in *S.R. Bommai*, will it be possible for the BJP to continue in power lawfully?

16

Narendra Modi's Hindutva Laboratory

Oppression does not stand on the doorstep with a toothbrush moustache and a swastika arm band.¹

It was in the fall of 1944 that Himmler realised that the war was coming to a close; the game was up and the extermination facilities at Auschwitz and the other concentration camps had to be dismantled. As he told Adolf Eichmann around this time, 'If up to now you have been busy liquidating Jews, you will from now on, since I order it, take good care of Jews, act as their nursemaid.'² That echoes Vajpayee's conversation with Modi, to whom K.P.S. Gill was sent instead of Article 355. This peace process was, like all such 'initiatives', as loosely structured as possible, promising no redress, no justice, but an abundance of pity for the plight of the victims of the great 'experiment'—not

¹J.A.G. Griffith, *House of Lords Debates*, Vol. 505, c. 1331, cf. Robert Blackburn, ed., *Constitutional Studies: Contemporary Issues and Controversies*, London: Mansell, 1992, p. 150.

²Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York: Penguin, 1992, p. 138.

⁸*S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

my description of the macabre events of February, March, April and May 2002. Gujarat, the RSS had announced, would be the laboratory of the Hindu Rashtra.

From the time they captured power in Gujarat through the electoral process, they have been true to their declaration. The BJP began its rule in the state by removing a ban imposed earlier on public servants being members of the RSS. The violence in Gujarat shows that the bureaucracy at various levels has turned into a Hindutva brigade. The state was preparing the people for the Hindutva experiment. This adroit move became possible because all our institutions had been destroyed by Mrs. Gandhi's experiment in authoritarian rule. Also, none of her successors were leaders; they were plagued with one desire, and that was to be the Prime Minister of this country, however long it took. With this kind of image, the voters returned one hung parliament after another.

In its previous incarnation, as the Jana Sangh, the BJP had no presence in Parliament. Only after the 1975 Emergency did they join the movement led by Jayaprakash Narayan. They rode into parliamentary politics after the defeat of the Congress (I) in the elections held immediately after the revocation of the Emergency, gaining some seats but as part of the Janata Party headed by Morarji Desai. The latter was a motley crowd of politicians who ended up giving an opportunity to the BJP to enter the power structure. That was the beginning of their fascist manoeuvres within the parliamentary framework, leaving it to a fractured left to uphold the Constitution.

There was a systematic assault on the Constitution and democratic values in the form of the anti-reservation stir and the Ayodhya Rath Yatra. In the course of my stay in Gujarat, I learnt that Advani's Rath Yatra was Narendra Modi's brainchild. In the context of failing welfare and democratic politics, with no threat from leftist movements, concerted attempts were made by the religious majority to capture power in order to ensure governance at the centre. Successive prime ministers after V.P. Singh facilitated this capture of power by the theocratic forces led by the BJP. The first ten years of this period, however,

did not see the vulgar display of religiosity by public functionaries that is commonplace today. In the context of these practices, secular values have lost their relevance. Every caste and religious division has become grist for the electoral mill. As commitment to social transformation diminished, the electoral process has become distanced from the people. What remains as campaign material are caste and communal factors, used as strategies in adversarial politics, the beginning of degeneration.

The resounding success of the Dalit movement has not helped strengthen the democratic and secular content of our politics. Earlier, social reforms were used to bring about homogeneity by attempting to abolish caste divisions. These were attempts to rid society of its long-standing aberrations, which treated a sizeable majority within its fold as non-persons. Such noble aspirations are outdated in present-day politics.

Communal politics has not emerged suddenly. It has been with us for a long time, growing steadily after Partition. It was given ideological content after the founding of the RSS. The contours of communal politics are now clearly defined. Representatives of the Visva Samvad Kendra, the RSS media cell, found fault with the presentation of the Gujarat riots in the media. They said that the media examines one person in a district and draws inferences about the entire episode. They gave us a copy of a magazine they had brought out which highlighted Godhra but not the subsequent anti-Muslim violence, although the issue had been printed much later. It traced the roots of India's communal violence to 1947. Their stand blocked further discussions.

We are taken back in time to Nathuram Godse, who, in his statement to the court, explained without remorse his reasons for killing Gandhi. His reasons were neither noble nor profound; they were limited to the communal ideology (if communal politics can at all be called ideology, that is) he was wedded to. It is impossible to understand Gandhi and the vision of society he had within a limited thought-frame such as Godse's. During the course of his epic tour of riot-torn Noakhali, Gandhi was informed of the retaliatory violence in Bihar. He said:

But, for a thousand Hindus to fall upon a handful of Muslims—men, women and children—living in their midst, is no retaliation, but just brutality. It is the privilege of arms to protect the weak and helpless. The best succour that Bihar could have given to the Hindus of East Bengal would have been to guarantee with their own lives the absolute safety of the Muslim population living in their midst. Their example would have told.³

Gandhi hailed from Gujarat. What happened in Gujarat on 28 February 2002 is not just a negation of what he stood and died for, but was equally a negation of the values we all fought for in the course of a long struggle for independence.

Post-Independence India has not known a leader of sufficient moral stature to effectively intervene in periods of acute political violence. We are still to hone our institutions to respond quickly and justly, which alone will discipline people to respect law and authority. The judges, administrators, lawyers, the entire quill-wielding class, the doctors and others who run this nation, as also its population, each have their own agendas and philosophies, and these inform their decisions and attitudes, whether in normal times or in times of crises. The massacre of Sikhs in 1984 on the streets of Delhi still awaits redress and justice.

There have been excellent analyses and interpretations of India's recurring communal riots. They have helped our understanding after the fact. The point, however, is and has always been to change what happens. The politics of secularism has been ineffective. After V.P. Singh's fall there have been no active and committed defenders of the Constitution, nor has any institution demonstrated a commitment to constitutional values. The BJP, which had nothing to do with writing the Constitution, undermined it from within by pointing to its inadequacies and committing it to a review.

The country has been got ready for a communalism qualitatively different from the earlier communal skirmishes it has witnessed. This trend was evident from the Ayodhya Rath

³D.G. Tendulkar, *Mahatma: Life of Mohandas Karamchand Gandhi*, Delhi: Government of India, Vol. 7, p. 258.

Yatra, which deliberately commenced from Somnath. When the Babri Masjid was brought down, we saw a frontal attack on our secular values. Hindutva was brought onto the agenda as a political ideology from that time. The anti-reservation stir and Ambedkar-bashing were a prelude to this. The Hindu religion, declared the RSS and its political wing, the BJP, is more equal than other religions. Hindutva's first experiment registered its success. The political agenda was contingent on keeping the temple issue alive, electoral strength being of no consequence at all. The attack on the World Trade Center in New York also helped this trend to some extent. The abracadabra of the 'war against terror' found support from the BJP government, which pushed its agenda of Hindutva while having POTA passed to simultaneously contain both Islamic terrorism and secular, democratic dissent within. A Hindu theocracy was the major unwritten premise of governance by the BJP.

A closer look at the violence in Gujarat shows that even while the *shilanyas* was being debated inside the courts, preparations were underway outside to test the Hindu parties' strength, despite their precariousness within the electoral system.

Godhra is in the Panchmahals district of Gujarat. The Sabarmathi Express, having carried the Ram *sevaks* to Ayodhya earlier, was bringing them back to Ahmedabad. They returned without expending their energies, as *shilanyas* did not take place. The Ram *sevaks*, or a majority of them, must have been quite young, energetic and unemployed, because these are the recruiting bases for the VHP and the Bajrang Dal. These foot soldiers of Hindutva belong to the last rungs of the caste hierarchy. Gathering regularly gives them not only a sense of belonging but also an occasion for proximity and gregariousness with upper-caste Hindus.

The train was carrying around twelve hundred passengers and was obviously overcrowded. Passengers with reserved seats had to allow heavy entry of Ram *sevaks* into their compartments. These people had all gone to Ayodhya to work for the party that ran their government, that of the country and therefore also owned the trains. That is what the cadres believe when they go

to or return from political rallies organised by their parties. There were complaints against these Ram *sevaks* both to and from Ayodhya on 27 February. They had inconvenienced even Hindu passengers in the reserved compartments. There were complaints by Muslim vendors on the platforms with regard to how much tea and eatables they had consumed. They had also misbehaved with the women assisting the Muslim vendors. By all accounts, there was an altercation between the Muslim vendors and the Ram *sevaks* at the Godhra station. There is no evidence that the other Hindus present on the platform participated in this altercation. But as the train pulled out, the chain was pulled, stopping it at the Falia signal, which was a Muslim area. There was an attack on S6, a reserved compartment. It can be inferred that anti-social elements among the Muslims living there converted an altercation into a communal riot. That it was spontaneous to start with cannot be ruled out. There was stone pelting from outside. A few seconds thereafter, the compartment was in flames. The stones would have made the passengers bring down the shutters, but it is asserted that flaming cloth balls were thrown in from the outside. At Falia the rail track is at a height of around 12 feet. The compartments have the added protection of three to four cross-bars running through all the windows to prevent miscreants and thieves entering. Once set on fire and flung in from ground level, the cloth balls must find their way into the compartment. However, the outside of the bogey does not bear any marks of large-scale charring. Burn marks are only found on the outer fringes of the windows, but these could be due to tongues of flame from the inside. The fire totally destroyed the inside of S6, twisting the steel and other metal used in the compartment. The tragedy is that the fire also consumed around fifty to sixty human beings, including a large number of passengers who had nothing to do with the goings on in Ayodhya or the rest of the country. Such crimes should never go unpunished.

The train fire raises several questions. The Home Minister was personally aware of what had happened in the country after the Babri Masjid was brought down. What security measures were

taken to prevent a flare-up of communal violence following the programme of *shilanyas*? It is not a responsible reply to say that law and order is a state subject. The Ayodhya *shilanyas* had all the possibilities of a breakdown of public order, but the sensitivity the government exhibits towards terrorist violence was absent in the face of a possibility of violence by the majority community.

After the Godhra tragedy, but independent of it, genocide was unleashed on the Muslim population of Gujarat. The day after the train fire, i.e. on 28 February, attacks on the Muslim population began in various parts of the state and almost at the same time. This simultaneity showed they had been planned long before Godhra. Chief Minister Narendra Modi described the first incident as communal violence and the consequence as secular violence. The latter was independent of Godhra because of various facts that have come to light. Those who were victims and others who were around but did not share the communal politics of the state government confirmed the plan to enact violence. There had already been preparations to support the *shilanyas*. The build-up of the theocratic agenda was very open. The statements of Praveen Togadia, General Secretary of VHP International, Acharya Giriraj Kishore, Senior Vice President of the VHP, S.K. Jain, National Convener of the Bajrang Dal and others in the month of February are instructive. They are provocative; although made with reference to temple construction, the message was very clear. Look at Praveen Togadia's statement to the *Asian Age* on 7 February:

It will have to be Pakistan or the mandir. The mosque constructed by Babar at Ayodhya 450 years ago by destroying the Ram temple there and the September 11 attack on the World Trade Centre are symbols of Islamic Jihad. It is necessary for India, the Jews and the Western world to get together and fight Islamic militants.

Such statements always lead to the massacre of the Muslim minorities living in our midst. In one statement the Bajrang Dal leader said that if Muslim organisations prevented construction

of the temple, the Dal would chant the Hanuman Chalisa at Delhi's Jama Masjid. Earlier, this outfit had assured the Supreme Court that the *kar sevaks* were a peaceful lot and would merely sing religious hymns at the Babri mosque. So they were allowed into it, but what happened there is a continuing story! What preparations were underway in other parts of the country can only be guessed at from what happened in Gujarat. The scale of these preparations came to light when the spark of communal violence was lit in Godhra.

One example is the Gujarat government's postings and transfers of police inspectors. As soon as Narendra Modi assumed power, inspectors were carefully chosen to man certain police stations. He also chose the commissioner of police. Muslim police officers were not given executive posts, but were transferred to administrative posts. The Bajrang Dal and the VHP, the militant wing of the RSS, had already spread their tentacles throughout the state. They had been working among the tribals and in fact used them effectively. They had armed their cadres, and we were told that meetings had been held regularly in various centres. Godhra has always had a communal history. This fact should have led the administration to effectively use its preventive detention laws. That course was not open because several ministers in Modi's cabinet were actually participating in the violence and/or monitoring the rampaging crowds they had organised. Ministers Ashok Bhat and Jadeja sat in the police control rooms at Gandhi Nagar and Ahmedabad and directed the mayhem. Revenue Minister Hiren Pandya, the victims say, led one of the mobs that attacked Muslims and their property. A former chief justice of the state emphatically confirmed the people's version by declaring that the Constitution and the laws stood suspended on February 28 and the following days. Narendra Modi, like the anomie man, is 'spiritually a sterile person, responsive only to himself and responsible to none'.⁴ He continues to be the Chief Minister.

⁴Ralph Dahrendorf, *Law and Order* (The Hamlyn Lectures), London: Stevens & Sons, 1985.

All the attacks in different parts of Gujarat commenced almost simultaneously. The killings also did not vary in pattern. Victims were killed, chopped into pieces and set on fire. A *tola* or a mob of ten thousand chased the Muslims till they were blocked by the police from fleeing to safety. The mob then fell upon them and killed them. A child victim told us that he saw ten members of his family being slaughtered. The manner in which Jaffri, Kausar and Geetha Ben were killed have by now become household stories in the country. The assailants wore head bands bearing the words 'Jai Siyaram'. The leaders of the *tola* sometimes asked their victims to repeat these words. Whether they did so or not, they were put to death. The mobs had converted Ram into a psychopathic, bloodthirsty god.

The violence that was enacted did not stop with just killing. There was also an effort to destroy the identity of those killed. Rich Muslims were killed too. The mobs had lists of the Muslims in each *mohalla*, and also a list of their properties. Two high court judges, one of them sitting, were attacked and their houses destroyed. They had to flee Judges' Colony and take shelter in a Muslim locality. The Supreme Court did not come to the rescue of these judges. Women were raped in the presence of a hysterical *tola*. A pregnant woman was killed and the fetus pulled out and quartered. Mob leaders identified mixed couples and killed both. Children were not spared. The properties and businesses of Muslims were systematically destroyed, including those where one of the partners was Muslim. A countless number of Muslim places of worship were destroyed. How does one explain this all-encompassing violence and destruction? Is it possible to conceive of madness without lucid intervals? Erich Fromm's analysis of human destructiveness to some extent answers the question. He says:

The degree of destructiveness is proportionate to the degree to which the unfolding of a person's capacities is blocked. If life's tendency to grow, to be lived, is thwarted, the energy thus blocked undergoes a process of change and is transformed into

life-destructive energy. Destruction is the outcome of unlivid life.⁵

We have here a case where the state has sponsored, directed and supported violence that killed more than a thousand. They have destroyed evidence of the number and identity of the persons killed. The party ruling at the center and the state are the same. This is a crime that has all the elements of genocide. It is not the first time genocide has occurred in India. The massacre of Sikhs organised by the leaders of the Congress party was by no means a riot. The killing of students belonging to the Sikh community in Bidar in September 1987 was also not a riot. These were the deliberate targeting of a particular religious group.

Talking about Hitler's 'final solution', genocide, in the words of Hannah Arendt,

is an attack on human diversity as such, that is upon a characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning.⁶

After the second world war, an International Covenant was brought into existence on 9 December 1948 to 'prevent and punish the crime of genocide.' It has a total of 19 articles, of which Articles 2 and 3 are important. Based on the German decimation of the Jews, Article 2 defines the crime of genocide thus:

Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to the members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

⁵Erich Fromm, *The Anatomy of Human Destructiveness*, New York: Holt, Reinhard and Winston, 1973.

⁶Hannah Arendt, *loc. cit.*, p. 269.

calculated to bring about its physical destruction in whole or in part;

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of one group to another group.

The Covenant has also enumerated those offences that are punishable, and they are:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

There is no law on genocide at present, nor if one were to exist could it have retrospective operation. I do believe, however, that the Covenant on Genocide has become part of customary law, as it does not conflict with any other existing law. Such an interpretation may help our National Human Rights Commission to conduct a detailed investigation into the Gujarat crimes. The facts narrated in its summary report on Gujarat add up to a *prima facie* accusation of genocide, but there is no detailed report. The commission has a present obligation to the people and a mandatory obligation to posterity to inquire into the violence in Gujarat and record its findings so that no political party and no government resorts in the future to such brutal practices. As part of this obligation, the National Human Rights Commission must prepare a 'Model Statute on Genocide', including provisions for taking effective preventive measures to protect religious, ethnic and linguistic minorities from being attacked. This action, in my view, is mandatory, because under the International Criminal Court, genocide and crimes against humanity are declared as offences. Political parties may not obey them, but the human rights commissions set up by various countries will have to enforce them, however limited their jurisdiction might be.

After the collapse of the socialist states of central and eastern Europe in 1989, violent ethnic conflicts erupted involving

minorities in Europe. By 1993, war in the former Yugoslavia—in Croatia, Bosnia and Serbia along with Vojvodina and Kosovo—had taken a toll of several thousand lives and two million displaced. The violence spread to the Caucasus and Moldavia and threatened to engulf the former Soviet Union. It was during this period that a resolution declaring the rights of persons belonging to national or ethnic, religious or linguistic minorities was passed by the UN General Assembly on 12 December 1992. Genocide is the forfeiture of minority rights. The protection of minorities is expansively spelt out by this resolution, all of which is implied in our Constitution.

The persons who met in the Constituent Assembly knew only too well that they had to deal with a conflict-ridden diversified society. So they provided for secularism as a value. A major but unarticulated premise of the Constitutional scheme has been secularism; the 42th Amendment made it explicit. As a concept, secularism came into existence during the early period of capitalism as a response to the misery inflicted on the poor by unregulated working conditions.⁷ Thus, secularism includes the objectives set out in the Preamble, the article pertaining to abolition of untouchability, bonded and child labour, and almost all of the Directive Principles of the Constitution. This is how the Supreme Court defined secularism in *S.R. Bommai*, in a decision made in the backdrop of the Ayodhya controversy. Now that all over the world ethnic claims and conflicts abound, there is a necessity for the world body to bring forth an international covenant on secularism in plural societies within states. The argument that secularism cannot be internalised and will therefore remain a problem appears to be wholly misconceived, as also our definition that it means 'all religions are equal'.

⁷Secularism can be defined as 'the doctrine that morality should be based solely in regard to the wellbeing of mankind in the present life, to the exclusion of all considerations drawn from belief in God or in a future state.' *The Shorter Oxford English Dictionary*, Third Edition, revised and edited by C.T. Onions, Oxford: Clarendon Press, 1970. Other definitions are used in socialist thought.

What should one do with the crimes committed in executing their plan of Hindutva by Narendra Modi and others? In this country, the courts are not geared to deal with large-scale social violence. Rather, the law and the courts have reduced the entire judicial process to a game where the major actors are not the accused or the complainants, but the lawyers who play for high stakes. The institution has been successfully subverted from its purpose and converted into a private enterprise. In registering the Gujarat crimes, the first information reports, which are basic and important documents, are flawed because the state's police departments are associates in the crime. How can one ensure a fair and independent investigation? Is it possible for the NHRC to get together a special investigation team under the Protection of Human Rights Act to file charge sheets in all the cases in Gujarat? The Muslims of Gujarat do not need charity, compassion or pity. The need justice in all the facets mentioned in the Preamble, and that is their right. Political justice by prosecuting the criminals is imperative, for that alone will ensure the Muslims' dignity and restore their faith in the system, by assuring them that their individual and collective rights as a minority will be protected.⁸

A formal compliance with the law, a routine engagement with justice will not keep justice alive. One of the articles in the Constitution says that justice—political, social and economic—should inform all the institutions of the state. Our campaign for a secular democracy should commence from this article.

⁸This chapter draws on my experiences as a Member of the Concerned Citizens' Tribunal that inquired into the carnage in Gujarat in 2002. The detailed report of the Tribunal has been released in two volumes as *Crimes Against Humanity: An Inquiry into the Carnage in Gujarat*, Concerned Citizens' Tribunal, 2002.

Scheduled Castes: Who's Afraid of the Law?

Gundumull is a village in the Kodangal taluk of the district of Mahaboobnagar in Andhra Pradesh. It is 147 kilometres from Hyderabad and 57 kilometres from Mahaboobnagar, which is the district headquarters. The segregation of Dalits is a fact of life; it is even incorporated in the policies of the state government. For instance, the acquisition of land to house the Dalits, which is a major social welfare activity of the state government, perpetuates this practice of segregation. Gundumull is no exception.

Gopala Reddy, the sarpanch of the village, is a big landholder and a member of the Congress (I). Within the four walls of an old dilapidated fort, about half a kilometre away from the main village of Gundumull, live the Dalits—Malas and Madigas. There are in the village about fifteen restaurants; all are owned by Telugus and one is run by a Muslim called Hashim. In all these eateries, a separate set of cups and dishes are kept for the Dalits. A Dalit wanting to buy a cup of coffee or tea has to pick up one of these cups himself and get his beverage poured into it. Later he has to wash the cup and put it back in its place.

On May 8, 1984, Solapurapu Venkataiah, Borsa Balappa and Borra Aashappa went to the village with two of their friends and asked for tea. When asked to use the cups kept separately, they refused and demanded that they be served tea like any of the caste Hindus. All the restaurants refused. The five men came to Hashim's place. He too refused, on the ground that Dalits eat pigs.

The young men then went straight to Kosgi police station, about 12 km away from the village, and lodged a written complaint against Hashim and five others, accusing them of practising untouchability. Under the Protection of Civil Rights Act, this is a cognisable and non-bailable offence.

The next day, the head constable and sub-inspector of Kosgi police station drove down to Gundumull on a motorcycle to make enquiries. In the restaurant run by Hashim, they seized the separate cups and other containers. They arrested six persons, including Hashim and his brother. They then proceeded to the panchayat office to prepare a *panchanama* of the seizure.

Immediately, 500 villagers surrounded the policemen and demanded that the Dalits' written complaint be handed over to them. Meanwhile, some other villagers deflated the tyres of the motorbike. Not having come with sufficient force, the two policemen returned to their station soon after, leaving behind those they had arrested. Incidentally, the sub-inspector himself belonged to a Scheduled Caste.

The following day, the deputy superintendent of police, Narayanpet, visited the village along with a tahsildar and the sub-inspector. They tried to persuade the villagers to give up the practice of untouchability, trying to conciliate instead of seeking to enforce the law. The villagers continued their defiance of the law and of authority. The officer finally managed the formal act of arresting the six persons named in the complaint and took them to the Kosgi police station, but they were released the same evening.

The Dalit youths had filed a complaint against the Muslim Hashim alone, though all 15 places had discriminated against

them. They must have hoped that the caste Hindus would not then oppose their complaint.

After these events, the sarpanch, Gopal Reddy, called a meeting of the villagers. There a decision was taken to boycott the Dalits of the village. The decision included refusal to supply groceries or any other services that are normally made available on payment of consideration. Even beedies and toddy were not to be sold to the Dalits. Persons committing breach of these decisions were to pay a penalty of Rs 500. Consequently, the Dalits had to trek 12 kilometres daily to Kosgi to buy the provisions they required.

The weekly *shandy* (market) is important for the villagers. Friday, May 11, was *shandy* day. The decision promulgated by the sarpanch was in full force. Five marriages were to take place in the Dalit *wada* or enclave. Cloth had been given to the village tailor to make blouses, shirts and trousers for the brides and grooms. The village goldsmith had been handed over gold and money to make *mangalasutras* for the brides. The tailor returned the uncut cloth and the goldsmith refused to make the jewellery. The banana leaves used to serve food to the guests were also not made available. The Dalits were not allowed to board the government-owned buses from the village bus stand. They were also told not to enter the village. The Dalits were afraid of violence to their person if they defied the boycott; as usual, they had no support from any quarter. The government at the district level had proved ineffective and too slow to enforce their legitimate rights under the provisions of the Protection of Civil Rights Act, 1955.

A few months earlier, a more violent incident had taken place in the same district in a village called Chinthagudem, near Balanagar. There, a landlord and his goons had attacked the Dalits and driven them away from the village in a bid to occupy their lands. These lands had been given away as *bhoodan* by the landlord's father more than two decades earlier. After a protracted struggle at the government level, official letters were issued to the Dalits, thus regularising their occupation of the lands. However, this time, it was the turn of all the Dalits of the

village to be held in custody. This was justified by the sub-inspector on the argument that the landlord and his men were in a minority and had therefore to be given protection!

Yet, long ago in 1947, Article 17 had been adopted as proposed by Dr. Ambedkar amidst shouts of 'Mahatma Gandhi ki jai'. Members of the Constituent Assembly representing the Scheduled Castes had welcomed this article as a historic measure that would put an end to a great social evil. Moreover, the Protection of Civil Rights Act has been on the statute books since 1955. Though the punishments prescribed by this act are not severe, very wide powers have been given to the state agencies to curb the practice of untouchability. To facilitate a just trial, a special rule of evidence was introduced whereby the normal legal presumption was reversed to assume, instead, that the accused had committed the offence of untouchability until the contrary has been proved. The government has even been empowered to impose a collective fine on villagers who act in concert.

Nevertheless, violence on Dalits is increasing, and there are protests against the policy of reservation. Fierce competition for greatly reduced opportunities has fostered the feeling among the upper castes that reservation and other facilities given to the lower castes are responsible for their own difficulties. This feeling is promoted, and is fully exploited, by many political parties. All economic issues arising between upper caste landlords and Dalit labourers, too, are converted by the landlords into 'caste issues', leaving them free to let loose violent repression, even as other oppressed sections, seeing it as a 'caste issue', fail to join hands with the oppressed Dalits.

18

Mr. President, the Game was Unequal

Things fall apart, the centre cannot hold,
Mere anarchy is loosed upon the world,

...
The best lack all conviction, while the worst
Are full of passionate intensity.

W.B. Yeats

Albert Camus makes a valid point when he says that no government has the moral right to invoke the absolute power of taking away the life of any of its citizens for the reason that it or its courts judges them to be evil. He points out that society precedes sovereignty to eliminate evil ones as if it represented virtue incarnate:

To assert, in any case, that a man must be cut off from society because he is absolutely evil amounts to saying that society is absolutely good, and no one in his right mind will believe this today.¹

¹Albert Camus, *Reflections on the Guillotine*.

Indian society today is far from free of violence, crime, and unjust and iniquitous practices. The government is run by persons who abuse the offices they hold. Several of them have criminal records. Given this background, have state or union legislatures any moral competence to pass laws that mandate a death sentence? Do our governments have the moral authority to impose and execute a death sentence?

It would be useful at this point to look at the record of governmental activity. Thousands of Sikhs have been slaughtered, many during the period when Sikh separatism was at its peak and even more after Indira Gandhi's assassination in 1984. How quickly were arrests made and how many charge-sheets have been filed since that time? How many convictions were secured and after how many years? What happened to the massacre of young Sikh students in Bidar, Karnataka, in 1987? Again, how many arrests were made and what is the nature of the convictions secured? In both these cases, our governments and politicians have sponsored and abetted mass murder. In Padirikuppam in the state of Andhra Pradesh, Dalits were mauled and their meagre livestock and property consigned to flames in 1982. How many arrests did the police make immediately after the incident? How many were prosecuted and with what result? In Karamchedu in 1985, around six Dalit men were killed and three women were raped in broad daylight. The Dalits organised themselves and undertook a militant campaign for justice. Because of their dogged pursuit of the prosecution, six persons were sentenced to life in prison. The sentence awarded was not death, because killing Dalits can never come within the definition of 'rarest of rare cases'. But neither did the Dalits ask for an enhancement of sentence. The culture of the oppressed has always been superior to that of the oppressor. Of all the atrocities perpetrated on Dalits, Tsunduru was the worst. People were killed, packed into gunny sacks and thrown into a canal. The culprits are all still at large, having twice stalled the proceedings successfully by

approaching the High Court.² None of these instances are less horrendous than the crime committed by Chalapathi and Vijayavardhana Rao, for which they were sentenced to death.

Criminal law has always been a political weapon in the hands of the state. Several members of our legislative bodies have criminal records: both white collar crime and the bloody variety. Our law enforcers have for long been responsible for the deaths of suspects in their custody. These suspects very often come from economically and socially deprived strata. There has never been any accountability for these deaths. They also kill people in 'encounters', a euphemism for extra-judicial killings. Their disregard for the law results in a conflation of impunity with immunity.

At a time when tolerance to this enveloping criminality in governance and administration has become a habit, it is untenable to insist on carrying out death sentences on the ground of legality, when all the fundamental assumptions, social and moral, underlying that legality have crumbled. The assumptions undergirding legality provide the reasons for respecting the law. These assumptions are found in the Preamble, the Directive Principles, and the Fundamental Duties enshrined in the Constitution. These should inform our understanding of governance and administration. The criterion of shared morality by which a deterrent sentence was imposed on Chalapathi and Vijayavardhan Rao has become a myth in the contemporary context. Can we with confidence assert that the crimes with which a former prime minister and his cabinet colleague are accused are less heinous than the one committed by the unfortunate two rotting in jail awaiting execution? Can we assert that this prime minister was acting according to constitutional norms and propriety when he attempted to bribe members of parliament to change the

²Twelve years after the massacre in Tsunduru at the end of 2003, the trial is yet to commence. Eight arrest warrants have been pending for 12 years and are yet to be executed.

course of a no-confidence motion to preserve himself in power? Take the case of a chief minister of Tamil Nadu who accumulated massive wealth at the expense of the state exchequer. Or that of another chief minister who appropriated several hundred crores of rupees that had been allotted to dairy programmes.³ It is possible to argue that according to law these acts would amount to cheating and, if misappropriation is added, would even be compoundable. Is there any moral or legal justification to subsume the homicidal activities of law-enforcing agencies under 'law and order'? It may become impossible to obey rules that are disregarded by those charged with their enforcement; at some point the reason to obey disappears. Fuller observes very pertinently that in such situations the citizen's predicament becomes difficult; where there is no total failure in any direction, there is a general and drastic deterioration in legality, as is witnessed today. There is no simple principle to test a citizen's obligation to obey the law, nor can we assert that implied in such a situation there is a right to engage in a general revolution. Fuller stresses the point with a stark illustration, which is certainly within the realm of possibility. Supposing Parliament were to pass a law that all its members are henceforth not subject to any laws and are authorised to rob, kill and rape without any legal penalty; and that any interference with such actions is a crime punishable by a mandatory death sentence; what advice should one give convicts? Should they claim that their right to equality has been violated!⁴ This telling illustration given by Fuller to demolish Dicey's theory of parliamentary sovereignty applies equally to assessing in the contemporary situation, the legitimacy of authority to sentence persons accused of capital offences.

Even under normal conditions, the death sentence can only

³The references here are to P.V. Narasimha Rao, Jayalalitha and Laloo Prasad Yadav in that order.

⁴Lon L. Fuller, *The Morality of Law*, New Haven and London: Yale University Press, 1967, p. 117.

be imposed in the rarest of rare cases. But where crime has become a part of parliamentary practice and a tool of administration as well, to maintain the rhetoric of community values and to argue in favour of the imperative necessity of the death sentence as a form of deterrence would be to endorse partisan positions and to affirm as valid a principle devoid of context. In our inexorable journey towards anomie, opportunities present themselves every now and then for introspection and reassessment of constitutional norms and values. Such an exercise should enable us to even reverse course. The sentence presently pending consideration for clemency is one such opportunity.⁵ In fact, the government's loss of credibility should be given out as the reason for grant of clemency. Otherwise their petition for clemency becomes an indictment, for they seem to be saying:

Mr. President,

Quite a few in the representative institutions of the country, including the parliament over which you preside, have committed almost all the crimes in the book, including acts similar to the one we stand convicted for, but they had the advantage of being part of the power structure. Though the law does not explicitly grant them immunity, in fact they enjoy total immunity. Coming from the deprived sections, these were our most accessible role models. Mr. President, Sir, the game was unequal between them and us.

⁵The death penalty awarded to Chalapathi and Vijayvardhan Rao was later commuted after persistent campaigning.

19

We, the Other People

The saga of 'the other people' has not ended in India, but fortunately, it has moved to the international arena. In our country, they are no longer part of 'We, the People', although serious efforts to bring these 'other people', who are rotting as non-persons in an irredeemable and degenerate caste-ridden society, to the status of persons, have been on since before Independence. The people of this subcontinent emerged from the status of subject to that of citizen on 15 August 1947. After the Constitution came into force, all of us attained political status with well-defined rights. The most articulate representative of the 'other people' wrote into the Constitution human values and gave it a human face. There was recognition in the Constitution that for the 'outcastes' to truly become part of the people, specific safeguards and positive measures were necessary. Caste was not abolished by the Constitution, but provisions were made to treat all castes on par with each other. Article 15(2) acknowledges the fact of discrimination and unequal treatment:

No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regards to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public

resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

But even after fifty years, the outcastes have remained 'others'. Constitutions and Gods have always been good. The problem has always been with the interpreters, both lay and the judicial. The Constitution makes untouchability an offence, but it persists. Bonded labour and child labour comes from the ranks of the Dalits. Both practices have been made criminal and abolished by the Constitution, and yet they persist. Offences against the human body enumerated in the penal code are not applicable if Dalits are the victims. The entire administrative, judicial and political systems are still operated by the upper castes despite large-scale movements against these hegemonic practices. A few Dalits are allowed to climb the social order as political leaders or as judges in the subordinate judiciary, even as high court judges. In education and government employment, the Constitution has introduced reservation as a way of giving equality to the Dalits. But some political parties at the centre have attacked reservation as the prime cause for diminishing merit and efficiency in the administration. By stoking anti-reservation sentiments, these parties brought down the government headed by V.P. Singh, which stood for reservation and secularism. The bogie of unending quotas, out of all proportion with reality, has created hatred for the Dalit community among the middle class intelligentsia. Meanwhile, the rights the Dalits have secured after prolonged litigation appear to offer them only a quasi-freedom and a teasing illusion that they are reaching the stage of genuine acceptability into the social order as equal members. It is more difficult to fight this teasing illusion than to fight downright subjugation and the status of non-person.

In the rural areas, violence against the Scheduled Castes continues unabated. Recognising this, Parliament enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, a law creating special offences which were made triable by special courts. One needs to look at the practices

which continue to exist and which Parliament has identified and inventoried as offences under its act. Very few people would have gone through the definition of 'atrocity' in the 1989 act; nor have many heard about or witnessed the indignities to which the Scheduled Castes and Scheduled Tribes are subjected continuously, and which were therefore categorised as atrocities. Dealing with the Dalits has always been a matter of charity or compassion and never a matter of reform or correction. Where social reformers have failed, a constitution may not succeed unless the words in it are transformed into deeds.

Section 3 of the 1989 act enumerates 22 categories of atrocities which it then makes punishable. Unless we read this list, we will not be in a position to understand why Ambedkar wanted to get out of the Hindu system, why the Dalits want to make the conduct of the upper castes an international issue by demanding that discrimination and violence against them should be equated to racism. The offences listed are firmly based on existing practices, so let us now examine them.

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,

- (i) forces a member of a Scheduled Caste or a Scheduled Tribe to drink or eat any inedible or obnoxious substance;
- (ii) acts with intent to cause injury, insult or annoyance to any member of a Scheduled Caste or a Scheduled Tribe by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighbourhood;
- (iii) forcibly removes clothes from the person of a member of a Scheduled Caste or a Scheduled Tribe or parades him naked or with painted face or body or commits any similar act which is derogatory to human dignity;
- (iv) wrongfully occupies or cultivates any land owned by, or allotted to, or notified by any competent authority to be allotted to, a member of a Scheduled Caste or a Scheduled Tribe, or gets the land allotted to him transferred;
- (v) wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes

- with the enjoyment of his rights over any land, premises or water;
- (vi) compels or entices a member of a Scheduled Caste or a Scheduled Tribe to do 'begging' or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government;
 - (vii) forces or intimidates a member of a Scheduled Caste or a Schedule Tribe not to vote, or to vote for a particular candidate, or to vote in a manner other than that provided by law;
 - (viii) institutes false, malicious or vexatious suits or criminal or other legal proceedings against a member of a Scheduled Caste or a Scheduled Tribe;
 - (ix) gives any false or frivolous information to any public servant and thereby causes such public servant to use his lawful power to the injury or annoyance of a member of a Scheduled Caste or a Scheduled Tribe;
 - (x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;
 - (xi) assaults or uses force on any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;
 - (xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually, to which she would not have otherwise agreed;
 - (xiii) corrupts or fouls the water of any spring, reservoir or any other source ordinarily used by members of the Scheduled Castes or a Scheduled Tribes so as to render it less fit for the purpose for which it is ordinarily used;
 - (xiv) denies a member of a Scheduled Caste or a Scheduled Tribe any customary right of passage to a place of public resort or obstructs such member so as to prevent him from using or having access to a place of public resort to which other members of the public or any section thereof have a right to use or access;

- (xv) forces or causes a member of a Scheduled Caste or a Scheduled Tribe to leave his house, village, or other place of residence,
- shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.
- (2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,
- (i) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of a Scheduled Caste or Scheduled Tribe to be convicted of an offence which is capital by the law [then] in force shall be punished with imprisonment for life and with fine; and if an innocent member of a Scheduled Caste or a Scheduled Tribe be convicted and executed in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence, shall be punished with death;
 - (ii) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of an offence which is not capital but punishable with imprisonment for a term of seven years or upwards, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years or upwards and with fine;
 - (iii) commits mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause damage to any property belonging to a member of a Scheduled Caste or a Scheduled Tribe, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;
 - (iv) commits mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause destruction of any building which is

ordinarily used as a place of worship or as a place for human dwelling or as a place for custody of the property of a member of a Scheduled Caste or a Scheduled Tribe, shall be punishable with imprisonment for life and with fine;

- (v) commits any offence under the Indian Penal Code (Section 45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;
- (vi) knowingly or having reason to believe that an offence has been committed under this Chapter, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall be punishable with the punishment provided for that offence; or
- (vii) being a public servant, commits any offence under this section, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to the punishment provided for that offence.

These atrocities recognised by Parliament are against persons who are born into the Scheduled Castes and Scheduled Tribes. This is the first time that 'atrocity' has been used and defined as a legal category.

This law was intended to afford speedy justice, the speed being meant to act as a deterrent. It has proved easy, however, to evade and thus defeat the law without any necessity for open defiance. The assault on Dalits is legitimised by the acquittal of assailants. That is, interpretive exercises by the courts have helped defeat this special legislation. Offences under the act were made triable by a special court whose presiding officer was to be a sessions judge. Special courts were used for the purpose of a

speedy trial, an aspect of Article 21 of the Constitution. This clause was interpreted by the apex court to mean that, like all other criminal offences, those against Dalits should pass through committal proceedings before a magistrate. The 1989 enactment now remains only in the statute book, and it will slowly fall into disuse. All this has been achieved without the help of loaded juries as in the U.S. Meanwhile, our laws and constitutional provisions creating special presidential commissions are showcased to international bodies through obliging attorney generals to demonstrate that the situation of the Dalit cannot be equated with race.

In this country, where everybody is born into a caste, getting rid of caste disability has not been possible. Even if the upper caste person converts to another religion, he would not give up the unequal status he enjoys over a lower caste. We are dealing with hereditary untouchability, as Ambedkar called it. Although the Dalits do not bear the characteristics of a separate race, Articles 341 and 366, which define Scheduled Castes, use the words caste and race in juxtaposition, making either or both of them eligible for inclusion in the list of Scheduled Castes. Dalit identity is assured by caste practices. Their habitats are quarantined to ensure that proximity does not pollute the upper castes. This is just a way to inform them of their subservient status. This hegemonic culture is there for everybody to see. Legal and sociological explanations of caste and race have no relevance to this debate. The emphasis should be on discrimination and related intolerances.

In fact, Ambedkar had demanded that the castes included in the Scheduled Castes order of 1936 be declared a minority. He pointed out that this group had all the characteristics of a minority. He was anxious to secure minority status, as this would have brought the Dalits out of the Hindu fold and made them a distinct, identifiable group.

James Baldwin, the well-known African-American writer, describes the condition of the Blacks in terms that could be used for the untouchables in India:

You were born where you were born and faced a future that you faced because you were black and for no other reason. The limits of your ambition were, thus, expected to be set forever. You were born into a society which spelt out with brutal clarity, in as many ways as possible, that you were a worthless human being. You were not expected to aspire to excellence; you were expected to make peace with mediocrity.¹

This is exactly what the caste system tells the untouchable. The slaves were not transplanted to the United States to give them democracy. In India, despite the grandiloquent declarations in the Constitution, birth and descent are the main criteria. The identification of this targeted collective of 160 million is not difficult; nor is it the issue. Racial discrimination targets the blacks for trying to rise above the subservient status allotted to them. They and the Dalits are needed for hard labour in the fields and for menial chores. They should be, to better function in their allotted status, quarantined and rendered invisible. Every society has such collectives that are targeted for discrimination and violence. The perpetuation of such a collective can only be by descent. The principle of power is at issue and not some sociological definition or description of caste which does not tally with the meaning of race. 160 million Dalits are demanding that untouchability and other forms of discrimination based on descent, as practiced in India, be equated with or included in racial discrimination and other related intolerances. The Indian government's arguments based on sovereignty to bar outside scrutiny of obnoxious and obscurantist practices violating human rights and dignity are irrational. Identification has never been an obstacle to the use of discriminatory practices and violence on Dalits. You can always ask them to wear badges, as Hitler's Germany did to the Jews and as the Taliban did to the Hindus living in Afghanistan.

¹James Baldwin, 'Letter to my nephew on the one-hundredth anniversary of the emancipation', cf. John Henrik Clarke, 'The Alienation of James Baldwin', in Clarke ed., *Harlem, U.S.A.*, Berlin: Seven Seas Publishers, 1976, p. 286.

After the Universal Declaration of Human Rights, it is necessary to explore the violation of human rights in its various specific forms, as occurring in various societies, which the member states are unable or unwilling to eradicate on account of the power equations within their nations. They are not willing to have them highlighted as wrongs by the international community. The caste system in India, its hereditary untouchability and the irrational and violent conduct these practices engender should be recognised as crimes against humanity under the Rome statute of the International Criminal Court.

20

Competent but Uncommitted Judges

Judicial appointments are in the news once again. The squabbles for judgeship closely resemble the infighting within a political party for ministerial positions. This state of affairs appears to be the logical consequence of the way the high courts make judicial appointments. An institution which day in and day out delivers judgments striking down the executive's arbitrary actions is yet to formulate a sane policy either with regard to appointments to the subordinate judiciary or in the matter of recommending persons for elevation. In the initial stages, efforts were made to make sure competent advocates got to serve as judges, and these efforts were largely successful. Ignoring the guidelines provided by the Constitution, appointments to the judiciary have always been regarded as the exclusive concern of the Chief Minister and the Chief Justice at the state level. Professional bodies, whether it be the bar association or the state bar council, were mute spectators. They did not think it was their duty to interfere critically and effectively in staffing the courts.

A Domestic Problem

Professional leaders did not lift their gaze beyond the business values of the day. Way back in 1922, William O'Douglas discovered that legal practice required 'predatory qualities'.¹ The aggressive competition within the profession never permitted practitioners to pay attention to the larger values propounded by the Constitution, which, to the practitioners, is merely a money-spinning document. This attitude has led to total indifference to the quality of justice. Neither professional bodies nor the high courts have seemed alive to the fact that the courts are public institutions which are socially accountable. That the judiciary is the fulcrum of a democratic set-up was totally lost sight of.

The members of the bar have always felt that criticising the functioning of the judiciary and the appointment of judges is an internal matter which should not be discussed publicly. Implied in this is the belief that the justice system is created to provide livelihood for the professional community. Thus, the profession has never functioned in a socially relevant and responsible manner. Starting in 1967, governments have tried to resurrect their plummeting socialist pretensions by means of measures that became hotly contended in the courts. The debates and decisions in and by the court were put out as confrontations between Parliament and the judiciary. The ascendancy of populist politics made a scapegoat of the courts. The reaction was more 'committed' judges.

But a 'committed' judiciary has dangerous propensities. While it might produce a few committed judges, it has immense possibilities of producing a crop of careerists. There have always been judges holding different political views; some even have strong political loyalties. But this did not lead to the situation we are witnessing now, when the accent is not even on competence. If in the process the litigant public is blessed with a competent judge it is by the sheerest of accidents. Hereafter,

¹William O'Douglas, *From Marshall to Mukherjea: Studies in American and Indian Constitutional Law*, Calcutta: Eastern Law House Ltd., 1956.

the judiciary will be a mere formality, the continuous functioning of which will earn our system of government the title of democracy. The present system of appointments to the judiciary, without any emphasis on efficiency and competence, will only encourage sycophants and manipulators, whose only merit would be access to the ruling power structure. Securing the concurrence of a chief justice will not be a great problem, for he too has been nurtured and pruned in this weird and self-destructive political culture. For the majority of young men and women who have joined the profession, such a trend has disastrous consequences. It leaves them without any idealism or a higher sense of purpose. Professional performance under such conditions will resemble a comic opera.

It should be remembered that the mere presence of a nominally functioning institution does not by itself enhance its democratic content. Staffing the courts with competent persons committed at least to constitutional values and with a broad vision of what that commitment implies is an urgent necessity. After having opened the floodgates of accessibility by way of public interest litigation, and with increasing judicial activism, the present system of appointments may reduce social and economic justice to a farce.

Central Role

A functioning institution is rooted in the life of the community and has to be tested constantly by the needs of that community. The results of its working must be open to enquiry. The staffing pattern of our judicial system is incapable of meeting the challenges that come frequently before the courts. It is the men inside who make or unmake the institution. This has been the anguish expressed by jurists who regard the courts as central to an effective democratic polity. In his 'Confronting Injustice', E. Cahn says:

By insisting on the personal element in all processes of decision, fact-scepticism underscores our state of need. It admonishes that the best and wisest propositions of social ethics, politics and law

will not preserve us if the men who apply them to concrete transactions are themselves philistine and mediocre, even affably mediocre. Nothing earthly can preserve us without sharply improved human qualities of leadership and citizenship.

Our system of justice is moth-eaten. It is being destroyed both from within and by the government. Public criticism in the present situation is not only in the public interest but also a social obligation. It would not amount to interference with the administration of justice to point out that our judiciary's method of functioning is totally out of tune with the philosophy and imperative premise of the Constitution.

Karl Llewellyn's prescription for an efficient judiciary is instructive and has contemporary relevance. The absolute bare bones for viable appellate judicial work is first four-fold and then three-fold:

1. Uprightness;
2. A modicum of judgment (neither wild men nor fools must dominate the bench);
3. A modicum of reckonability of the result; and
4. That reckonability must in some material degree transcend the persons of the personnel.

That is the four-fold aspect, one of objective substance. The three-fold aspect is one of subjective attitudes. Not only

1. must these things be there and at work, to the knowledge and in the feelings of the judges, but
2. the general public and, perhaps especially, all but unreasonable litigants must *feel* their presence, and
3. the bar must *know* them to be there.²

The present crisis has afflicted in the first instance the bar, but it has at least for a decade, perhaps for more than two, been seeping through the bar into the much wider public, which lacks

²Karl Llewellyn, 'The Common Law Tradition' (1960) in Lord Lloyd of Hampstead, *Introduction to Jurisprudence*, Fourth Edition, London: Stevens & Sons, 1979, p. 522.

the means for constructive or remedial thinking and so is helpless, even a little pitiable.

Crisis Within

The crisis to which Llewelyn refers is present today, as also the helplessness. The fact that lok adalats are so vociferously advocated is itself an indication of the crisis within the legal system. We no longer hear about the dispensation of justice. We hear instead of the huge pendency. The workman who has lost his job, the public servant who is dismissed or who was denied his promotion, the poor and the landless who reach the courts through public interest lawyering, the men who are detained preventively or have been held in illegal custody are all people in need of quick disposal. Traditional litigants do not go to the courts to have their cases settled.

In fact, in almost all litigations, one side instructs its counsel to prolong the matter. The rampant deal-making at the bar caters to the needs of clients but subverts the purpose of the courts. While 'disposal jurisprudence' may not even touch the fringe of the problem, it has succeeded in introducing a productivity ethic into the administration of justice. We find courts giving priority to 'batch cases'—those that raise the same issues—mainly with a view to attain the disposal target. Theoretically, the bar assumes both transient and transcendent responsibilities—to serve clients and to serve society. This is an irresolvable contradiction, so the transcendent responsibilities are confined to seminars and lawyers' conferences. The transient responsibilities, servicing one's client's concerns, go on undeterred. The present method of staffing the courts is not suited to meet the challenge of the transcendent responsibilities.

21

What is Wrong with Judicial Activism?

'It has long...been my opinion, and I have never shrunk from its expression...that the germ of dissolution of our federal government is in the Constitution of the federal judiciary; an irresponsible body (for impeachment is scarcely a scarecrow), working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all shall be consolidated into one.'

(Jefferson, in a letter to a friend dated 18 August 1821)

The Republicans, through corruption, have lost the confidence of the country, the Democrats have not regained it. Meanwhile, a new breed of judges went to the Bench.

(Wallace Mendelson)

The Preamble to the Constitution assigns to all the institutions created by it an obligation to play a transformative role. This and the Directive Principles of State Policy set down in Part IV of the Constitution elaborate the quality, character and direction of the tasks assigned to the institutions. The Constitution is qualitatively different from the Government of India Act, 1935,

which was passed by the Imperial Legislature. No doubt we have incorporated into our Constitution many of the latter's provisions, but this does not detract from the fact that the Constitution was hammered out by a constituent assembly of representatives. Considering the circumstances leading to Independence and the termination of foreign rule, the leaders who spearheaded the struggle managed to structure as representative a body as possible. They opted for Western liberal values, which they then used effectively against the British and Westminster models of governance. In our country, Parliament is not paramount; the limitations imposed by the Constitution are. These limitations assign a supervisory role to the judiciary. To play this role the judiciary had to be assured of independence and freedom from executive interference. In opting for secularism and an independent judiciary while rejecting the presidential system, the mandate was clear: democracy is intrinsically and fundamentally valuable; apart from its instrumental value, history informs us that if a humane society is our goal, democracy has to be a way of life and not merely a system of governance. When Nehru proclaimed our 'tryst with destiny' on August 15, 1947, he was referring to the constitutional promise which was then on the anvil.

The progress towards this constitutional promise required that the three branches of the government act in unison rather than as adversaries to ensure inter-institutional equality and discipline. The claim for institutional equality and whether the courts could discipline the executive became a matter of fierce debate in the late 1960s and early 1970s, and it is again being revived with less justification. The debate assumed an adversarial character, where the executive with a parliamentary majority overtly tried to subordinate the judiciary with some success. The entire debate proceeded on the assumption that the parliament in our country, which has a written constitution, is a direct descendant of the British parliament, with sovereign powers even to legislate validly that all babies with blue eyes be thrown into the nearest river. And therefore it was expected that the courts should play a subordinate role. In this way, the executive has been continuing

the colonial tradition of arbitrariness, protected by statutory immunities and a total absence of transparency. But the judiciary too has continued colonial traditions, as can be illustrated by what happened to A.K. Gopalan on 15 August 1950. When he was not released as expected, he organised an Independence Day meeting within the jail premises, but the very next day he was produced before a magistrate on charges of sedition! All the judges who ruled on Gopalan's case, except Das, were members of the Federal Court. Das was the only judge on this panel to interpret personal liberty broadly. He pointed out that Article 19 includes several important attributes of personal liberty as independent rights, and that Article 21 had to be understood as including within its meaning 'all the varieties of rights which go to make up the personal liberties of man.' He pointed out that the merit of our Constitution was that it does not attempt to enumerate exhaustively all the personal rights. Rather, it uses the compendious expression 'personal liberty' in Article 21 and thereby protects all of them. Despite this broad formulation, he concurred with the majority who shackled liberty with their interpretive skill. All that was needed to justify incarceration was the existence of an enacted law which prescribed the procedure for detention. Defining Article 22 as a self-contained code ensured the incarceration of liberty during normal times as a valid exercise of power; in times of crisis there was not even the need for extraordinary provisions.¹ While the court denied liberty to Gopalan, it recognised in *Kameshwari Singh*² the right to property of a zamindar under a constitutional scheme, thus honouring the disposition of predatory acquisitions that had been made legitimate by the colonial system. This was the inauguration of the courts in independent India. They continued the colonial system of restricting personal liberty by defining it narrowly, and by honouring colonial legacies in favour of persons who had no role to play in the freedom struggle.

¹For an analysis of *Gopalan*, see Chapter 4.

²*State of Bihar v. Kameswar Singh*, AIR 1952 SC 252; *Raghbir Singh v. Court of Wards, Ajmer*, AIR 1953 SC 373.

The doctrines propounded by the majority in *Gopalan* had the effect of diminishing the expansiveness of freedom of property, which until *Kesavananda*³ was a fundamental right. Said Justice Subba Rao in *Kochunni*:

Had the question been *res integra*, some of us would have been inclined to agree with the dissenting view expressed by Justice Fazl Ali, but we are bound by the majority.⁴

This was the beginning of the kind of judicial activism which ultimately led to a confrontation with the executive. There is a qualitative difference between dissent in favour of property and one in favour of liberty. The latter has a romantic aura about it and will get wide social approval. In *Kharak Singh*,⁵ a case dealing with personal liberty, Justice Subba Rao disagreed with the view that Articles 21 and 22 were self-contained codes, and that one whose liberty had been restricted could not plead violation of the rights guaranteed under Article 19. In *Prabhakar Pandurang*,⁶ a person's right to publish his book written in prison was declared a part of the right to personal liberty. Thus, the ground was prepared for a major onslaught on *Gopalan*.

When Subba Rao assumed the leadership of the court, the economic and political climate of the country was depressing. Apart from the China war in 1962, the planning process had failed, with all the attendant consequences of high governmental investment and expenditure and no corresponding return in real terms. Nehru's death precipitated a crisis. In the elections of 1967, the Congress lost power in five states. There was all-round degeneration in the political system and governance. The judges, aware of what was going on in the country, felt that they should call a halt to what they perceived as dangerous trends. The courts reacted then as now, but the issues were different and the judges

too were of a higher stature and better equipped. When in *Golak Nath*⁷ the issue was raised regarding the validity of the 17th Constitutional Amendment, the court, by a slender majority, held that Parliament could not abridge or take away fundamental rights. Without taking on vested interests or reacting in a politically correct manner, Indira Gandhi painted the court as the principal adversary of her radical politics. The *Golak Nath* judgement negated the sweep of Article 368 to amend the provisions contained in Part III of the Constitution. This was the first major step taken by the Supreme Court to contain the erosion of the constitutional scheme. The court was apprehensive that the erosion of the right to property may be practised against other fundamental rights. 'Small inroads lead to larger ones,' said Justice Hidayatullah. This was in February 1967.

Indira Gandhi launched a campaign against the judicial system, calling it a major obstacle to progress towards socialism. There were quite a few intellectuals—academics, lawyers and judges—who emphatically criticised the Supreme Court's decision in *Golak Nath* and generally regarded the court as the principal class enemy. They discovered the Directive Principles of State Policy contained in Part IV of the Constitution and the fundamental character of the obligations set out in this chapter. They talked about 'door delivery of justice' and about the need for 'barefoot lawyers'. The court, having decided on the political character the Indian state should possess, went on to subject its economic policies to judicial review in the bank nationalisation case.⁸ Commencing with *Gopalan*, a long line of cases held that each article in Part III guaranteed a distinct fundamental right and therefore formed a self-contained code. Any infringement which fell directly within the ambit of one guaranteed right could not be tested for validity with reference to other rights. The court, overruling *Gopalan*, declared that even if the law satisfied the requirements of Article 31(2), it had to satisfy those of Article 19(1)(f) too. The court's attitude to the amending

³*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

⁴*Kochunni v. State of Madras*, AIR 1960 SC 1080.

⁵*Kharak Singh v. State of U.P.*, AIR 1969 SC 1295.

⁶*State of Maharashtra v. Prabhakar Pandurang Sangegiri*, AIR 1966

SC 424.

⁷*Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

⁸*R.C. Cooper v. Union of India*, AIR 1978 SC 597.

power of the Constitution and to bank nationalisation became campaign issues during the general elections of 1971. Victory in those elections, success in the Indo-Pakistan war which brought Bangladesh into existence, and victory in state elections made the executive strong, with the result that all these judgements were set aside by the 24th, 25th and 26th Amendments to the Constitution.

The Constitution (Twenty-ninth Amendment) Act, which came into force on June 9, 1972, lodged the Kerala Land Reforms Amendment Act in the Ninth Schedule of the Constitution. Both acts were challenged in *Kesavananda Bharati*. The judgement was delivered on April 24, 1973. The debate, a major one, encompassed the type of polity we were committed to, the power of Parliament to abrogate fundamental rights wholly at will, the relationship between Directive Principles and Fundamental Rights, the basic structure of the Constitution, particularly with reference to the extent to which amendments can be introduced, whether our federal democratic republican structure can be changed, and other similar issues, with a view to containing the aggrandisement of power by the executive. Under Article 31C, around ten rights enumerated in Part III can be abrogated merely by declaring that the proposed law is in furtherance of the Directives contained in Articles 39(b) or (c). While seven out of these ten have nothing to do with property, these changes were brought about with the object of abolishing property. The principle of basic structure emerged from this judicial debate. Although many were sceptical about the court's role, the events which followed immediately thereafter justified to a large extent its strident activism during that period.

The court is not equipped to alter the course of history. Nor is it meant to. In periods of political turbulence, the responses of the judiciary and the executive (invariably backed by the legislature) may be at variance, even to the extent of being diametrically opposite. Political leadership, to win credibility, should seem to have full authority, untrammelled if possible. Legality is a constraint on the exercise of power, and judicial review is a road-block. When the court is faced with the

abrogation of the constitutional system with a view to establishing an authoritarian regime, the judges of the court are left with very few options. They are: (a) save the institutional values and thus make the executive pause, as happened in the case of Nixon; (b) face impeachment or be coerced to resign or resign voluntarily and transfer the responsibility to others; (c) simply accept reality and survive. In our case, supercession has compelled senior judges to resign, while the rest have accepted this without even a protest at the shabby treatment.

The concept of basic structure is an attempt to save our constitutional value system. I would not brand all the judges who sat in the court during that period arch-reactionaries. There must have been among them individuals who were committed to preserving liberal values. Supercession was an act of reprisal against the judiciary. The setting aside of Mrs. Gandhi's election, the passing of the Election Laws Amendment Act, 1975, and the Constitution (Thirty-ninth Amendment) Act, 1975, were brought again before the court, this time after the proclamation of a state of emergency. The amendments introduced to the election law and the Representation of the People Act were lodged in the Ninth Schedule. Article 329A was designed to allow Mrs. Gandhi's election appeal by legislative exercise and the abuse of constituent power. Justice Matthew, who like the Biblical Jacob grappled all night with the theory of implied limitations on amending power, had to wait till Indira Gandhi's election appeal to realise the value of the doctrine. And yet, these engagements with authoritarian powers did not really strengthen the judiciary. When personal liberty was forfeited without any procedure or valid reason, the majority abjectly surrendered to the executive by validating an obnoxious piece of legislation which barred judicial review in all such cases.

The policies of the government of the day are forever being equated with national interests, an equation that ignores or overrides every constitutional principle assuring limited government. Judicial review is the means of enforcing limitations on governments. The presence of a strong political process is a great disciplining force for governments. The court, in the

meanwhile, is expected to promote faith in the rule of law broadly defined, and to act in furtherance of the objectives set out in the Constitution.

It was during the Emergency that the courts and the people realised that representative institutions can become engines of tyranny. The last two decades of the twentieth century have shown us that criminals operate our political institutions. The way they have plundered renders all the 'marauding hordes of Hindustan' insignificant in comparison. In the next phase, judicial activists had to take on crime, as all other institutions had failed to play their assigned role. This time no politics was involved. There was no ideological confrontation. The subject matter was un-investigated crimes committed by elected representatives occupying the positions of cabinet minister or chief minister. These are white-collar crimes, but the size and magnitude of appropriation makes the offence qualitatively different from the wrongful gain or wrongful loss of Macaulay's code.⁹ The persons responsible for these crimes do not suffer any civil or political disabilities. The legal system has yet again proved inadequate to deal with these large-scale plunders. The media generally subsumes them under the expression 'scam'. There have also been allegations of Members of Parliament being bribed to defeat no-confidence motions. Corrupting or attempting to corrupt the parliamentary process is no offence. Parliament passes stringent laws to curb terrorist activity, but when political offences surface there is no such legislative response, not even a private member's bill. While such bills may come to nothing, they do have the merit of registering a member's protest.

Over the last fifteen years or so, public interest litigations have amassed information on abuse of political power and aggrandisement while in office. This information has been placed before the courts, the only functioning institution under our Constitution. Till that point, a public interest litigation

⁹Macaulay did not define plunder as an offence, because that is a coloniser's prerogative.

(PIL) was a form of representative action for social justice for the poor, the marginalised and the deprived classes. They also spanned human rights violations and environmental issues. The government did not protest. It was only when PILs started confronting politicians and their conduct while holding office that we hear protests against them. The court cannot indulge in selective legality and therefore must initiate proceedings. Any legal system can have respect and inspire adherence only if it appears even-handed in its application. This does not, however, mean that the courts can browbeat the executive with the threat of imposing President's Rule, or arrest people under one or the other preventive detention law!

An activist attitude within a national institution is possible when its leading members are willing to play an instrumental role in realising the objectives contained in the Constitution; when there is a willingness to assume that the Indian Constitution heralds a new beginning and a decisive break from the British colonial system in all respects, including the legal and administrative framework; when a persistent effort is made to fashion new conceptual tools or to redefine concepts to work out their constitutional purpose. But then, as Dahrendorf, reiterating Eschenburg's advice to politicians, argues:

All this would end up with the search for one virtue which has much to do with institutions, the virtue of authority...But they have to be filled by personal authority, which is a delicate balance of qualities of leadership, institutional sense and contact with those who are affected by decisions. 'Only where these contacts exist but leadership remains in the lead, where it knows what needs to be done and works convincingly for its solutions can one speak of authority in the democratic sense.'¹⁰

It is in its activist role that the judiciary has been deficient. Rather, it has proceeded on the path of aggrandisement of power. It has expanded and sharpened its contempt jurisdiction,

¹⁰Ralph Dahrendorf, 'Society and Liberty', in *Law and Order* (The Hamlyn Lectures), London: Stevens & Sons, 1985, p. 151.

and has by an interpretive device wrested the appointment of judges from the executive without introducing an objective method of selection. In fact, its use of PILs to appropriate to itself the power of appointing judges can never be called legitimate judicial activism. The court has never attempted to democratise its procedures, proceedings and discourse, and has not yet made a clean break from its colonial legacy. As presently constituted, the courts are an amalgam of persons, some of undoubted merit and competence, who adjudicate on the basis of *ad hoc* consensus and not on a shared vision.

22

What Shall We Do with Our Judiciary?

Our politicians are convinced that public property exists to be appropriated and that public appointments have been created only to be distributed as patronage to kith and kin, the near and dear, and to hangers-on and sycophants. Once a person is elected in this country, his or her heirs will also get elected as successors to the office. In non-elective positions too, although this principle of hereditary succession obtains, it may not be as visible as in the case of politicians. This practice corrodes. Further, persons appointed to an office help favourites to plunder at will the institutions they preside over. The honest within these institutions are not willing to stand up against these trends for the simple reason that they do not want to jeopardise their careers. I am laying stress on the obvious only to point out that very often we transfer our inadequacies onto the system and lull ourselves into believing that a mere change in form will remedy the defects.

If we go back to the Constituent Assembly debates, we will find that the primary anxiety was to secure an *independent judiciary*. No modification we suggest should jettison this very important requirement. We fought Indira Gandhi because she

wanted a committed judiciary. Today we have a judiciary peopled by mediocrities; if there are any exceptions it can only be due to oversight. They are not 'hindered' by any vision or world view. When Nehru declared that India had made a tryst with destiny, he was dreaming about the emergence of a new democratic order in the hope that it 'would exhibit a new kind of political community composed in large part of moral aristocrats.' Talking about American society, Cahn points out that what was originally a charming vision had become a matter of arresting urgency. He states:

It is no longer merely desirable, it is virtually indispensable that American society produce a multitude of superhuman beings, men and women of understanding, judgement and moral rectitude, of expansive horizons and humane sensibilities who can feel the full pathos of individual misfortunes and predicaments, yet venture to act on occasion as though the world were plastic.¹

Pointing out the importance of the personal requirement in all decision-making processes, he is of the view that the

best and wisest propositions of social ethics, politics and law will not preserve us if the men who apply them to concrete transactions are themselves Philistines and mediocrities, even affable mediocrities. Nothing earthly can preserve us without sharply improved human qualities of leadership and citizenship.²

In order to prevent/eliminate political influence even at the stage of initial appointment and ensure the presence of merit and independence in the judiciary, the Supreme Court opted for the primacy of the Chief Justice of India along with two of his senior judges in the matter of appointment of judges to the their body, and the Chief Justice of India in consultation with, if necessary, one or two senior judges of the concerned High Court with reference to appointments to the latter.³ In the process, they

¹E. Cahn, 'Confronting Injustice' (1967), in Lord Lloyd of Hampstead, *Introduction to Jurisprudence*, London: Stevens & Sons, 1979, p. 501.

²E. Cahn, *loc. cit.*

³S.C. *Advocates on Record Association*, AIR 1994 SC 268.

laid down the entire procedure to be followed, up to the issue of the warrant of appointment. The procedure set down by them is based on the word 'consult' as used in Article 142. They legislated their hegemony into these constitutional provisions by the device of interpretation, without improving the quality of the judiciary.

The three leading judges of the apex court have appropriated the power of appointment to themselves on the questionable assumption that they are 'pure and virtuous'. What does not seem to enter into consideration is that independence, whether of the judiciary or of the profession as a whole, is not a virtue in itself. While Indira Gandhi destroyed the institution on the ground that only politically committed persons could qualify, we have swung to the other extreme and produced an institution which has become reckless and accountable to none. The way it has expanded its power base is reflected in the judgements of the court on its contempt jurisdiction and the magnitude of its power under Article 142.

By interpreting these articles, the institution has unabashedly appropriated and exercised arbitrary powers. Raising one's voice while arguing has been interpreted as contempt. This enforces the obsequious conduct of a bygone era quite successfully even today. Having been theoretically reborn after the coming into force of the Constitution, the court unfortunately traces its legacy back to the British by interpreting the Constitution as a continuation of the Royal Charter, thus making a mockery of the struggle for independence that gave birth to the Constitution and the value system which it engenders. Even today, the power of the Chief Justice is traced to Section 108(2) of the Government of India Act, 1915, read with Section 223 of the Government of India Act, 1935, thus conferring quite arbitrary powers to the Chief Justice in the matter of allotting cases and work to various judges constituting the High Courts. Obviously, this overriding power was given to the Chief Justice by the 1915 act because the emerging political movements and struggles meant there would be many arrests and prosecutions in the

courts, and in such circumstances the power to allot cases was critical to the British.

This recounting of history is necessary for an informed debate on the need to democratise and overhaul the judiciary. There is nothing democratic about the institution as it is now constituted, either in the manner in which it is staffed or in its functioning and the discourse within the courts. An *ad hoc* approach to these matters may not lead to any improvement. Nor is it likely to reduce corruption, which only bothers elite lawyers, because a corrupt judge at that level will erode their income, not that of the majority in the profession. The existence of corruption has never intimidated the profession as a whole. In fact, lawyers have used corruption to secure benefits for their clients. As long as this continues, corruption cannot be eliminated.

Justice V. Ramaswamy sat on the bench despite an enquiry against him. There were advocates who supported and championed his cause. In fact, the impeachment proceedings turned out to be partisan and politically contentious, so it failed. The Ramaswamy affair was beset with litigiousness, which has been the hallmark of our subverted adversarial system. Even before the impeachment proceedings against him failed, he secured for judges a right to judicial review of the very parliamentary process by which impeachment might succeed.⁴ This power to review was traced to the constitutional scheme.⁴ It was described as a blend of the political and judicial processes. Thus was born a neo-Brahminical class.

While the hearings of the U.S. Senate's Judicial Committee on the appointment of Judge Bork were characterised as a national seminar on how to judge judges, the Supreme Court's views on impeachment proceedings in *Sarojini Ramaswamy* is a dissertation on how to judge Parliament judging judges. In view of these decisions, any suggested constitutional amendment is subject to judicial review, as also any action initiated under it. In short, how does one shake up the Hobbesian absolutism that

is presiding over the judiciary? It is comparatively easier to unseat the political executive. The rule of law is incompatible with absolutism in the judiciary. It may not be sufficient to install a judicial commission. It is also important to annul the effect of the interpretations contained in the above two judgements. More importantly, the power of judicial review of the stage before impeachment, and potentially to annul the impeachment, subverts the constitutional scheme itself. It is a disingenuous exercise to deny equality to the legislature, which is the basis of the theory of separation of powers.

The proposed judicial commission should consist of representatives of Parliament, the sitting Chief Justice of India, his predecessor, and distinguished academics, all to be nominated by the President. The names of advocates and district judges recommended for appointment should be widely publicised. The views of the Bar Council of India and the concerned state bar councils, as also the views of the All-India Bar Association and the concerned state bar associations should be invited. The procedure for assessment of a High Court judge proposed for elevation to the Supreme Court should follow the same pattern.

The ideal way of eliminating incompetent contenders and manipulation is to appoint judges through a public hearing by the judicial commission. No judge should be permitted to occupy the bench for more than ten years, including the time spent on elevation to the Supreme Court. All appointees to the judiciary should be around fifty years. Impeachment should remain without judicial review of the order of removal. The nature of impeachment proceedings needs to be defined clearly. Just as the President can be impeached for violation of the Constitution, the judges should be impeachable for proven misbehaviour and incapacity. Neither violation of the Constitution nor judicial misbehaviour are ordinary crimes. When a judge is brought before Parliament, the enquiry and the debate have reference to the whole of the judiciary and the damage the judge has caused it. Fixity of tenure and irremovability are related to his functions while in office, so the public has an overriding interest in the proper staffing of judicial

⁴*Sarojini Ramaswamy v. Union of India*, AIR 1992 SC 2219.

institutions. Therefore, when Parliament is conducting impeachment proceedings, it is acting as a court to preserve the Constitution and its value system. The adjudicatory process during impeachment should transcend party considerations. What ordinarily governs parliamentary activities may not be appropriate for regulating impeachment proceedings. Issuing a whip to regulate voting on impeachment may damage the functioning of the institution and destroy its independence, which is so necessary to preserve the rule of law as a way of life. While preserving impeachment as a way to remove bad judges, it may be necessary to introduce provisions to regulate the procedure to be followed in the matter of debate and voting.

While taking steps to ensure accountability and independence in our judiciary, it is also necessary to review the concept of *independence of the judiciary*. As was pointed out by Simon Shetreet:

Independence of the judiciary has normally been thought of as freedom from interference by the executive or legislature in the exercise of the judicial function...In modern times, with the steady growth of the corporate giants, it is of the utmost importance that the independence of the judiciary from business or corporate interests should also be secured. In short, independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglements likely to affect, or rather to seem to affect him in the exercise of his judicial functions.⁵

⁵Simon Shetreet, *Judges on Trial*, Amsterdam: North Holland, 1975, pp. 17–19.

23

A Code of Conduct for Judges

Like the robe of the pastor, it is designed to transform the wearer into the instrument of a higher power. The risk is that the judge will start thinking that *he* is the higher power. The likelihood increases when he proclaims from the bench to people who cannot differ with him and acquires a complacent confidence in his own view of things.¹

It is recorded in the *Mirror of Justices* that the Saxon king Alfred the Great hanged forty-four judges in one year for violating the code of conduct prescribed for judges.² Long before constitutions, Alexis de Tocqueville, the separation of powers and the principle of natural justice, Alfred the Great had laid down some rules for his judges. He had a right to, for he had appointed them. If they acknowledged bad judgments made out of ignorance, he scolded them as follows:

¹Judge Robert Satter, *Doing Justice: A Trial Judge at Work*, New York: American Lawyer Books & Simon and Schuster, 1990, p. 241.

²Dick Hamilton, *Foul Bills and Dagger Money: 800 years of Lawyers and Lawbreakers*, Oxon: Professional Books, 1988, p. 1.

I wonder truly at your insolence, that whereas by God's favour and mine, you have occupied rank and office of the wise, you have neglected the studies and labours of the wise. Either, therefore, at once give up the discharge of the temporal duties which you hold, or endeavour more zealously to study the lessons of wisdom.³

He was obviously aware that learning is not a prophylactic against corruption. So he commanded:

Judge thou very fairly. Do not judge one judgment for the rich and another for the poor; nor one for the one more dear and another for the one more hateful.⁴

The maladies which King Alfred found among his judges continues to plague societies today.

Arbitrariness in governance, degenerating into tyranny, led to revolts, rebellions and revolutions and finally, the laws and procedures which should regulate the workings of the institutions of governance and justice. These found their definition in their present form during the period when the English struggled against and successfully defeated Stuart absolutism, culminating in the English Revolution. This marks the beginning of the rule of law. There was never any visible severance with the past. Rather, it was by a patient theoretical reformulation and redefinition over long periods of time that the break with arbitrary justice was effected. But alongside these developments, the absolutist trends against which the people had struggled were dexterously woven into jurisprudence and theories of law. The power of the king was transferred to Parliament and the courts. The privileges which Parliament had claimed against the king were transformed into privileges against the people who elected it. Similarly, the courts were given independence against interference by the king mainly to protect the realm against arbitrariness. But very often they ended up working on the side of Parliament and the executive in

perpetuating and justifying arbitrary governance, whenever it seemed that the people were in a state of insurrection. Ironically, it was in the process of securing rights for the people and establishing the rule of law that Parliament had claimed contempt powers against citizens as well as absolute powers of legislation. The limits of its legislative power are exposed by the example given.

Theorists of parliamentary democracy were of the view that parliamentary power is absolute and expansive, a power which no absolutist monarch had ever claimed. This has not gone unquestioned by those who have started a movement for the inclusion of entrenched rights in the English constitution. Historically, the power of the absolute monarch has been appropriated by the legislature and the courts. However, the powers of the legislature and the executive are limited by periodic elections, which act as a check on authoritarian trends. There are also judicial reviews by the courts of executive actions and legislative measures. By contrast, no systematic attempt has been made to contain the absolute powers of the court without impairing its independence. Any attempt at reforming the judiciary is read as eroding its independence. But judicial independence is not a value in itself; it is expected to subserve the social values incorporated into the Constitution. Despite this assurance of independence, our courts have not promoted democracy, personal liberty, or social, economic and political justice in the fifty years since the Constitution.

Judicial independence coupled with contempt power has made the institution absolutist. Such an institution can never be the bulwark of democracy. The judiciary has appropriated the contempt power the king had and turned it into an aspect of justice. But this power was an emanation of royal authority, and any contempt of court was really contempt of the monarch. Under our Constitution the people are sovereign. No legitimate inference can be drawn that the Constitution has delegated to the courts the sovereign power to punish the people or any one among them. Just as the Indian Parliament inherited the privileges of the House of Commons, the Indian courts have

³Dick Hamilton, *loc. cit.*, p. 2.

⁴Dick Hamilton, *loc. cit.*, p. 2.

inherited their contempt power from the king of England. The courts in India trace their genealogy of power to the royal power of punishing people for contempt and its subsequent metamorphoses. This power was transformed into a power which inheres in a court of record, and the offence has become *sui generis*, transcending the limits of reasonable restraint. The myth of the original court of records in which the power of punishing for contempt inheres has become part of the 'occult jurisprudence' in which our law abounds. Such anachronisms coupled with irremovable tenure leads to misconduct among the judges. To the principle that untrammeled power, whether *de jure* or *de facto*, encourages impunity, the judiciary is no exception. These powers are absolute, and one cannot even plead justification in the public interest when accused of contempt. Even our elected representatives do not have such absolute powers. An authoritative statement on the character and magnitude of the contempt power will demonstrate why a code of conduct for judges may not really be effective:

It is an offence purely *sui generis*, and...its punishment involves in most cases an exceptional interference with liberty of the subject, and that, too, by a method or process which would in no other case be permissible, or even tolerated...The jurisdiction should be exercised the more carefully in view of the fact that the defendant is usually reduced, or pretends to be reduced, to such a state of humility, in fear of more severe consequences if he shows any recalcitrancy, that he is unable or unwilling to defend himself as he otherwise might have done.⁵

Having been fed on hope and illusions, all of us applaud our judges for prescribing for themselves a code. But this code contains principles which are merely pious homilies that cannot be enforced and can be breached at will. The conduct the judicial code addresses are old habits which die hard. The Chief Justice, who is only first among equals, has no authority to even

⁵Oswald, *Contempt of Court*, Kent: Butterworths. First Indian Reprint, Calcutta: Hindustan Law Book Company, 1993, p. 17.

command his colleagues to commence their sittings strictly according to the prescribed timings.

The private and public life of a constitutional appointee cannot be separated. One cannot be unjust, unequal and arbitrary in personal life and claim to adjudicate constitutional principles competently and fairly in the courts. Talking about professional ethics, Durkheim has raised issues which seem to be quite relevant in today's context:

A way of behaviour, no matter what it be, is set on a steady course only through habit and exercise. If we live amorally for a good part of the day, how can we keep the springs of morality from going slack in us? We are not naturally inclined to put ourselves out or use self-restraint; if we are not encouraged at every step to exercise the restraint upon which all morals depend, how should we get the habit of it? If we follow no rule except that of clear self-interest in occupations that take up nearly the whole of our time, how should we acquire a taste for any disinterestedness, or selflessness or sacrifice?⁶

If they are to abide by moral precepts, do the judges require a code of conduct like clerical staff? Does not the Constitution imply a code of conduct? The objectives enumerated in the Preamble to the Constitution, the fundamental rights and fundamental obligations enumerated in Part IV, and the constitutional oath prescribed for judicial appointees regulate their work in the courts, and the same values give rise to moral principles on which to regulate their conduct in life. A whole lifetime spent in seeking career enhancement brings about a debasement of public morality. The colonial mind-set and the feudal and caste practices which everyone of us has internalised is still the predominant culture of our judicial institutions. These are compounded by an adversarial legal culture which is unredeemingly competitive and is therefore impervious to social mores and social purposes. The Pharisaical righteousness, the

⁶Emile Durkheim, *Professional Ethics and Civic Morals*, London and New York: Routledge, 1992, p. 12.

aggressive, authoritarian and pompous demeanor and other feudal habits, and the discourse in the courts inform even a casual observer that our judiciary is arbitrary, and that no code of conduct can ever improve its performance unless we invoke against its members the same principles of deterrence which they so generously expound in criminal cases. The first step towards reforming the judiciary is to democratise its structure and mode of discourse. One could begin by getting rid of the professional robes, a symbol of power. The simulated obsequiousness which one is a witness to in the courts is quite disgusting, and it goes with the colonial-feudal structure. The mode of address inside the courtroom gets transformed into a title and we find judges being addressed as 'Your Lordship' outside the court, in seminars or on any occasion where a judge is participating or is merely present! The expression 'Justice' is similarly used to address a judge who has demitted his office, as if it were a title. Though we have abolished titles, the habit continues. The institution should be exposed to public criticism by confining its contempt power to a very narrow field of administration of justice. This will discipline the institution. Everything about the courts requires a radical transformation, and the first step should be to discard colonial and feudal vestiges to give the institution the democratic visage it so badly needs. A second but not last step would be to liberate the legal profession from its self-imposed servitude, which is seen as a part of a lawyer's professional competence.

24

On the Selection of Judges: An Open Letter to the Chief Justice of India

I have spent forty-five years in the legal profession with the growing realisation that the institution of justice has progressively forsaken the pivotal role assigned to it after Independence. It has given up the instrumentalist role assigned to it, although I would not say by design. The institution was not restructured to play this role. In the deepening crises of the 1960s and 1970s, the institution's opposition to certain populist policy initiatives was perceived as the obstructionism of a conservative court which did not believe in the instrumentalist role assigned to it by the Constitution. While the accusation is true, using this as a pretext to destroy the court's independence was uncalled for. This assault brought to the fore the importance of an independent judiciary, leading to successful efforts to wrest the power to appoint judges from the executive and give it to the high courts and the Supreme Court.

In the first decade of the Supreme Court, an informal system for selecting judges appears to have worked well. The

deterioration started around the 1960s. On the record it surfaced when Mr. C. Subramaniam pushed through the case of Justice Alagiriswamy. The Madras High Court Bar Association unsuccessfully resisted this attempt to fast-forward the career of a judge. The court ended the case by extending an assurance that such an attempt may not succeed with the President. However, the executive had its way and the court was wrong. Though Justice Alagiriswamy turned out to be a good judge, the method left the institution damaged. Thereafter, the institution was not seen as having an independent status with the definite role assigned to it by the Constitution, but as an arena for the practice of political patronage. In this situation, the presence of a judge of merit on the bench could be viewed as an accident or oversight. Also, the present system does not appear to be beyond manipulation. There does not seem to be a realisation that staffing this institution is crucial to the independence we all have striven to secure. Echoing the words of Theodor Eschenburg, Ralph Dahrendorf points out the importance of a nuanced understanding of authority in a democratic system. The bearers of institutional authority must

be filled by personal authority, which is a delicate balance of qualities of leadership, institutional sense and contact with those who are affected by decisions. 'Only where these contacts exist but leadership remains in the lead, where it knows what needs to be done and works convincingly for its solutions, can one speak of authority in the democratic sense.' Eschenburg's advice to politicians holds *mutatis mutandis* for judges, police officers and all others with special responsibility for human affairs.¹

He goes on to say:

The virtues required of all inhabitants of the institutional edifice are even more important. They take us one more time to the *homo sociologicus* syndrome. There are those who practice straightforward compliance with norms, whether thoughtless or

¹Ralph Dahrendorf, 'Society and Liberty', in *Law and Order* (The Hamlyn Lectures), London: Stevens and Sons, 1985, p. 151.

fearful. They lack the imagination or the courage even to consider deviance. Needless to say, they are not the stuff from which the citizens of a free society are made. They leave norms without meaning and drain the lifeblood of institutions. But then there are those who have a peculiar sloppy attitude to norms. They recognise them for what they are, on the whole observe them, but leave no doubt in the minds of bystanders or those on whom the normative force of society is brought to bear, that if it was for them these norms would be quite different and might perhaps not exist at all. They are players of roles rather than actors who merge with their parts. Even while they apply sanctions—and this attitude is particularly frequent among administrators of many grades—they shrug their shoulders with a wry smile as if to say that they know fully well what nonsense they are doing but it happens to be their job to do it. The result of this attitude is twofold. In practice it does not lead to any changes of norms, whether in the direction desired by those who apply them or any other direction. On the contrary, by their cynical application, prevailing norms are confined to the point of ossification. So far as underlying attitudes are concerned, on the other hand, the basis for legitimacy is pulled away from under the norms. Norms are separated from institutions, and the world that emerges combines formal compliance with a profound depreciation of all things social.²

I have been fascinated by this formulation of Dahrendorf. It describes so well the attitude of quite a few judges on the bench. The fear is, that as the years roll by, their numbers might increase. What has been left unattended even now is the manner of assessing the aspirants' competence and fitness to undertake the tasks assigned to them with a constitutional vision and a determination to abide by the discipline imposed by constitutional morality. Unfortunately, for over two and half decades, and for all the debates during this period inside and outside the courts, not much attention has been bestowed on this aspect, except when, during the late 1960s and early 1970s, there was a call given for filling the court with committed judges,

²Ralph Dahrendorf, *loc. cit.*, pp. 151–152.

their commitment being propagated as an eligibility criterion. This was rightly opposed, and that fight will not be complete unless an alternative eligibility criterion is stipulated. Securing independence from executive interference without a corresponding assessment criteria is not going to keep that independence effective and vibrant, particularly when political heads in the states are making inroads into the judiciary by other means. Chief Ministers can be and are experts in public relations, and there have always been more ways than one to undermine the independence of the institution. Independence can only be maintained by judges, not mere officeholders. We have seen many of them come and go, but what has kept this institution alive is a succession of accidents whereby the constitutional appointees were endowed with merit and competence. The search for such persons is what needs to be systematised. There must be progressive reduction of the role played by chance in all those institutions where persons in authority are not elected and are irremovable from office.

I am afraid this exercise has to be undertaken. As a first step, in the interests of the institution and as part of the consultation process, it may be proper to interact with these aspirants to assess *prima facie* their ability to articulate sense. But it is imperative that a process be devised to assess eligibility in keeping with the dignity and responsibility of the office. These institutions need to be strengthened as part of an effort to leave behind a better world. I do not think we can wind up our lives by exclaiming, 'What has posterity done to me that I should do so much for posterity?'

25

Collective Action: The Andhra Pradesh Lawyers' Strike

When the lawyers of the Andhra Pradesh High Court Bar Association went on an indefinite strike recently, the question this raises is not 'should the lawyers go on strike at all?', but 'why is it they are driven to collective action so often, and for one reason or the other?'

The lawyers' profession, as it functions, is not structured to respond collectively. Aggressive, competitive ethics are the governing principles of the profession. The political views of individual members never enter the arena of their professional practice. The volition and values that guide lawyers in their career are often disguised under the cloak of technical proficiency and skill. Thus, the successful lawyer sells his craft to the highest bidder and yet can proclaim that his practice is 'an avenue for service and not a means for private gain.' *Laissez faire* still operates in the profession. Schizophrenia is not a lawyer's disorder; it is a necessary trait to eliminate from consideration the social and political implications of his work. This schizophrenia

assures nobility outside and value-free performance inside the court halls, along with promises of prosperity.

That a profession which has been functioning independent of society and in total fidelity to nineteenth century *laissez faire* is repeatedly driven to collective action informs us that there is something wrong with the nation. Unfortunately, when lawyers go on strike the debate that follows obfuscates the real issue—the reason for the strike. The excessive use of wishful descriptions about the profession—its nobility, duty to the clients, constitutional obligations and such other references to its platonic essence as reasons against strikes and collective action—sound hollow, if not farcical. It should be noted that repeated collective action not only leads to the edge of anarchy but also focuses our attention on the crisis in legitimacy of our constitutional arrangements.

Take the posting of the Chief Justice of Delhi as the Chief Justice of the Andhra Pradesh High Court. It is this which led to the strike mentioned earlier. The collective anger of the lawyers was not generated out of an abstract love for the acting Chief Justice or hatred against the incumbent from Delhi. Lawyers have an assigned role as part of the judiciary under the Constitution. They are part of an institution, which has claims to equality along with the legislature and the executive. It is also an institution which, at any rate theoretically, ensures a limited government, a government by laws and not of men as the old adage goes. When lawyers go on strike it generally is with reference to the working of the judiciary. A strike by lawyers can never be for the purpose of promoting their earnings. The Andhra agitation was not for a chief justice; it was against the principle of these transfers. When they were originally introduced, however, they were welcomed as a sign of progress.

Transfers and supercessions claim legitimacy from the 14th Law Commission report of 1959. The government noticed this report only in 1973 and used it to throw overboard the principle of seniority after the judgment in *Kesavananda Bharati*.¹ The

Law Commission felt that the chief justice of India should not only be a man of ability and experience, but also a competent administrator capable of handling the complex matters that may arise from time to time, a shrewd judge of men and personalities, a person of sturdy independence who would if the need arose be the watchdog for the independence of the judiciary. An erudite and able judge need not necessarily possess the qualifications required for a chief justice.

Job Requirements

If these job requirements could not be met from within the judiciary, it would be better to bring in an outsider. According to the same Commission, similar requirements are necessary for the chief justices of the high courts. After the promulgation of a state of emergency in 1975, one more policy decision was engrafted to those recommended by the Law Commission. The government felt that one third of the judges should be from the outside. This principle received wide support from the bar, not because such a course would serve the interests of the public, but because it was felt it might put an end to the system of 'concubinage' which promoted the practice of a select few at the expense of equally able contenders. Such a course, the lawyers felt, would create conditions of equality in the predatory exercise of their calling.

In our country's politics, everything is ostensible; nothing is real. While implementing the Law Commission's recommendations, the government negated the reason behind the policy. The Andhra Pradesh High Court has had several chief justices from outside, and many of its judges have been sent out as chief justices to other states. If those who were transferred were not considered fit to head their own court, how could they provide leadership to a court in another state, and in entirely new surroundings?

As for the chief justices from outside, one cannot assert that they left an indelible impression on the functioning of the Andhra High Court. Nor can one say that they left the

¹*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

institution stronger and sturdier. The lawyers perceived this exercise as an attempt by the executive to denigrate and thereby subordinate the legal institutions to partisan political interest. It is more than two decades since the system was introduced. The profession should review the policy and its effectiveness.

Humiliation

The transfers subjected the judges to humiliation, and served no other purpose. One transferee tendered his resignation, while the other was sent overnight to Patna as chief justice of that high court. Yet another acting chief justice, if not transferred, will have to serve as a puisne judge in a court headed by an outsider. The judicial institution and the legal profession should not learn to cope with this insane exercise of power, but to discipline the exercise of power and restore sanity. We have been witness to open subversion and flouting of all constitutional norms and conventions. Parliamentary cretinism, a Marxist pejorative, has literally come true.

The crisis in legitimacy is visible to all. Legitimacy goes beyond legal rights and entitlements. It encompasses issues of moral or ethical entitlements, issues of the ends for which power is used, and issues of the means and procedures by which power is used. The 59th Constitutional Amendment signaled repressive institutional changes. If the rule of law could be dispensed with in relationship to Punjab, it can be dispensed with just as easily in other areas of the country.

Young Blood

A subordinated judicial system will only lend legitimacy to arbitrariness and brutality. It is this inchoate perception of things to come that is driving lawyers to collective action such as strikes. It is the overwhelming and overpowering presence of young lawyers, who are not yet sold on the *laissez faire* philosophy, that makes these collective actions successful.

The Andhra Pradesh High Court is no exception. Successful senior members of the bar may resent strike actions by lawyers.

It does cause inconvenience, and litigants are perhaps harassed. In fact, the striking advocates may not even have public support or sympathy. But this is true of all strikes. It is equally true that lawyers as a body keep away from protests by others, and do not raise their voice of protest against injustice outside their profession. This fragmentation and insularity are not peculiar to advocates.

One often cites instances of illegal detentions and high prerogative writs of *habeas corpus* as arguments against lawyers' strikes. However, illegal detention of the poor has been taking place with or without strikes. *Habeas corpus* does not occupy the prestigious position it did in earlier times, as the content of our liberty has eroded to the point where procedure—the last defence of a citizen as a person—has been taken away by legal fiction, and where a confession made to a police officer is enough to make a person swing as a terrorist.²

Last Bastion

The profession had no time to debate these Draconian measures when tabled. The proposal of constitutional amendment has been in the air for some time. Yet there was no debate in professional bodies. When judicial remedies, the continued existence of which alone will ensure us a democratic polity, are suffering gradual eclipse and ultimate extinction, any talk about the responsibility of lawyers under the Constitution to counter collective action by lawyers sounds hollow. Practising under these conditions may even be downright dishonest.

The question is not whether a particular individual should head the Andhra court. It is the principle behind the practice of transfers that has to be questioned. In fact, the Andhra lawyers did not go so far. All they wanted was that the acting chief justice should not be humiliated. Obviously, this limited demand was aimed at preventing a division among the lawyers. Notwithstanding the limited demand, it is time to consider

²See Chapter 9.

whether the practice of transferring chief justices serves the purposes of the institution and helps in the preservation of the value system in the Constitution.

Lawyers, being part of the judiciary, which is one of the basic institutions under the Constitution, do have a constitutional obligation to intercede and prevent erosion of this institution. This institution is an instrumentality of the people. We owe it to the people and to posterity to preserve it as such. Thus, collective legal action is perhaps a healthy sign, an attempt by a professional group to transform itself into a socially useful entity.

26

Governors and Politics

Governors were intended to provide national unity and that is why, after a full debate, it was decided to have the present system, wherein the President appoints the governor, whose tenure can be pleasurable but with no express assurance that the exercise of pleasure will not be whimsical. He reigns but does not govern. His constitutional ventriloquist is the Council of Ministers. To employ Walter Bagehot's metaphor, the governor is the buckle that binds the state to the centre, a link from which the state can never secure its release constitutionally. Indian governors have been denied the arbitrary powers that they enjoyed under the British, but then we have had our own variety of abuses of power orchestrated through governors. None of us are democrats, either by tradition or training. The diffusion of power and its exercise have been the subjects of human struggle. All of our efforts have been to contain power and its abuse, and setting up a constitution is one of the accepted methods for this. We wrote a constitution for ourselves and made a turn towards what we call democracy. But we forgot to restructure the institutions we inherited from the British in constitutional terms.

In the appointments of governors and in the purposes for which they have been used, we find examples of abuse and the steady undermining of our Constitution. A governor's discretionary

power to call a particular party to rule a state, and the power to recommend dismissal of state governments have been matters of debate throughout the fifty years of the Constitution.

The first glaring abuse was the formation of the Madras government after the first general elections under the Constitution. That was in 1952. In that election the United Front, led by Tanguturu Prakasam, secured 166 seats and the Congress got 152 seats in the 375 member state assembly. Sri Prakasa, then governor of Madras, rejected Prakasam's claim and called upon Rajaji, who had not even been elected to either house, to form a government, after first nominating him to the Legislative Council. On this act of impropriety Rajaji became the chief minister of the first Congress government after Independence. Prime Minister Nehru and President Prasad did not like it, but Rajaji and Sri Prakasa felt that establishing an 'ideological democracy' was insufficient justification to risk leaving patches of 'rebel' areas and slipping into disorder. Governor K.M. Munshi of Uttar Pradesh, one of the architects of the Constitution, commended Sri Prakasa for handing the reins of governance to Rajaji to prevent the area from sliding into communism.

The ends and means debate employed against communists and their methods were not applicable to their adversaries. It was around this period and without reference to these events that Justice Patanjali Sastri of the Supreme Court was at pains to point out that the Constitution was intended to be operated by political parties of varied persuasions and should be handled with care. The absence of congruence between the rule and the way it was administered became more and more blatant.

In 1957, the Communist Party secured 60 out of the 126 seats in the Kerala Legislature and, with the help of independents, formed a government there. The pre-emptive step taken against them at Madras was absent in Kerala. The Kerala Education Bill, the land ceiling laws and other such measures withstood constitutional and legal tests. But the Kerala government was brought down by the use of 'extra-parliamentary tactics' and violence. Governance without state violence became impossible.

Governor Burugula Ramakrishna Rao declared that the government had lost the support of the majority of the people, and that to continue to govern on the basis of legislative majority was not proper. So he recommended the imposition of President's rule.

In West Bengal in 1967, Governor Padmaja Naidu called upon Bangla Congress leader, Ajoy Ghosh, as he had the support of the United Front. Immediately thereafter, there was a tussle between Ajoy Ghosh and P.C. Ghosh for power. This rivalry was manipulated by the centre by using the next governor, Dharma Vira, as the hatchet man. But working out the replacement of Ajoy Ghosh and inducting P.C. Ghosh became quite a problem, and the new governor ended up by recommending President's rule for West Bengal. Thereafter, even parties of the same persuasion were not permitted to rule a state if they posed a threat to the power structure at the centre.

According to the Sarkaria Commission, between 1947 and 1967, thirty-two governors lasted their full five-year term, but of the eighty-eight tenures in the period from 1967 to 1986, only 18 lasted for five years. Premature exits were much faster in the later period and fewer lasted the full term. Governors have also been used to do the centre's dirty work. At first, no communist government was allowed to function. Even the possibility of communists coming to power was unabashedly prevented. But it did not stop there. The habit of toppling state governments for no valid or acceptable reason has led to trivialisation of governance. Governor Ramlal dismissing N.T. Ram Rao's government, the fight for power between the latter and his son-in-law, the litigation and the counting of heads in state assemblies by the governor and, last but not least, Governor Fathima Beevi calling upon a convicted person, whose nomination had been rejected by two returning officers, to form the government, are instances of callous trivialisation of the Constitution.

In order to stay in power, it is necessary to camouflage abuses and subversion with a thin veneer of constitutionality and legality, as proof against revolt. In the course of abuse, when

things become uncomfortable, a debate ensues. With every furore about the doings of a governor, a debate ensues about his or her appointment, and the furore is soon absorbed by the debate. Now we have started appointing superannuated civil servants who during their careers managed their political bosses well. The question that has never been answered is: 'Will the political system operating the Constitution refrain from abuse?'

27

Privilege and Obligation

'Free for all in Jammu Kashmir Legislative Assembly' was the headline in almost all the newspapers on 18 August 1985. A similar ruckus in the Tamil Nadu Legislative Assembly in March 1983 was described in *Vaniga Otrumai*, a Tamil monthly of modest circulation, as conduct worthy only of 'theru porikkikal' (roadside hooligans). This comment was referred to the Privileges Committee in 1984, and the next year the publisher Paul Raj was punished with two weeks' imprisonment. According to the finance minister, 'This would serve as a deterrent and a warning to other publications which indulged in similar writing which lowered the dignity of the house.' Another journalist, Cho Ramaswamy, has called the legislators 'uneducated'. Anyone who knows Cho would say immediately that this is the mildest term in his repertoire. He can be devastating and perhaps his respect for the institution was the cause for his restraint, but he was charged anyway. In 1984, the Andhra Pradesh Legislative Council served a contempt notice on Ramoji Rao for the caption 'Peddala Galaba' (noisy elders) in the Telugu daily *Eenadu*. A couple of weeks later, a woman from Andhra called Arundhati was sentenced to seven days in jail for distributing pamphlets from the visitors gallery of the Andhra Pradesh Legislative Assembly. The offences in all these cases was

breach of privilege of the house. Paul Raj can rush to the court and obtain stay orders; Cho, in view of the position he occupies in the politics of his state, can fight both outside and inside the court and has the capacity to raise a national debate on any issue; Ramoji Rao can afford to take matters all the way to the Supreme Court; but Arundhati went to prison without a protest. After the breach of privilege motion against *Eenadu*, several articles appeared in the press about the privileges of the house and the jurisdiction of the court to interfere. While this is not the first time such a debate has been raised, what is almost never questioned is the character of the power that our legislatures claim for themselves against the citizens.

As things stand today in matters of privilege, the house is supreme. It combines in itself the powers of the legislature, the judiciary and the executive. It decides and declares what its own privileges are and, based on its own precedents which are not known to anyone else, it indicts, tries, and awards punishment. It executes its own orders and denies to any external agency the right to review its conduct in any matter. Arbitrariness cannot be defined better. Yet few have seriously questioned the authority of the legislature and the privileges that flow out of it, which has no basis in history, and which cannot be supported by any known democratic principle.

Unfortunately, we do not have a tradition of debating the relevance of conferment of power. The debate always centers around containing power within limits, but very often power extends outside the purpose which brought it into existence. Power is generally entrusted to bodies or institutions to enable them to discharge their obligations effectively. When institutions lose purpose and are only utilised by those who operate them for their own ends, then both their performance and the powers exercised are farcical. One can see that this has happened to representative bodies like Parliament, the State Legislatures and the institutions of justice. The public expenditure incurred in maintaining these institutions bears no relation to the services rendered by them in terms of efficient management of the

society at large. Instead, the people are entertained with all sorts of confrontations, as if they were spectators at a sporting event.

The basic and serious issue is that of freedom of speech, the right of a citizen to criticise, howsoever mildly, the elected representatives. But a transformation of this simple and fundamental issue into one of confrontation between the legislature and the judiciary will ultimately result in legitimising arbitrary power. There is always danger inherent in converting political issues into purely technical issues of law, where freedom of speech and expression merely provide the rhetorical background. When political problems are made technical, then only experts can solve them. More and more areas of our life are thus being defined as technical problems and getting removed from the arena of political debate. The authority of the expert has become a substitute for the will of the people. The danger of such a course to a democratic way of life hardly needs emphasis.

Examining the history of the British House of Commons, one can see that the privileges claimed by its members today are distortions and, in fact, represent the very arbitrariness against which they had fought in the early stages.¹ The House of Commons did not secure the power to be the sole arbiter of the conduct of its members until the Tudor period. Earlier, the members could defend their privilege of freedom from arrest only by petitioning the king or the House of Lords. The Speaker had no power to procure a writ of privilege by his warrant, and the members could not summon an imprisoned member and his jailor before them as they were able to do later. They had no control over elections, nor could they ask any member to depart early from Parliament. Even to fix the time of their meetings, they had to petition the king. They also had to beg the king for forgiveness if in the course of their speeches they had said

¹For a comprehensive account of this struggle in England, see E.B. Fryde and Edward Miller, *Historical Studies of the English Parliament: Volume 2, 1399–1603*, Cambridge: Cambridge University Press, 1970.

anything to displease him or which infringed on his prerogative.
John Dorward prayed in 1399

that what he should thus say in this parliament on behalf of the said commons should not be interpreted as coming from him personally or on his own individual initiative.²

In 1378, a petition to the king reads as follows:

Firstly, on behalf of the commons. Should he happen to say anything which might sound as prejudicial, damaging, slanderous or evil towards our lord the king or towards his crown or as belittling the honour and estate of the great lords of the kingdom, this should be ignored by the king and the lords as if it had never been said. Because the commons are moved by nothing save an overriding desire to maintain and safeguard the honour and the estate of our lord the king and the rights of his crown in all things and (by wish) to preserve the reverence due to the other lords in everything.³

Whatever its composition or class character, the Commons was subservient to the king and the lords of the realm. Its supplications are not assertions of freedom to criticise the king, nor early signs of modern parliamentary government. They are an episode in the struggle for power between the feudal barons and the king. In the period prior to the Tudors, the test of strength was not between the king and his lords. During this period, the Commons was an unorganised body and its speaker was a member elected to report its wishes to the king.

Until 1515, no member could absent himself without the permission of the king. But this year saw the first of a new power under which a member could leave Parliament before its close with the permission of the Speaker. This is the first recorded assumption by the Commons of control over its members. In 1523, however, we still find Sir Thomas More petitioning the king as speaker:

²J.E. Neale, 'The Commons' Privilege of Free Speech in Parliament', in Fryde and Miller, *loc. cit.*, p. 327.

³J.E. Neale, *loc. cit.*

The mynd is often so occupied in the matter, that man rather studieth what to say, than how... It may therefore like your most abundant Grace... to give to all your Commons here assembled your most gracious license and pardon freely, without doubt of your dreadful displeasure, every man to discharge his conscience, and bouldly in everythinge incident among, declare his advise, and whatsoever happeneth any man to say, it may like your noble Majestie of your inestimable goodnesse to take all in good part, interpreting every man's words, how ununningly soever they may be couched, to proceed yeat of a good zeale towards the profitte of your realme and honour of your Royall person.⁴

The struggle—if petitioning for permission to speak freely is a form of struggle—was directed against the king. No demand was ever made to permit the members to govern themselves, nor were they bold enough to assert the right to frame a form of religion which was one of the burning issues during that period. The members were petitioning the king on their own behalf, but it would also be fair to say that they were seeking this limited right on behalf of the people who sent them to the Commons. Any extended claim might have been dismissed with the words: 'No ruler fit for his state would suffer such absurdities.'⁵

During the reign of Elizabeth I, the elaborate and obsequious petitioning was given up. The Commons demanded curtly

that the Assembly of the Lower House, may have frank and free Liberties to speak their Minds, without any Controulment, Blame, Grudge, Menaces or Displeasure, according to the old antient Order.⁶

This assertion was in conformity with the time and its rising spirit of independence. We find the Commons describing its right to free speech as 'an ancient and undoubted privilege'. The reply to these petitions always indicated, however, that the control of free speech was with the king: 'The king will not deny

⁴J.E. Neale, *loc. cit.*, pp. 157–158.

⁵A statement attributed to Queen Elizabeth see J.E. Neale, *loc. cit.*, p. 158.

⁶J.E. Neale, *loc. cit.*

honest freedom of speech,' or Sir Nicholas Bacon's assertion that the petition was granted so the Commons

be neither unmindful, or uncareful of their Duties, Reverence and Obedience to their Sovereign.⁷

Slander and riotous conduct in Parliament were viewed as acts of indiscipline, and the Crown retained the right to regulate the conduct of its members.

It was the Wentworth brothers, Paul and Peter, in the second half of the 16th century, who made the first attempt to define freedom of speech and claim it as a privilege against the Crown. When the queen exercised her right to veto a Commons discussion on succession, Paul Wentworth used the occasion to assert that the Queen's veto was a breach of liberty.⁸ His brother, Peter Wentworth, carried on the fight. A plentitude of freedom, he maintained, was Parliament's right, on both theoretical and practical grounds. He attacked limitations to free speech and sought to limit the Crown's right of punishment to traitorous words.⁹ The royal prerogative asserted against the Commons was seen as arbitrary then, but it is now asserted by the same house against the people it represents.

In 1397, a bill introduced by one Haxey, containing a bold attack on Richard II and his courtiers, was accepted by the Commons. The House of Lords treated the bill as traitorous and condemned Haxey to die. But for the Archbishop's intervention the sentence would have been carried out.¹⁰ In 1454, the Speaker, Thomas Thorpe, was imprisoned for his opposition to the Duke of York. When the Commons demanded their Speaker back, the Lords denied the petition.¹¹ Strode, a member of the Commons was imprisoned for having proposed certain bills in

⁷J.E. Neale, *loc. cit.*, p. 162.

⁸J.E. Neale, *loc. cit.*, p. 172.

⁹J.E. Neale, *loc. cit.*, p. 173.

¹⁰F.W. Maitland, *The Constitutional History of England*, Cambridge: Cambridge University Press, 1961, p. 241.

¹¹E.B. Fryde and Edward Miller, 'Introduction', in Fryde and Miller, *loc. cit.*, p. 10.

Parliament to regulate the privilege of tin miners.¹² A statute was then passed by the Commons declaring the proceedings against him void and of no effect. There was also a general declaration that no member could be prosecuted for anything said in the present or future parliaments. In 1571, Strickland was ordered not to appear again in Parliament for having introduced some ecclesiastical bills. In 1576 and 1588, Peter Wentworth was committed to the tower for having made trenchant speeches about freedom of debate. A compliant Commons was used by Elizabeth to commit him to the tower the first time.¹³

The House of Commons in fact had an authoritarian origin. It used to always assemble on royal summons. When the king summoned Parliament it assembled as a response to his command, and by summoning he was seeking his own ends. The Commons during this period remained for long

in the outer darkness of unessentials; and even when they emerged into parliamentary light they were scarcely capable of positive attitudes...¹⁴

Their importance grew when the Tudors needed their support to put down the barons and the Church.

It was during the Stuart period that there was open confrontation between the king and Parliament. Any aura this institution has acquired was on account of the defiant fight it put up during the reign of the Stuarts, leading to the revolution of 1688 and the offer of the crown to William of Orange. By securing this power to decide succession to the throne, the institution acquired the power vested in the king hitherto. In 1614, James I dissolved Parliament and committed four of its members to the tower. In 1621, he asserted that the privileges of the Commons

¹²F.W. Maitland, *loc. cit.*, p. 242.

¹³F.W. Maitland, *loc. cit.*, p. 242.

¹⁴E.B. Fryde and Edward Miller, 'Introduction', in Fryde and Miller, *loc. cit.*, pp. 14–30.

were derived from the Grace and the permission of our ancestors and us, for most of them grow from precedents which show rather a toleration than inheritance.¹⁵

The rejoinder of Sir Edward Coke (1552–1634), Chief Justice of the King's Bench, shows the changes that had been brought about by the times and forced on the existing power structure. In an impassioned address he asserted:

The privileges of this House is the nurse and life of all our laws, the subjects beat inheritance... When the king says he cannot allow our liberties of right, this strikes at the root. We serve here for thousands and ten thousands... Let us make a protestation, enter it in the journals to the king—but not as requiring an answer.

The protestations delivered to the king asserted freedom of speech and informed him that

the liberties, franchises, privileges and jurisdictions of Parliament are the ancient undoubted birth right and inheritance of the subjects of England.

The king, sitting in the council chamber, sent for the journals and, in the presence of the lords and the judges, tore out the page upon which the protestations appeared. Coke and two other Commons leaders were sent to the tower.¹⁶

The fight against the king continued until the Restoration. The Convention Parliament which met in January 1689 invited William and Mary to the throne and offered them the crown and a declaration of rights for their acceptance. This declaration was later passed as the Bill of Rights. It proclaimed that 'the freedom of speech and a debate or proceedings ought not to be impeached or questioned in any court or place out of Parliament.' Thereafter, we do not hear of any arbitrary acts of arrest by the king, but the Parliament itself assumed the role of the king when it began claiming for itself the power to punish

¹⁵F.W. Maitland, *loc. cit.*, p. 243.

¹⁶F.W. Maitland, *loc. cit.*, p. 260.

citizens who criticised it or its members. The unfettered freedom of speech which it had obtained from the crown was directed towards the citizens. Any slanderous attack on a citizen enjoyed total immunity from the processes of the courts if uttered inside Parliament. On the other hand, an ordinary citizen was denied the right to criticise Parliament or its members. Thus the House of Commons, which had started as a mere petitioning body struggling to secure freedom of speech to criticise the king, transforming itself into opposition to the king's absolute reign during the Stuart period, itself became a power after 1688, and started exercising arbitrary powers thereafter. Each of the houses claimed the same extensive powers of arbitrary imprisonment which they had earlier denied to the king and his court of the Star Chamber.

The privilege now claimed for the printed word also has a peculiar origin. We have seen that the Commons started as a petitioning body and that anything spoken on the floor of the house against the king could well, if reported, invite his wrath. As a measure of self-protection, therefore, the Commons kept its proceedings secret. Thus the house could order out strangers and direct that its proceedings could not be reported. What was initially a safety measure adopted by Parliament to protect itself and its members against the arbitrary exercise of power by the king later became transformed into a privilege against freedom of the press.

The extension of privilege from words uttered to the printed word gave rise to the celebrated case of *Stockdale vs. Hansard* in 1839. The firm of Hansard, under the authority of the house, had printed a report of the inspector of prisons which contained defamatory words about one Stockdale, who then brought an action against Hansard. The latter pleaded the authority of the house as a complete defence and a jury accepted this statement. But Chief Justice Denman and other judges held that this was no defence. Stockdale sued for damages and obtained a verdict for 600 pounds. It was the House of Commons that had treated the case as a breach of privilege and not allowed the printer to use any defence except the order of the house. When Stockdale

sought to collect his damages, the house sent him, his solicitor and the sheriffs who had executed the orders of the court to prison. The sheriff sought to obtain a writ of *habeas corpus*, but a court of the King's Bench refused to issue such a writ because the Sergeant at Arms had filed a return stating that they were under a warrant of the Speaker for contempt.¹⁷ The sheriffs had to remain in prison for having attempted to execute a warrant issued by the court, i.e. for performing a legal duty!

We in India have no history of struggle in the legislature, so we are bereft of precedents in this field. Our struggle basically was against British rule. But our antagonism to British rule did not prevent us from adopting the British system of governance. We have all been bred in the British liberal tradition, hence the unwillingness to examine the validity and relevance of the various concepts which were introduced into the superstructure. The claim of privilege against the citizens might have been a valid transitional power immediately after 1688 in England. It might have been one of the means of pre-empting the regrouping of monarchical forces. But its continuance without a rationale would be to legitimise arbitrary power. When the Constituent Assembly debated draft Article 85 relating to the privileges of members of parliament, H.V. Kamath felt:

There is nothing derogatory to the dignity of our Constitution or of our State in making reference to the United Kingdom. It may be further reinforced by the argument that now that we have declared India as a full member of the Commonwealth, certainly there should be no objection, or any sort of compunction in referring to the House of Commons in England. But may I suggest for the serious consideration of the House as to whether it adds—it may not be derogatory or detract from the dignity of the Constitution—but does it add to the dignity of the Constitution? Will it not be far better, far happier for us to rely upon our own precedents or our own traditions here in India than to import something from elsewhere and incorporate it by

¹⁷See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, Delhi: Macmillan and Universal Book Traders, 1985, pp. 56–58.

reference in the Constitution? Is it not sufficient to say that the rights and privileges and immunities of Members shall be such as have been enjoyed by the Members of the Constituent Assembly or Dominion Legislature just before the commencement of the Constitution?¹⁸

Alladi Krishnaswami Iyer intervened to point out:

If the privileges are confined to the existing privileges of legislatures in India as at present constituted, the result will be that a person cannot be punished for contempt of the House...whereas the Parliament in England has the inherent right to punish for contempt.¹⁹

He found nothing derogatory in the provision that was ultimately incorporated in the Constitution. A legislative committee constituted by the speaker of the Constituent Assembly also found it difficult to list parliamentary privileges without going into the whole question of the working of the same institution in the United Kingdom.

As they originally stood, both Articles 105(3) and 194(3), after conferring unfettered powers of speech to the members, left it to Parliament to enact a law defining and enumerating its privileges, and until then allowed it to enjoy those of the House of Commons of the United Kingdom. The 42nd Amendment Act of 1976 dispensed with the need to enact a law defining privileges, and stated that the powers, privileges and immunities of the house and its members were those listed in Sections 21 and 34 of the act and as may be evolved by the house later. But then the 44th Amendment Act of 1978 repealed the provisions of the 42nd Amendment. As matters now stand, Parliament must enact a law, and until then its privileges are those current immediately before the coming into force of Sections 18 and 26 of the 44th Amendment.

We are not here concerned with the question of the

¹⁸Constituent Assembly Debates: Official Report, Delhi: Government of India, Book No. 3, Volume VIII, p. 144.

¹⁹Constituent Assembly Debates, loc. cit., p. 148.

codification of the privileges, powers and immunities of the members of State Legislatures and Parliament. What appears arbitrary, on the face of it, is the power exercised on citizens who are not members. The State Legislatures and Parliament are mandated to respect the rights of the citizens as described in Part III of the Constitution, which includes Articles 14, 19, 21 and 22. Yet today a citizen is helpless against the arbitrary exercise of power by these bodies.

The reasons given for not codifying the privileges makes interesting reading. According to Mavlankar, these are as follows:

i. Any legislation at the present stage would mean legislation only in regard to matters acceptable to the Executive Government of the day. It is obvious that, as they command the majority, the house will accept only what they think proper to concede. It is important to bear in mind that the privileges of members are not to be conceived with reference to this or that party, but as privilege of every member of the house, whether he belongs to government or the opposition party. My fears are, therefore, that an attempt at legislation would mean a substantial curtailment of the privileges as they exist today.

ii. My second reason is that any legislation will crystallise the privileges and there will be no scope for the presiding authorities to widen or change the same by interpretation. Today they have been given an opportunity to adapt the principles on which the privileges exist in the United Kingdom to conditions in India.

Mavlankar buttressed his views by referring to the Secretary's note:

Our Constitution has one important peculiarity in that it contains a declaration of fundamental rights, and the Courts have been empowered to say that a particular law or a part of a law is void or invalid because it is in conflict with a particular fundamental right and therefore beyond the powers of Parliament.

He went on to assert:

Once, however, the privileges are codified by an Act of Parliament in India, the position changes entirely...The Statute

will be examined in the same way as any other Statute passed by Parliament, and the Courts may well come to the conclusion that in view of the provisions in the fundamental rights, it is not open to any legislature in India to prescribe that the Speaker may issue a valid warrant without disclosing the grounds of commitment on the face of the warrant...All matters would (then) come before the courts and Parliament would lose its exclusive right to determine matters relating to its privilege.²⁰

Dealing with the same question of codifying parliamentary privileges, Justice Hidayatullah made the following observations:

If there is mutual trust and respect between Parliament and Courts, there is hardly any need to codify the law on the subject of privileges. With a codified law more advantage will flow to persons bent on vilifying Parliament, its members and Committees, and the Courts will be called upon more and more to intervene. At the moment, given a proper understanding on both sides, Parliamentary right to punish for breach of its privileges and contempt would rather receive the support of Courts than otherwise. A written law will make it difficult for Parliament as well as Courts to maintain that dignity which rightly belongs to Parliament and which the courts will always uphold as zealously as they uphold their own.²¹

While Mavlankar was concerned about opposition parties and leaving room for future widening of privileges, he did not address the rights of the citizens who had elected the representatives in the first place. The Secretary's note expressed concern about court interference once the privileges had been codified, because Parliament's attitude has always been to exclude the jurisdiction of the courts. Hidayatullah's concern was to avoid a confrontation between the courts and Parliament. According to him, all criticism of the conduct of Parliament and its members had to be stopped because some may use the courts to vilify Parliament. While the contempt jurisdiction of the courts is codified by Parliament, he wanted to leave parliamentary

²⁰Conference of Presiding Officers of Legislatures, August 1950.

²¹Hidayatullah, *A Judge's Miscellany*.

privileges uncodified on an unfounded presumption of the likelihood of abuse of court processes. He felt that a written law would not be conducive to maintaining the dignity of Parliament.

The dignity of either the courts or Parliament cannot be maintained by clothing these institutions with arbitrary powers. It can only be maintained when they function with a sense of social purpose. The contempt jurisdiction has of late become a cloak for operating these institutions for personal and sectarian ends without any fear of public criticism. The concept of sovereignty of Parliament appears to be wholly irrelevant in a democratic set-up and it has outlived its purpose—if at all it had any. The power which the members who constitute Parliament enjoy is derived from the people, and from this no one can infer reasonably that the people have conferred absolute, arbitrary powers on Parliament and the State Legislatures to punish citizens summarily. There is no evidence to support the inference that the procedures that Parliament and Legislatures follow with regard to their penal powers can override Articles 14, 19, 21 and 22 of the Constitution.

The major premise of our Constitutional system is the rule of law. This has two aspects:

- (i) that people should be ruled by law and they have an obligation to obey it;
- (ii) that the law should be so framed that it is able to guide them.

The first aspect implies that a citizen has information about the law so that he may conform to it. The second implies that the law must be capable of being obeyed. If the law is to guide people, they must be in a position to find out what it is, which means it should be transparent and adequately publicised. For the same reason, it should be free from ambiguity or vagueness, especially in cases which involve forfeiture of liberty. Power-conferring rules are designed to guide behaviour and should conform to the doctrine of the rule of law if they are to fulfill their purpose.

To appreciate this, we should know the privileges that were in vogue in the House of Commons up to 1950, the purpose for which power was exercised by the Commons, and the extent of freedom permitted by the Commons to the citizens before it becomes a breach of privilege. Were there grades of punishment or were they awarded at the whim of the house? In India, two amendments on the subject have not improved matters. The 42nd Amendment sought to give unlimited powers to each house of Parliament to evolve its own privileges and immunities without interference from anyone outside them. But introducing legislation meant deliberation in both houses, the President's assent and possible interference by the courts on the validity or otherwise of such law. The 44th Amendment, while doing away with the rights of Parliament to evolve its own privileges, has kept intact the original vagueness, and the necessity for referring indirectly to the privileges of the House of Commons, which even today are obscure and wholly unnoticed.

The latter arbitrariness was recognised by Maitland when he raised the question and answered it thus:

For what offences can the House inflict this punishment of imprisonment? Our answer must be that it is the power of the House to inflict it in a quite arbitrary way.²²

He is also of the view:

Too often we see questions of privilege treated as party questions, and then the House, whatever it may think of itself, becomes truly contemptible. That it has a very dangerous power in its hand is too obvious.²³

De Smith, dealing with the British Parliament and its power to punish breaches of privilege, is of the view that despite the fact that judges are not always better equipped to decide questions of law set in a political context,

²²F.W. Maitland, *The Constitutional History of England*, Cambridge: Cambridge University Press, 1961, pp. 377–378.

²³F.W. Maitland, *loc. cit.*, p. 378.

the unhappy combination of uncodified contempts, an unsatisfactory procedure for investigating allegations of contempt, and the insistence of the House that it must have the first and last word in matters touching the interests of its members as members, irrespective of the impact of its decisions on the interests of members of the public, strongly suggests that the House should relinquish its jurisdiction over breaches of privilege and contempts to the courts, as it has in effect relinquished its privilege to determine disputed election returns.²⁴

Harry Street draws a distinction between disciplining members of Parliament and extending this power over citizens, and holds that 'the House of Commons ought not to treat the trial of citizens as one of its functions; disciplining its members is one thing, punishing outsiders is another.' The English Revolution effectively used a parliament that had been set up by medieval kings. Its authoritarian origin was masked by its later transformation into an effective forum to fight royal absolutism. The original antagonism between the bourgeoisie and royalty has become a conceptual unity between popular sovereignty and the divine right of kings. A new rationale has been found to justify a representative's arbitrary power: that it is necessary to enable him to discharge his public trust with firmness and to protect him from the resentment of those offended by the exercise of his right. The parliamentary institution was created and extended social support to give the citizens the freedoms needed to ensure political progress; yet exercising the freedom to discipline this institution has become an offence.

In our society, where respect for authority has been internalised, arbitrary power is perceived as a valid exercise of authority, so abuses go unquestioned. Those who perceive the abuse do not wish to enter into confrontation. They make their peace by cajoling and appeasing authority. We seldom realise that the measure of freedom we enjoy is the extent conceded to political dissent, the poor and the oppressed. Let us look at what

²⁴S.A. de Smith, *Constitutional and Administrative Law*, Harmondsworth: Penguin, 1971, p. 332.

happened to Arundhati. More than the cases of Cho, Paul Raj and Ramoji Rao, Arundhati's punishment shows the arbitrariness of the power exercised by our legislatures. Her liberty was forfeited summarily and casually, in one of the innumerable instances where Article 21 remained muted. She entered the Andhra Assembly with the proper permission, viewing those assembled there as her representatives, who would be willing to hear her tale of woe. She had not been informed that circulating pamphlets containing only her grievances was an offence and a violation of the privileges of the house. She could not defend herself because she was not aware that the representatives that she and millions of others had voted to office had been entrusted the power to punish people summarily. She was not aware of the precedents of the British House of Commons, nor that there were parliamentary privileges whose breach would entail punishment. In all these cases, nobody is told which particular privilege has been breached, nor whether what is breached belonged to the House of Commons or specially evolved by an Indian Legislature. Ayn Rand says:

Just pass the kind of laws that can neither be observed nor enforced, nor objectively interpreted—and you create a nation of lawbreakers and then you cash in on guilt...The only power any government has is the power to crack down on criminals.

This philosophy informs all our institutions, including the Legislatures and Parliament.

28

Political Justice through Concerted Protest

There cannot be a matter of greater public importance than the assassination of the prime minister of a country. A one-man commission of inquiry headed by Justice Thakker, a sitting judge of the Supreme Court, was appointed to enquire into the assassination of Prime Minister Indira Gandhi in 1984. The commission submitted its report in 1986 and the government was supposed to place the report before the Lok Sabha soon after. But the President promulgated an ordinance introducing amendments to the Commissions of Inquiry Act, 1952, evidently to avoid doing so. The reason was the sovereignty and integrity of India. Similarly, the 'security of the state', 'friendly relations with foreign states' and 'the public interest' have been used to create new legislation. These terms have been introduced time and again into statutes to exclude the entire body of citizens from all or any of the rights secured by them. These terms have been invoked to confer on governmental exercise of power a legitimacy which is beyond scrutiny. In effect, they preempt social and political accountability. Any action under their cover

becomes a legitimate exercise of power purely because the motives that prompted these actions are not open to debate.

Principal Section

Section 3 is the principal section of the Commission of Inquiry Act. It deals with the powers of the central and state governments in appointing commissions of inquiry; the constitution of such a commission; how to fill vacancies in it to ensure continuity; and the obligation of the state or central government to table its report before the Legislative Assembly or the Lok Sabha, as the case may be, within six months, together with a memorandum on the steps taken by the government on the report within six months.

The government found the 1952 Act deficient in many respects and referred it to the Law Commission. After detailed examination, the latter, in its 24th report, suggested several revisions and the government introduced the corresponding amendments in the Commissions of Inquiry (Amendment) Bill, 1969, which was later referred to a Joint Committee of Parliament.

During the course of evidence given before the Joint Committee, it emerged that the reports of such commissions on important issues of national interest often did not see the light of day even though a considerable amount of public funds had been spent on them. The Joint Committee therefore considered it necessary that a specific provision should be made in the act requiring the appropriate government to cause the report of every commission of inquiry to be laid before Parliament or State Legislature, together with a memorandum in regard to the action thereon within a period of six months from the date of submission of the report.

Pursuant to the evidence before it, the Joint Committee introduced Subsection 4 and Section 3 into an amended act in 1971. This was in deference to public demand and is in fact a recognition of the principle of social accountability. Though the Commission of Inquiry Act has been on the statute book from

1952 onwards, the principle of social accountability, albeit of a very limited nature, was only recognised by the amendment introduced in 1971. After 15 years the original position was restored, with an added disability that prohibits discussion of the report even in a privileged body like Parliament should the government invoke the amendment.

In the act as it originally stood, there was no provision that required the government to place the report before the Lok Sabha or the Legislative Assembly. But debate, whether inside Parliament or outside, was not explicitly prohibited. When Subsection 4 was introduced, debate was confined to Parliament, not because the public was prohibited, but because it was believed this job could only be entrusted to a responsible and expert body.

By the amending ordinance, if the government waives application of Section 3 on any ground, public debate is silenced. The public is all too familiar with the powerful terms 'integrity and sovereignty of India', 'security of state', 'friendly relations with foreign states' and 'public interest'. Once the waiver is invoked, all debate about the report gets linked to one or the other of the preventive detention laws, or to one or the other of the offences in the Indian Penal Code listed as offences against the state. Leaks can be treated as treasonable or seditious, or as adequate ground for preventive detention.

Under Section 3, a commission of inquiry may be appointed either by the government or on a resolution passed by the Lok Sabha or the Legislative Assembly. Thus, the government may at its discretion and of its own volition refer a specific matter of public importance to a commission of inquiry, but where a resolution has been passed by a legislative body, the government has no option but to refer the matter to a commission of inquiry. In the latter case, however, the executive can invoke the amendment and prevent the commission's report from being tabled before the representative body for debate.

Thus, the power which our legislative bodies have reserved for themselves was obliterated by an ordinance. The waiver of 1986 referred to was obviously with reference to the obligation of the

government under Subsection 4 of Section 4, according to which a report must be laid before the representative body.

The impropriety deserves careful scrutiny: the executive, which is under an obligation to refer a matter to a commission of inquiry or report to Parliament, can flout its obligations with impunity simply by waiving the application of Section 3. The sweep of the amendment is not confined only to the report. If the Lok Sabha considers that a matter merits discussion, the executive can veto the resolution on the grounds mentioned in the amendment. Thus, the integrity and sovereignty of India, the security of the state, friendly relations with foreign states and public interest have been made the exclusive concerns of the executive. The use and frequent repetition of these terms ensures minimum participation by citizens.

Under these conditions, the opposition parties are disabled from forcing a political debate, as such an effort would be characterised as antinational and irresponsible. They are thus distanced from active participation in the governance of the country. The presence of an opposition in Parliament becomes formal; its ineffective presence even confers a seal of legitimacy to the acts of the ruling party.

In a rigidly formal sense this amendment may be lawful. In fact, the courts have upheld Draconian legislations of doubtful legitimacy as competent. But is such an exercise of power legitimate with regard to constitutional arrangements and the major premise underlying these arrangements? Legitimacy does not concern itself so much with whether governmental exercise of power is lawful. Rather, what is at issue is the manner and purpose of the exercise of constitutional power and the justification of such an exercise. The perspective for legitimacy should be with reference to the constitutional scheme, the history which brought it into existence, and the expectations of the people who entrusted these powers to the government by the Constitution. If the manifestations of executive power are examined, one finds a growing centralisation of power, both at the state and union levels, impervious to charges of abuse and to all forms of traditional political protest.

Issues Involved

What is the use of a Constitution which not only imposes limitations on the governmental exercise of power but positively mandates that governmental action should be guided primarily by obligations 'fundamental to the governance of the country', when it is not adhered to by the institutions created by it? The issues raised by the Commissions of Inquiry Act, 1952, are not confined only to the abuse of the ordinance-making powers of the President and the Governors under the Constitution; the right to information and political justice are also involved.

The large-scale and generous use of ordinance-making power was noticed by the Supreme Court when it said:

One of the larger states in India has manifested its addiction to power by making an over-generous use of it—so generous indeed that ordinances which lapsed by efflux of time were renewed successively by a chain of kindred creatures, one after another. And the ordinances embrace everything under the Sun, from prince to pauper and crimes to contracts. The Union Government, too, passed about 200 ordinances between 1960 and 1980, out of which 19 were passed in 1980.¹

Free resort to ordinance-making power always raises questions of legitimacy. When such legislative powers of the President came up in the Constituent Assembly, the debate focused on the possibility of the President assuming dictatorial powers. Our parliamentary democracy, it was believed, would avoid a dictatorial regime coming into existence through a constitutionally sanctioned presidential system. What was not anticipated at that time was the movement towards a system of elective dictatorship. The founding fathers of the Constitution did not perceive what Thomas Paine foresaw when he said:

It is not because a part of the government is elective, that makes it less a despotism, if the persons so elected possess afterwards, as a parliament, unlimited powers. Election, in this case, becomes

¹D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579.

separated from representation, and the candidates are candidates for despotism.²

'Engines of Tyranny'

It is slowly being realised that

...representative institutions are not necessarily guardians of freedom but can themselves become engines of tyranny.³

There is unfortunately a popular belief that electoral victory enables the party in power to impose its will and bring about irreversible changes on a helpless people who did not vote for them and maybe even actively opposed them.

We should surely need our heads examined if we were to go on with a system by which members selected as candidates by existing methods of nomination and elected as members by existing methods of voting, are entitled to vote general legislation without adequate control, legal or political, on the use of their powers.⁴

These words of Lord Hailsham addressed to the Labor Party could well apply to the Indian situation.

The first casualty in every illegitimate exercise of power is freedom of speech and information, which comprises the right to know and to be informed. And the question of free speech is invariably a question of political justice. Both these have suffered total obliteration in practice. The state's violations of these rights are legion. While the courts have shown some concern for social

²Thomas Paine, *The Rights of Man* (1791), Pelican, 1977, p. 215. Also see Carol Harlow, 'Power from the People? Representation and Constitutional Theory', in McAuslan and McEldowney, eds., *Law, Legitimacy and the Constitution*, London: Sweet & Maxwell, 1985.

³Lord Hailsham, The Dimbleby Lecture, 1977, later expanded in *The Dilemma of Democracy*, London, 1978. See Patrick McAuslan and John F. McEldowney, 'Legitimacy and the Constitution: The Dissonance between Theory and Practice', in McAuslan and McEldowney, eds., *Law, Legitimacy and the Constitution*, London: Sweet & Maxwell, 1985, pp. 13–14.

⁴Ibid., p. 17.

justice, on issues of political justice they have basically sided with the state. There is hardly any concerted or informed protest. Once information is blocked, all acts of authority are perceived as legitimate.

The illegitimate exercise of power surfaced in 1969. This overt illegitimacy was justified on the grounds that it was necessary to sweep away inertia, institutional blockages and interest groups dedicated to the *status quo*. Populist politics acquired a new legitimacy by pressing into service the Directive Principles, sweeping away even formal democracy in the process by invoking the emergency provisions of the Constitution in 1975. The illegitimate exercise of power has been so continuous since then that we now no longer need promulgation of a state of emergency to ensure obedience.

The people are fully conditioned to the exercise of arbitrary power. Terms like security of the state, integrity and sovereignty of India, etc., are reserved for the politically articulate. The use of these terms is calculated to facilitate the use by the government of unrestricted power and to put anyone it chooses under surveillance. The objective of this power is to obstruct informed judgment, which alone can help discipline the government and compel it to not only be fair and just in its acts but also to enable it to attain the objectives contained in the Preamble without distortion either in means or in results. Also, illegitimate exercise of power goes unchecked on account of the helplessness of opposition within Parliament, which has over the years forgotten the art of taking up issues of democracy and organising protest, making a conscious effort in the process to raise the quality of public debate.

The amendments referred to earlier pose a threat to the right to life of the accused in the broader sense of the term. Although the report by itself may not have any relevance in a criminal trial, the disclosure of the report and debating it would have compelled the government to act justly. It is equally a matter of political justice when a few thousand Sikhs are killed because the assassins were members of the Sikh community. Viewed from any angle, disclosing the report would have been in the public

interest, which need not be shrouded in vague terms like security of the state.

The question should be taken up as an issue of the legitimate exercise of power. Having distanced itself from the people, the political opposition has encouraged increasing reliance on the courts to resolve political questions. Perhaps the only way to check illegitimate exercises of power is by restructuring democratic protests to generate wider public participation.

29

Defining Right as Wrong: Reflections on Associational Freedoms and Free Speech

The struggle of man against tyranny is the struggle of memory against forgetting.

Milan Kundera

Trade Unions and the Right of Association

The right to association and to free speech, even today central to a discourse on human rights and civil liberties in India, must be understood in the historical context in which they emerged at the international, national and subnational levels. This chapter will examine the relevance of this history to an understanding of the trade union movement in India and in understanding the character of the state in the struggles for associational freedoms and freedom of speech.

The Industrial Revolution provides the point of departure for the present exercise. The migration to industrial towns where factories were located brought with it the freedom from feudal shackles and the related freedom to bargain with employers. This

and other revolutions and the Bill of Rights gave individuals the right to liberty and contract, both of which could not have survived the defining principles of status-ridden societies.

The people, however, always had the choice of revolting against tyranny, a sort of right they possessed long before the bourgeois revolutions that granted the right to liberty. Revolts have always been collective actions, the collective never only an aggregate of individuals or a crowd developing a common intention on the spot as defined by Macaulay's penal code. Rather, the group or collective always shared a fairly definite understanding of the purpose for which it had gathered, and it demanded conformity, consensual or otherwise, from its members. In other words, the 'right' to associate and rebel is perhaps as old as human society itself.

The transition from status to contract, viewed initially as an 'emancipation', soon led the serfs gathered in England's industrial districts to the realisation that their newly won freedom was an illusion. The French Revolution and the subsequent wars which lasted twenty years created an internal crisis in England. Parliamentary reforms intended to extend suffrage, obtained by associational struggles for better representation in the Commons, were not only shelved but any talk about reforms became an offence.

Meanwhile, the coming together of people at factory sites became inevitable in the context of industrial production and the growth of worker townships. The concentration of workers in large numbers had two consequences. The government looked upon them as potential Jacobin agglomerations that were politically threatening. While Burke fulminated against the French Revolution, Paine campaigned for the rights of man. He attacked the monarchical system and was intolerant even of a reduced monarchy. He wanted to toss out all the dead wood of Britain and replace it with a republican form of government whose power could come through the people. He regularly addressed assemblies of workers. But Paine was exiled and his writing banned because he had asserted his right to form an association. In a single sweep, Paine's right to free speech, the

people's right to peaceful assembly, their right to form an association, and Paine's right to move about freely were all denied. Trevelyan, dealing with this period, illustrates it with the prosecutions that were launched:

Finally in 1794, the government was so far blinded by panic that it sought the lives of the Reformers. A charge of High Treason was instituted against Thomas Hardy, the shoe-maker, the founder of the Corresponding Society and the principal leader of the constitutional movement in politics among the working classes. Other innocuous and respectable persons, like Thelwall the lecturer and Horne Tooke the philologist, were tried on the same capital charge. But the good genius of England came to her rescue in her characteristic institution, the jury system. Pitt had outraged the English sense of fair play. Thanks to Erskine's persuasive eloquence, twelve Tory jurymen acquitted Hardy and his fellow prisoners on the capital charge, and reminded the government that the methods of Robespierre were not wanted over here.¹

The freedom to communicate, free speech, the freedom to assemble, freedom of association and freedom of movement—all were transformed into high treason. The second consequence was to restrain workers from coming together to improve their working conditions and living standards. The Combination Acts introduced by Pitt applied both to traders' combinations and trade unions. But its application to curb workers' right to form unions was primarily aimed at disabling them from becoming a powerful political adversary. The strength secured by association is so formidable that it leads to claims against other groups and individuals. A well-organised workers' union has the power to paralyse governments and political and economic institutions. This power has always been used to secure for the working class a fair wage and decent living conditions. However, the possibility that workers' associations could be harnessed to support radical movements led to the prohibition of all activities of workers in combination.

¹G.M. Trevelyan, *History of England*, London: Longmans, 1962, p. 567.

Thus, the trade union movement started its career with a conspiracy charge, which is associational in character and content. An assembly or association of persons gathered for political or quasi-political purposes has always been viewed as unlawful or conspiratorial. Associations always appear conspiratorial from the perspective of authority and power. The right to assemble is always assumed to be unlawful and preemptively prohibited by invoking the provisions of public tranquillity in a suitable statute.

The overt criminality attributed to trade unions ended with the repeal of the Combination Acts in 1824–25, but then strikers began to be charged for intimidation. This was because some among a large number of strikers hurled stones or indulged in physical violence of one sort or another. This led to the easy assumption that trade unionism depended on the use of force and violence.²

The effort at attrition this time took new forms. Employees resorted to civil action. Lawyers innovated on the charge of conspiracy to injure and held the union and its office bearers liable for tort. Trade union activity interfered with the basic economics of competition and therefore had to be curbed by the defining and interpreting devices of the courts. The taming of direct political action by legality is exemplified by the history of the trade union movement and also by other political dissent and protest movements. It is this process of taming labour by the institutions of the bourgeois revolution which is interesting. Under this head, acts done in concert become actionable wrongs, while the same done by individuals may not furnish cause for a legal proceeding.

A combination of traders or business undertakings formed to eliminate competition was not considered to be a restraint on trade, despite injury to rival traders, in *Mogul Steamship*

²Sidney Webb and Beatrice Webb (1894), *The History of Trade Unionism*, New York: Augustus M. Kelley, 1965. The mere sight of a large mass of workers unionising themselves is even now seen as intimidation, a threat to security and public peace.

Company. The appeals court and the House of Lords upheld the right to form combinations to eliminate trade rivals. Morals have no place in competition, which implies destroying one's rival. They found nothing wrong in forming such trade combinations so long as they were free from violence or such other means. This judgement was a judicial elaboration of the Darwinian principle of survival of the fittest.³ The effective result, as this case showed, was the elimination of competition and the emergence of a monopoly. The Combination Acts posed no obstacles, but the interpretation given to the Trade Union Acts of 1871–76 was obviously with the intention of criminalising the activities of trade unions.

The employees of the Taff Vale Railway Company went on strike in 1900. The management sued them for damages, treating the strike as a tort and an activity not covered by the provisions of the Trade Union Act, which workers thought gave their union and its officials immunity from legal proceedings against union activities. This immunity was denied to the railway company trade union, and it was held that, despite being an unincorporated body, it could be sued for damages.⁴ One of the judges held that a preventive injunction and even a *mandamus* could be issued. Webb and Webb point out that this decision set at nought the three prior decades of immunity enjoyed by the trade unions, and that it led to unrest among the working class.⁵ It was described as showing flagrant disregard of the intention of the government and Parliament. The Trade Disputes Act, 1906, reversed both *Taff Vale* and *Quinn v. Leathersns*⁶ by giving immunity to trade unions for any act done in contemplation or furtherance of a trade dispute.

The Osborne judgment struck at the effort of trade unions to establish links with a political party by raising funds for a candidate's election to Parliament. In practice, the workers could

³(1889), 2 QBD 598; (1892), AC 25.

⁴*Taff Vale Railway Company* (1901), AC 426.

⁵Sidney Webb and Beatrice Webb, *loc. cit.*

⁶*Quinn v. Leathersns* (1901), AC 495.

only establish links with the Labour Party, which had a socialist programme. One Mr. Osborne, obviously supported by the management, brought an action against the Amalgamated Society of Railway Servants, restraining this union from demanding that workers contribute to a political fund. There was a condition in the bylaws that members of Parliament should obey the party whip. The court seized on this clause and made it one of the reasons for invalidating the power of unions to raise political funds:

Unless a member becomes bound to the society and to the Labour Party by these conditions, and shapes his parliamentary action in conformity therewith, and with the decisions of the parliamentary party, he has broken his bargain. Take the testing instance: should his view as to right and wrong on a public issue, as to the true line of service to the realm, as to the real interests of the constituency which has elected him or of the society which pays him, differ from the decision of the parliamentary party and the maintenance by it of its policy, he has come under a contract to place his vote and action into subjection not to his own convictions but their decisions.⁷

This was neither congruent with the spirit of the constitution nor with the principle of representative government in the United Kingdom. The court had given the trade unions corporate status; having been formed under a statute, their activities could never be permitted to stray from the purposes for which they had been created. The court invoked the doctrine of *ultra vires*. Trade union activity was limited to the purposes expressly set out. This disabled the trade unions from carrying out the various beneficent roles they were playing. According to Webb and Webb,

what lay behind the Osborne judgement was a determination to exclude the influence of the workmen's combinations from the political field.⁸

⁷*Osborne v. Amalgamated Society of Railway Servants* (1911), 1 Ch 540.

⁸Sidney Webb and Beatrice Webb, *loc. cit.*, p. 626.

The employer-worker relationship can, in an exploitative order, only be hostile, bordering on violent antagonism. As the character of industrial production changed, their own lives became a major preoccupation of the workers, and their association or union had to take up issues concerning their employment. Diminishing their right to associate with a political party of their choice was a denial of that right. It led to a determined campaign to change the law and overturn the Osborne judgement. The Osborne case also highlights the fact that labour did not link itself with the Conservative Party in the emergent political system. Abstract theorising about rights does not explain these biases, which are unconscious.

The Trade Disputes Act of 1906 laid down in Section 3 that any act done in contemplation or furtherance of a trade dispute will not be actionable merely because it induces some persons to break the contract of employment, or because it interferes with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or labour as he wishes. This was put to the test in 1955.⁹ The Draughtmen's Union and the airline BOAC had an agreement of 100% membership. Rookes was a member of the union and in the employ of BOAC. In 1955 he resigned his membership from the union. Two unpaid officials—Bernard and Fistal—and a union official informed BOAC that if Rookes was not removed in three days the men would withdraw their labour. This led to Rookes initiating an action for damages resulting from conspiracy and intimidation by the union.

The entire struggle has been to free union activities from the charge of conspiracy and intimidation. While the criminal charge of conspiracy has become obsolete and not in use after the repeal of the Combination Acts, the charge of conspiracy and intimidation has been constantly renewed to defeat every attempt to overcome adverse judgments. This particular matter reached the House of Lords, all of whom agreed that despite Sections 1 and 3, the union's action amounted to intimidation.

⁹Rookes v. Barnard (1964), AC 1129.

The Conservatives and their followers did not like the immunity and extensive powers enjoyed by the trade unions. They went to the electorate for a mandate to curb this power. Once elected, they introduced the Industrial Relations Act, 1971, which came into force on 28 February 1972. This act, among other things, created a court comprising a High Court judge and two or more lay members. This tribunal enjoyed the powers of the High Court. The trade unions did not nominate any representative to the tribunal. Although there was a provision for doing so, the trade unions refused to register themselves under the act. The Transport and General Workers Union was one such.

The act was put to the test soon after it came into force. Goods to be transported by ships were no longer being brought to and from the ports packed in sacks or bags or crates, to be loaded by cranes onto the ships. The container system was replacing this method. This meant that the amount of work at the ports went down drastically. The containers were packed in warehouses far from the ports and loaded on or unloaded from ships that had been specially built to accommodate them by mechanical devices that used minimal labour. This provoked the ire of labour. The shop stewards, without reference to their trade union, called for a strike and the dockers at Liverpool would not admit trucks carrying containers. They were then put on a blacklist. There was similar 'blacking' at Hull. The issue was taken to the Industrial Court, and the union, the powerful Transport and General Workers Union, was fined. An appeal was allowed on the ground that the shop stewards at Liverpool and Hull had acted on their own, so the union could not be held responsible. But the House of Lords reversed the decision of the court of appeal and restored the industrial court's order levying a fine on the trade union.¹⁰

The committal order on the London picketers by the industrial court, the strike that soon followed, and the arrest of

¹⁰(1973), AC 15.

five dockers for disobeying the orders of the industrial court led to a decision by the House of Lords in *Heaton* that the trade union was not liable. The five dockers got released.

The development of industrial and trade union law in England illustrates the struggle between authority and the right to freedom of association. The struggle was not over any political principle but with respect to the right of trade unions to strike and also the practices of blacking, closed shop, etc., which operated harshly on their members. The closed shop, which follows usually from a union agreement, often results in injustice to individual workers and could be harsh on those who are forced to conform. The worker cannot resign from his/her membership, but must resign from other unions. The agreement between the employer and the union makes union membership a mandatory requirement for employment. Secondary actions initiated by unions could affect third parties and their right to carry on their business. Also, decisions taken by two feuding unions may lead to the deprivation of a right or employment to an individual workman without either a notice or any reference to him. Such matters have been taken to the courts. There have been decisions where the judges pleaded for defining and limiting the immunity of trade unions. In *Merkur Island Shipping Corporation*, the court of appeals bemoaned the loss of clarity in defining secondary actions.

In all these cases, the right to strike appears to be an adjunct to the right to freedom of association. That is, associations are effective because of picketing and strikes; these activities cannot be separated from the freedom of association. The history of the trade union movement demonstrates this. During the 1870s and the 1880s, the struggle between labour and authority was always a tussle between the Conservative and Labour Parties, who ruled England alternately. Although they did not actually belong to any party, judges in England were either conservative or liberal and very rarely totally left-wing. A leftist judge, alone in a hostile system, was forced to throw in his lot with the liberal group in the judiciary. Lord Denning, for instance, was called an anti-trade union judge and his resignation was demanded.

In dealing with freedoms, any abstract theory of rights may not fit into the dynamics of social change, which is what living in a society is all about. The trade unions, after the collapse of Owenism and Chartism in the 1930s and 1940s, settled down to collective bargaining, the main function of freedom of association. But this too produced its own distortions. While trade unions were fighting for their rights, they were not mindful of the fact that they were violating the individual rights of their members. Despite the 1980 and 1982 Employment Acts, workers' freedoms have remained precarious. The European Court at Strasbourg found in such cases that Article 11 of the European Human Rights Convention, which had given workers the right to form or join a trade union, had been violated, and it gave relief to the workers. Thus, aggrieved persons are driven to international tribunals for redressal.

But the major problems with a claim to freedom in general and freedom of association in particular derive from the theoretical parameters within which these rights are absolute but also incapable of prediction with certainty. When the freedom becomes contentious, the discourse ceases to be academic. It is often characterised by belligerence, unless taken to a court. Here the belligerence has to be suspended, as approaching an institution of adjudication implies accepting its decision. But this decision is not likely to be definite, as it is subject to reversal on appeal or review during some other contentious issue by a larger bench of the same court. It is further subject to the disposition of the government, for political reasons or expediency. In the history of British trade unions, from the Osborne case onwards, the expression 'in furtherance of a dispute' illustrates this position.

When an association claims political rights and contests the legitimacy of the political power in authority, its activities get characterised as seditious, conspiratorial, and as attempting to overthrow a government established by law. Thus the associational right has an obverse side, which is the offensive nature of its exercise.

The American experience has been no different. The working

class used the strike as a major weapon to improve its living conditions. The workers were not organised in the early stages. According to Jeremy Brecher, July 1877 marks the first great American mass strike, though it may not be remembered as a memorable day.¹¹ The railroad strike which began in the small town of Martinsburg, West Virginia, became known as the Great Upheaval and signaled the spontaneous realisation by the workers that their coming together was the source of their strength, and that the reason for coming together was to assert rights as distinct from demands. To begin with, there was no concerted action. The concept of associational strength was still in an inchoate state. Also, actions to quell such uprisings were always brutal. The National Trade Union, formed in 1834, and the Knights of Labour, established in 1869, were perhaps the earliest organisations of workmen, and they professed no revolutionary ideals. Their demand was to secure for workers full enjoyment of the wealth they helped create; sufficient leisure to develop their intellectual, moral and social faculties, and for recreation and pleasure; and shorter working hours. Between 1836 and 1858, there were a number of general statutes limiting the working day.

Although the fulfillment of the demand for the eight-hour workday represents a victory in the exercise of associational rights, the unfair trial and execution of the leaders of the Haymarket strike represents the underside of that victory—the arraignment of ‘revolutionary’ trade unionists on charges of treason in periods of crisis. Judges were characterised by the workers as ministers of ‘Capital’ and the legislature as its lackey:

It silenced the preacher in the pulpit; it muzzled the editor at his desk; the professor in his lecture room. It set the price upon the heads of peaceful citizens; it robbed the mails and denounced the vital principles of the Declaration of Independence as treason.

The First World War led to abandoning rights altogether. President Wilson held the view that once the people had spoken

¹¹Jeremy Brecher, *Strike!*, Boston, Mass.: South End Press, 1972.

through their Congressional representatives in favour of entering the war, there was no scope for dissent. A young Presbyterian minister, Norman Thomas, articulated the principle that the First Amendment (of the U.S. Constitution) was the foundation of democracy and that tolerance for all ideas provided a mechanism for orderly progress. He realised in 1917 that such views were heresy, for in June that year all anti-war and socialist writings were banned. The Socialist Party leader, Eugene Debs, was sentenced to a ten-year prison term for criticising the war in general terms. Max Eastman’s anti-war magazine was proscribed in the appellate on the prevailing ‘bad tendency’ test, though Judge Learned Hand prescribed tolerance of all methods of political agitation as a safeguard for a free government. J. Edgar Hoover, a young clerk in the FBI, was assigned the task of identifying political heretics. He prepared profiles of 200,000 and detailed profiles of 60,000 persons. The files were compiled on the basis of guilt by association. Those marked were pacifists, labor radicals, socialists, black activists and civil libertarians. Conscientious objectors were prosecuted. The government’s assaults on dissent were brazenly unlawful. Federal agents, often without a warrant, descended on private homes. The offices of political groups were ransacked and people were arrested. Though the FBI’s wrath fell on every dissenter, whatever his political views, it was most unrelenting on Industrial Workers of the World (IWW) and the Socialist Party. The witch-hunt of IWW members, known as Wobblies, was very severe. In September 1917, a country-wide swoop took place on all the offices of IWW; a few hundreds were arrested and 169 leaders were prosecuted. When the National Civil Liberties Bureau, which came into existence during this period, demanded fair trials and raised funds for their defense, the administration felt that the NCLB rhetoric of free speech was a smoke-screen for revolutionary radicalism. The prosecution ended in sentences of twenty years for 14 wobblies and ten-year terms for 33 others.

This attitude of the state has an enduring and universal quality about it. The infamous Palmer raids of the 1920s is a

lasting testimony to the opportunistic American faith in democracy, their own First Amendment and to due process. The courts, under the constitutional system, were independent of the executive, but certainly not independent of the economic system running the country. The courts were not able to stand outside the economic philosophy which justified the capitalist system, its brutal practices and its propensity to negate democracy on the slightest pretext. While the debate on whether human rights are universal or not is not yet resolved, the violations of human rights has been universal. The right to free speech is only available up to the stage of declaration of war, and thereafter it ceases, ruled the courts. Very often, the court defined freedoms in terms of their limits.

In the political sphere, free speech is related to the freedom of association. Charles T. Schenck was the general secretary of the Socialist Party. He was convicted for mailing anti-war and anti-draft pamphlets to draft-age men. Schenck equated conscription to slavery and urged the youth to resist. This theme was to recur in the 1970s when there were widespread protests against the Vietnam War. Schenck's pamphlets said, 'Do not submit to intimidation. Assert your rights.' It was with reference to Schenck's anti-war position that Justice Holmes laid down his doctrine of 'clear and present danger'.¹² Were Schenck's words, in the circumstances in which they were used, of such a nature as to present a clear and present danger? Holmes' doctrine was applied again in the prosecution that followed of yet another socialist, Eugene Debs. His speech at a Socialist Party Convention earned him a conviction, which was confirmed by the Supreme Court.¹³ Very soon, this doctrine was further honed

¹²The question in every case is whether the words used in such circumstances are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.' Justice Oliver Wendell Holmes, in *Schenck vs. United States*, 249 US 47 (1919).

¹³Samuel Walker, *In Defence of American Liberties: A History of the ACLU*, New York and Oxford: Oxford University Press, 1990.

by Holmes himself, but more significantly by Justice Louis Brandeis in the Anita Whitney case, where he held that

no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.¹⁴

There was always a desire to sustain freedom of contracts while declaring associational rights invalid. They were reading the *laissez faire* principle into the Constitution. Only Holmes held that the 14th Amendment did not enact Herbert Spencer's social statics. The history of the period up to the Roosevelt era again demonstrates that the right to livelihood drives workers to form unions to preserve and promote employment. The decade of the Depression saw large sections of the working class unemployed and facing eviction. It is in this context that the Unemployed Citizens' League came into existence.¹⁵ It organised self-help groups on a large scale, but by 1933 these had collapsed. Then the New Deal and the National Recovery Administration of President Franklin Roosevelt offered workers the hope that the government would show them a way out of their misery and deprivation. Roosevelt created a national relief system which effectively prevented mass starvation. By Section 7A of his National Recovery Act, employees were given the right to organise themselves collectively without any restraint or hindrance from the employers. Previously, the trade unions, including the American Federation of Labor (AFL), had not been in a position to combat the wage cuts and lay-offs of the Depression. Until the National Recovery Administration was formed, the American trade union movement had been ineffective, with a considerable slump in union membership. Once the government recognised collective bargaining through the unions as part of the President's plan for economic recovery, union membership registered an increase. But the New Deal also increased governmental activity. The enormous increase in the

¹⁴*Whitney vs. California*, 274 US 357 (1927).

¹⁵Jeremy Brecher, *loc. cit.*

federal government's powers under New Deal policies carried with it inevitable fears of inroads on the right to agitation. All the same, associations of African-American workers came together to form the National Negro Congress under the leadership of Randolph, who also worked tirelessly to eliminate racism within the AFL. While racism continued to be an issue, black unionists had emerged as a force for employers, the government and organised labour to reckon with. The United Farm Workers, founded in the early 1960s, brought together predominantly immigrant workers in the southwest. It attracted hundreds of idealistic youth as volunteers in direct actions, and grew into a social movement that secured the passage of state legislation in 1970 guaranteeing farm workers the rights already enjoyed by most other workers since the passage of the National Labor Relations Act.¹⁶

While it would be very interesting to map the growth of trade unionism in different sectors, constituencies and regions, it is clearly beyond the scope of the present exercise. This bare sketch of trade union history and adjudication on the questions of associational freedom in England and the United States is however necessary to place in context the Indian experience, within and outside the courts, over the last five decades.

The years after World War II, with its growing confrontation with the Soviet Union, ushered in a 'cold war' in which liberal opinion became suspect in the West and attitudes to constitutional rights coarsened. There was all-round suspicion and associational freedoms were under attack, more so if the unions were leftist or communist. Senator McCarthy and his investigations into un-American activities are too well known to be retold. But what is important to remember is that an assault on free speech and association marks the suspension of democracy and constitutional rights without effecting any constitutional change. All the black movements were accused of

¹⁶Michael D. Yates, *Why Unions Matter*, New York: Monthly Review Press, 1998, pp. 114–115.

being communist-inspired. In fact, FBI agents identified as communist whoever was at ease with the blacks or socialised with them. The fight for black equality was regarded as communist-inspired. The American Civil Liberties Union was in difficulties, and its 'right to fight for rights' was questioned and branded anti-national. This right remained in jeopardy until the fall of the Soviet Union and the collapse of communist systems around the world. With the emergence of globalisation, however, movements within countries for social transformation received a major setback. Yet, today associations that fight for an equitable order all over the globe receive greater international understanding.

Free Speech and the Colonial Legacy in India

Any revolution is social to the extent that it breaks up the old society, and any revolution that overthrows an old ruling power is political. To this formulation of Marx, Engels adds that every real revolution is a social one; it brings a new class to power and allows it to remodel society in its own image. The Russian Revolution was meant to exemplify this idea, and since then revolution has always meant a radical break in continuity and with the past. And the progress has always been visualised as a movement towards a better society. India has not witnessed a revolution. There was no desire, during the struggle against British colonial rule, to restructure Indian society in social and cultural terms; the struggle, although pluralistic in character, aimed only at political emancipation. There were the communists who, firmly tethered to Marxism, believed in armed and violent overthrow of the British; there were the terrorists, who believed in the integrity of India as a nation and on that basis organised political movements for a violent overthrow of British rule. There was also a growing Western-educated middle class with aspirations to leadership, but who believed in securing emancipation by peaceful means. Gandhi gave their movement an ethical content by his politics of non-cooperation and civil disobedience. The last organised their entire politics on a complete comprehension of liberalism as it had evolved in Britain and were adept at using these liberal values in insurgent fashion.

The Indian Constitution consists of inalienable fundamental rights and a group of non-justiciable rights, which have been termed fundamental obligations. These values were, however, never subjected to severe test until the country was enveloped by crisis and entrenched power blocs were threatened by emerging political movements in various parts of the country. But in these moments of crisis, the first and major assault has always been on freedom of speech and expression. After Independence, the first major political movements to question the way Indians were being governed were the Nav Nirman Samiti of Gujarat, the Movement for Democracy led by Jayaprakash Narayan in Bihar, and the Naxalbari Movement in West Bengal, Andhra and Kerala.

Of these, the Naxalbari movement was qualitatively different. It emerged after two major splits in the Communist Party and brought back onto the agenda the path of armed struggle for the overthrow of the Indian state and for restructuring the society in accordance with Marxist-Leninist and Maoist principles. This movement had a large following among the youth and it spread like a forest fire. In Andhra it arrived in Srikakulam in 1968. Although the repressive machinery of the state swung mercilessly into action against it, there was a large following of teachers and writers, the former assuming leadership and the latter breaking away from progressive writers' bodies and proclaiming themselves revolutionary. Their writings put to test the definition of sedition in independent India: should it continue to be interpreted as did the British and their judges (whether British or native), or should sedition contain the limitation which Gandhi implied?

When Gandhi was prosecuted for sedition in 1922, he made a memorable statement to the court, in which one could identify the limitation which ought to be placed on prosecutions for sedition:

I am satisfied that many Englishmen and Indian officials honestly believe that they are administering one of the best systems devised in the world, and that India is making steady, though

slow progress. They do not know that a subtle but effective system of terrorism, together with an organised system of force on the one hand, and the deprivation of all powers of retaliation or self-defence on the other have emasculated the people and induced in them the habit of simulation. This awful habit has been added to the self-deception of the administrators.

Section 124A, under which I am happily charged, is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote, or incite to violence.

I hold it to be a virtue to be disaffected towards a government, which in its totality has done more harm to India than any previous system. India is less manly under the British rule than she was ever before. Holding such a belief, I consider it to be a sin to have affection for such a system.¹⁷

Gandhi is saying that sedition as a political offence must not be docketed under the category of crime. He spells out a theory that disaffection to oppressive governance is a right and disobedience to such a government is no crime. Thus ideally, we should move towards a system of jurisprudence and justice where limitations on prosecution for sedition will become part of the adjudicatory process. For example, criticising the government for failure to perform the fundamental obligations set out in Part IV of the Constitution should not invite prosecution for sedition. The Constitution's Preamble and Directives prepare the ground for a redefinition of sedition, an interpretive exercise in which the courts must adjudicate on the basis of the values of the freedom struggle and their incorporation in the Constitution. We are not concerned with the politics or values the revolutionary writers believed in. In all these cases the question has always been whether the government has forfeited its moral and constitutional claim to obedience. When the possibility of

¹⁷Statement to Judge Broomfield, 1922.

peaceful social transformation becomes impossible, political movements organised for bringing about social change may plan to overthrow the government, even one established by law, as according to them such a government has forfeited the claim to continue. In such circumstances, the interests of free speech always seem to lose over those of state security.

In fact, soon after Independence, the communist movement confronted the courts on the issues of the extent of freedom under the preventive detention law, freedom of association, freedom of speech and expression, etc. The first major case was A.K. Gopalan's writ petition, sent from the jail where he had been preventively detained. Gopalan was not released on 15 August 1947; he celebrated Independence Day in solitary confinement for having made a speech inside the jail after hoisting the national flag. He was produced before the ADM, Calicut, the next day on a charge of sedition, where he was accused of instigating the people against the British king and emperor. He was not released by the ADM. There were protests throughout Kerala. Gopalan went on hunger strike and wrote to the provincial ministry of independent India:

I was a political prisoner from 1930 to 1945 in the eyes of a foreign government. Under today's popular government I am branded as a criminal. The only reason I can find for this is that I am a communist.¹⁸

This case provided an early clue to how the institutions were going to define the freedoms guaranteed by the Constitution.

Gopalan's petition from jail questioned the validity of his detention, as also the scope and ambit of Articles 22(3) to (5). Only constitutional questions were debated but not the factual background of the case. The entire debate became semantic, with no attempt being made to define terms in the context of the history which preceded the drafting of the Constitution. Rights, which were to be the foundation of our lawful government, came

¹⁸A.K. Gopalan, *In the Cause of the People: Autobiographical Reminiscences*, Madras: Sangam Books, 1976, p. 168.

to occupy second place, while the limitations on those rights became fundamental, the very subversion Justice Vivian Bose had warned against.

Although the judges and lawyers who appeared in the case were part of the generation that fought for Independence, they had not themselves played a part in that struggle. They had received their training in the colonial courts and therefore viewed fundamental rights as variants of legal rights, not as qualitatively different from them. They viewed the Constitution as a legal document to be interpreted formally and not as a political document calling for an entirely new method of interpretation. This is reflected in the decision in Gopalan's case. The court merely explored the meaning of the words 'preventive detention' without taking into account the ideological content of these words.¹⁹ Preventive detention should not have the same meaning for a political person and a smuggler, hoarder, hooligan or other such anti-social. When a political person is detained, the intention is to restrict his speech, his movements, his right to association, his entire political life. Treating the limitations contained in Articles 22(3) to (5) as self-contained foreclosed all debate on Gopalan's right to free speech, association and movement. He had been preventively detained with the obvious intention of thwarting these rights, and the grounds for his arrest ought to have been tested for violation of these rights. To lump political persons along with anti-socials is to ignore the mandate of Article 14, which should normally inform all interpretive exercises by the courts. Dissimilar categories grouped together violate the principle of equality. The subjective assessment of the state, which is from the perspective of public order and security, becomes the yardstick by which the courts judge the issue of liberty. In this approach, the activities of A.K. Gopalan and Haji Mastan and the disparate social consequences of their activities are irrelevant.

Romesh Thapar's English weekly, *Cross Roads*, was very

¹⁹For a more detailed discussion see Chapter 4.

popular with leftist students and intellectuals in Madras in my student days. Then the Madras government banned the sale or distribution of this weekly under the Madras Maintenance of Public Order Act, 1949, a post-independence pre-Constitution law. At almost the same time, Brijbushan, at the other end of the political spectrum, questioned the pre-censorship of the Punjab magazine, *Organiser*, under the East Punjab Public Safety Act. The courts, on strict interpretation of the Constitution, decided these cases in favour of free speech. In the Constitution as originally framed, Article 19(2) did not contain the words 'public safety' and 'public order', and the courts held that a threat to these could not be equated to a threat to 'national security'. The courts treated the absence of the words 'public safety' and 'public order' as mere omissions and also held that free speech includes the right to circulate and to disseminate. The decision was overturned by the Constitution First Amendment Act, 1951. By contrast, the First Amendment to the American Constitution is the introduction of free speech. It is reasonable to infer that the words public safety and public order were not used as the framers felt that the Indians' freedoms should not suffer abridgement on the slightest pretext. Thus, the courts should have made the interpretation that the Constitution had advisedly confined the abridgement of rights to situations where there is a threat to national security.

V.G. Row of the well-known Madras lawyers' firm Row and Reddy, established to take up leftist causes, was also the secretary of the Madras Public Education Society. This society had been set up to propagate the communist movement and its values. The Madras government banned this society by invoking Section 15 of the Criminal Law Amendment Act, 1908, for interfering with the administration's maintenance of law and order and constituting a danger to public peace. It was declared an unlawful association. The Madras government had exercised powers under Section 15(2)(b) of the Madras (now Tamil Nadu) Amending Act, 1950, and issued notification under Section 16 of this act. The Madras High Court allowed a writ petition and the matter was carried to the Supreme Court by the state of

Madras. The Supreme Court examined the Madras Amendment Act No. 11 of 1950.

Before setting out the amended provisions which came up for consideration by the Supreme Court, it is necessary to understand the scope and ambit of the terms used in the concerned sections. The term 'unlawful association' is defined as one which

- (a) encourages or aids persons to commit acts of violence or intimidation or whose members habitually commit such acts; or
- (b) has been declared to be unlawful by the provincial government under the powers conferred on it.

The Madras act amended Clause (b) of Section 15(2), and replaced Section 16 with Sections 16 and 16-A. While there is no amendment of Section 17, new Sections 17-A to F were added. Thus, what fell for consideration before the Supreme Court was Section 15(2)(b), which is the principal section in the act. It is this Tamil Nadu Amending Act which has been adopted by the Andhra Pradesh Law (Amendment of Short Titles) Act, 1961, under which it has been incorporated as the Indian Criminal Law Amendment (Andhra Pradesh) (Andhra area) Act, IX of 1950, which is applicable to those areas of Andhra Pradesh which were formerly part of Madras Province.

Section 15(2)(b) of the Madras amendment continues the definition of an unlawful association as one which

- (c) has been declared by the state government by notification in the Official Gazette to be unlawful on the ground (to be specified in the notification) that such association:
 - (i) constitutes a danger to the public peace, etc.,
 - (ii) has interfered or interferes with the administration of the law or has such interference for its object.

Section 16-A of the act provides for representation to the Advisory Board in terms of the time fixed in the notification for making such representations. Section 17-A empowers the government to notify and take possession of places used for

unlawful association. This was amended by the addition of two subclauses, 2(a) and 2(b), which allows the party dispossessed to approach the Chief Judge, Small Causes Court, or the District Judge, according as the place notified is situated within the presidency town or outside it, for a declaration that 'the place has not been used for the purpose of any unlawful association'. If such a declaration is made, the government must cancel the notification by which it took possession of the place. Section 17-B empowers the officer taking possession of a notified place to forfeit the movable property found in the premises if he opines that such property 'is or may be used' for the purpose of unlawful association, but only after following the procedure indicated. Section 17-E empowers the government to forfeit the funds of an unlawful association if it is satisfied, after enquiry, that such funds are being or intended to be used for the purposes of unlawful association. The procedure to be followed is also indicated. Section 17-F prohibits the civil courts from entertaining any suit or matter in respect of proceedings initiated under Sections 17-A to E of the amended act.

The reasons for introducing this statute was explicitly to contain the freedom struggle. Deshbandhu Chitta Ranjan Das, in his undelivered address at the Gaya Congress, condemned this legislation. Satyamurti of Madras, in his private members bill in the Council, called for the repeal of all repressive laws, including this one. Despite this history, the statute was adopted by presidential order for continuance in independent India.

After examining the aforesaid provisions, the Supreme Court opined that:

Giving due weight to all the considerations indicated above, we have come to the conclusion that Section 15(2)(b) cannot be upheld as falling within the limits of authorised restrictions on the right conferred by Article 19(1)(c). The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such

imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed by Section 15(2)(b) on the exercise of the fundamental right under Article 19(1)(c); for no summary, and what is bound to be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive government, can be a substitute for a judicial enquiry. The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights.²⁰

The court also dealt with the inadequacy of the notice periods and the manner of publication of notice. Ultimately, it held that having regard to the peculiar features to which references had been made, Section 15(2)(b) of the Criminal Law Amendment Act, 1908, amended by the Criminal Law Amendment Act (Madras), 1950, falls outside the scope of the restrictions under Clause 4 of Article 19, and is therefore unconstitutional and void. The court went on to observe:

We are unable to discover any reasonableness in the claim of the Government in seeking, by the mere declaration, to shut out judicial enquiry into the underlying facts under Clause (b). Secondly, the East Punjab Public Safety Act was a temporary enactment which was to be in force only for a year, and any order made thereunder was to expire at the termination of the Act. What may be regarded as a reasonable restriction imposed under such a statute will not necessarily be considered reasonable under the impugned Act, as the latter is a permanent measure, and any declaration made thereunder would continue in operation for an indefinite period until the Government should think fit to cancel it.²¹

²⁰State of Madras v. V.G. Row, AIR 1952, SC 196.

²¹State of Madras v. V.G. Row, AIR 1952, SC 196.

To summarise, the court struck down the ban order on the ground that it violated freedom of speech and association as well. It was pointed out that the principle of subjective satisfaction cannot be extended to the rights covered by Article 19. Subsequently, however, the history of this legislation has not been placed before the courts and no dispute has ever been raised, whether inside Parliament or the courts, whenever an occasion presented itself, about the propriety of adopting all the repressive colonial laws in the statute books of independent India.

Keshavan Madhava Menon v. State of Bombay was yet another communist case under the Indian Press (Emergency Powers) Act.²² The question involved was the freedom of speech and expression. But far more interesting is the dissenting opinion of Justice Vivian Bose in *Krishnan v. State of Madras*.²³

In looking at the issue of preventive detention, Bose pointed out that it was irrelevant whether or not the man for whom he was laying down the law had any respect for the Constitution. He held that any statute on preventive detention should specify a maximum period of incarceration. Bose's powerful dissent was taken note of by the government and an amendment to its preventive detention law was introduced providing for such a maximum.

In all these cases, there has been no attempt at a radical interpretation of the Constitution, or at forcing a discontinuity with the colonial legal framework. There has not even been a consciousness of the values inscribed in the Constitution. The communist movement, influenced by Soviet thought on the subject, was not really interested in the concept of the rule of law or its validity, even in a socialist society. This concept has a long history; it evolved as a major check on power and the arbitrariness it engenders. But our countrymen have never been ready or willing to operate the legal system insurgently, and to

²²*Keshavan Madhava Menon v. State of Bombay*, AIR 1951 SC 128.

²³*Krishnan v. State of Madras*, AIR 1951, SC 301. For a detailed discussion of this case see Chapter 4.

break the linguistic formalism into which the rule of law had become trapped. The colonial legal structure was undoubtedly positivist in the Austinian sense, and colonial governance claimed for itself absolute powers to rule. The native population was put on probation to claim eligibility for self-rule. This proved to be a drawn-out process. The introduction of representative status to the native population in small doses had the advantage of producing an elite leadership which would rein in the emerging militant groups. This policy also led to the introduction of natives into the civil service and the judiciary. But the colonial legal structure manned by Indians did not produce any spectacular judgments in favour of the freedom fighters. They had thoroughly imbibed the British legal positivist approach and were quite unprepared to handle the major issues of independent India in any other manner by which the legal structure could enhance the quality of governance and life. They had been trained to look into words, grammar and punctuation; whether conjunctions are to be read as disjunctions or *vice versa*; whether a singular should be read as a plural and whether 'he' subsumes 'she', etc. Words are tools to understanding, but no one looked beyond the words and the meaning they might yield to other learned judges in similar or dissimilar circumstances. The problems that confronted the courts were of linguistic expressions; it was felt that a harmonious construction would tidy up the words.

In all the cases concerning the communists, the courts examined the rights of the citizen before them on the basis of the words contained in various statutes. In *A.K. Gopalan*, the debate was on the terms 'procedure established by law' and 'freedom of movement', and on the difference between punitive and preventive detention. What was not debated was how and in what manner and under what circumstances a preventive detention law may act as a restraint on the freedom of speech and freedom of association. As already pointed out, you do not imprison political leaders for the reasons set out in any preventive detention law. Rather, the government arrests these leaders to curb their freedom of speech, association and

movement. All these rights were treated as irrelevant by construing Article 22 as a self-contained code. A fundamental limitation on preventive detention was converted into a shackle on liberty and it took over fifteen years to get rid of this interpretive fetter. *Romesh Thapar* would not have led to immediate amendment if the courts had interpreted the restraint more plausibly by holding that the constitution-makers did not desire that free speech should be restrained on the flimsy grounds of law and order and public order.²⁴ In *V.G. Row*, the court could have struck down the entire Criminal Law (Amendment) Act, 1908, had they been forward-looking and boldly innovative. Had they only looked at the statements of objects and reasons, they could have passed strictures on the executive for having adopted a law whose repeal every important national leader had demanded of the British government.²⁵

Free speech and its companions, freedom of association and freedom of movement, have transformative use and cannot be read disjunctively from the people and their aspirations. These are political liberties in the sense that politics is the driving force of social change and these rights cannot be extrapolated from their social context and setting. A constitutional provision has a separate status in a legal system. In adjudicating whether a law is constitutional or violative of the fundamental rights, the courts have a moral obligation to examine it from the standpoint of the objectives of the Constitution: specifically, whether the measure thwarts or promotes progress towards these goals and whether the actions of those threatened with detention are a protest, a complaint that the government has been working to thwart such progress.

The fundamental rights granted to individuals enables them to rally collectively to discipline governance. This collective action by the people may take various forms, always depending on the response or absence of it. It is in such situations that the theory of power and the theory of rights are tested in regard to

²⁴*Romesh Thapar v. State of Madras*, 1950 SCR 594.

²⁵For a discussion on the debates surrounding the Criminal Law Amendment Acts, see Chapter 3.

which gets precedence. The resulting decision on priority decides the fate of both institutions and society.

The State, Free Speech and the Naxalite Movement in Andhra Pradesh

The schism with communist orthodoxy in India finally took place in Naxalbari in West Bengal. Charu Majumdar emerged as the new movement's unrelenting spokesman. The emergence of the Naxalbari movement coincided with radical youth revolts in Europe and the U.S.A. Its new agenda was based on the long tradition of Marx, Lenin, Stalin and Mao. The Naxalbaris decided that recurring trade cycles would no longer swell the ranks of the proletariat until a revolution became possible. Rather, it would be brought about by armed peasant struggle under the leadership of the working class. But the movement did not find its leadership in the working class. Whatever course it had taken in the beginning, it acquired a large following among the youth, and its leadership in Andhra was provided by the teaching profession, who also provided it a radical literary wing. Their writings depicted a totally bankrupt society, with literary and art forms that were hollow, meaningless and ritualistic. They rejected the traditional values of the Indian communist movement. The Naxalbari writers were inspired by the novelty of the Cultural Revolution initiated by Mao. They bloomed as Mao desired them to.

A group of writers who called themselves the Digambara poets broke free from pedestrian and obscure literary styles. A rickshaw puller released their first collection of poetry. In Bengal, Samar Sen and Saroj Dutta led the new literature that emerged with the Naxalbari movement. They made an attempt to liberate art and literary forms from the stifling influence of Tagore, calling themselves the Bhuk Peedi poets. There was freshness in the air, and hope and courage in the youth. Many felt that a revolution was around the corner. Even a mild-mannered poet like Lochan from Warangal wrote a poem entitled 'With Your Fingers on the Trigger'. A society called Swetcha Sahiti was formed in

Warangal around 1968, and a collection of poems with the title *Your Fingers on the Trigger* was published. The following year another collection came out under the title *Revolt*. This breaking away from traditional literary forms, always an attack on the existing social order, encountered the inevitable opposition. The whole situation was fluid.

As the Srikakulam peasant struggle gained momentum, students in Vizag questioned the role of the famous traditional poet Sri Sri, asking him, 'On whose side are you?' This has always been a classic query of the communist movement. At that time the question appeared relevant. The Revolutionary Association was formed on July 4, 1970, with the declared object of supporting the Srikakulam peasant struggle. By then the state had unleashed its repression full throttle. The Madras Suppression of Disturbances Act, 1947, was adopted in the year 1967 by Andhra Pradesh and used successfully against the Naxalite movement. It enabled the state to notify affected tribal regions as 'disturbed areas', giving the police enormous powers, including that of shooting to kill. The entire northern coastal belt comprising Vizag, Srikakulam and East Godavari, and the hinterland districts of Khammam, Warangal, Karimnagar and Adilabad were under the grip of government repression characterised by a brutality which far exceeded that employed by either the Nizam or the British.

The Congress Party under Indira Gandhi lost its majority in five states during this period. The direct result of this was her inability to carry through the annual renewal of the Preventive Detention Act, 1950. However, her government at the centre gave leave to the states to have their own detention laws. Thus, the Andhra Pradesh Preventive Detention Act, 1970, was brought onto the statute books. It was used against three members of the Revolutionary Writers Association, Cherabanda Raju, Nikhileswar and Jwalamukhi, who were arrested for their writings. To get over the limitation imposed by Article 22(5) of the Constitution, the legislature enacted a provision which reads:

No detention order will be invalid or inoperative merely by reason that one or more of the grounds on which the detention

order is made is or are vague or irrelevant, when the other ground or grounds does not or do not suffer from any such infirmity.

This needs some explanation and some background. Preventive detention means jailing without trial; it is not punitive in character. At the drafting stage of the Constitution, a mere assurance was considered sufficient so that life and liberty were not taken away without procedure established by law. This bland assurance did not satisfy many members of the Constituent Assembly, who felt that Article 21 (then 15) was a blank cheque to the executive. It was in these circumstances that the present Article 22 was introduced. This extended positive assurances that those arrested would be produced before a magistrate within 24 hours; that they would be entitled to the presence of a lawyer of their choice; that incarceration would always be under the authority of a statute passed for that purpose, which would provide for furnishing of grounds immediately on arrest; that there would be a maximum period of detention; that the case would be scrutinised by an advisory board consisting of a sitting judge of the High Court and two retired judges. There were other protections too. The furnishing of grounds of arrest was a mandatory requirement. Based on the material placed before him, the detaining authority has to satisfy himself that there exist grounds for detaining the person arrested, and that every one of these grounds is relevant: even if one ground is irrelevant or vague the detainee is entitled to release. The courts have read this safeguard into the constitutional provision.

Clause 5 of Article 22 specifies that the grounds of his arrest must be communicated to the detainee, who must then be provided with a reasonable opportunity to make a representation against his arrest. The satisfaction of the detaining authority is subjective and therefore, to be valid, the grounds have to be relevant, not vague. To redeem the arbitrariness which will be present in every subjective formulation of power, the courts have evolved this principle in favour of liberty. The specific grounds or materials that persuades authority to act cannot be predicted. Therefore, a single irrelevant ground is enough justification to

release the detainee. This interpretation was built into Clause 5 of Article 22, and therefore became a constitutional guarantee. The Andhra Pradesh Preventive Detention Act, 1970, tried to circumvent this guarantee by legislating against the courts' interpretation of Clause 5. It was legislated that the existence of one ground that was relevant among others that were not was sufficient to justify detention. It was this that was questioned by the arrested writers. They also claimed a poet's freedom to write. When Indira Gandhi nationalised the banks to claim socialist credentials and refurbish her image, the statute she used came under challenge. The principle in *A.K. Gopalan*, that Article 22 is a self-contained code and that the issues covered by this article could not be tested for their validity with reference to the other fundamental rights, was extended to the interpretation of property rights in Articles 31, 31A, etc. Such an interpretation became an obstacle to the successful challenge of the bank nationalisation act, thus successfully challenging the validity of the reasoning in *Gopalan*.

This came in handy in the revolutionary writers case. Prosecuting them for their writings put into focus the courts' definition of free speech and how far this definition has helped us progress toward the constitutional objectives after Independence.

The writers' case came before a bench presided over by Justice O. Chinnappa Reddy and Justice A.D.V. Reddy. The hearing was totally uninhibited and free. The courtroom was packed and our request to permit the poets to read out the poems impugned by the detention orders was acceded to. Cherabandaraju's wife, Shyamala, was present in the court.

Jwalamukhi read out his poem in a manner reminiscent of the actor Sivaji Ganesan's dialogues in Tamil cinema. Nikhileswar, a mild and polished person, read out his poem very well. But the best was Cherabandaraju's reading. It was a fine satire on Indira Gandhi's socialism, set to rhythm and tune. This device demonstrated the untenability of the detention orders against these three poets. On examining the grounds of arrest the court found that they were wholly irrelevant. Compelled to go into the details of the act, the court found that the provision

cited violated the guarantee given by Clause 5 of Article 22. It therefore struck down the act as invalid. Striking down an enactment after testing its validity with reference to free speech and expression was a major step in understanding and interpreting our constitutional rights. But this was only the decision of a state High Court and did not end the repression to which radical writers were subjected in Andhra Pradesh, which was already under an unproclaimed emergency.

It would, however, be interesting to examine the grounds for their arrest. First, these grounds were common to all of them. This set the pattern for the ensuing subversion of legal processes. It was not Section 124A alone (that Gandhi described as the prince of Macaulay's codes) which was pressed into service. Order was sought to be maintained by preventively detaining a person so that his or her speech would not be heard. The threat to the security of the state posed by the writers was as follows. They had founded an association called Digambara Kavulu and contributed verses to three volumes of poetry. This was an association of angry men who believed in the ideas of Marx, Lenin and Mao. Their poems mingled hope with destruction, and their references to the propertied classes, blackmarketeers, followers of swamis, etc., were vulgar, even sadistic. They instigated the famous poet of the people, Sri Sri, to leave the Progressive Writers Association and found the Revolutionary Writers Association, which then appealed to the president of India to stay the execution of Kista Goud and Bhoomaiah, who had been sentenced by the A.P. High Court. Finally, the writers' group also criticised the government for suppressing civil liberties in the state.

Even today the state is trapped in abysmal ignorance. That administration implies an understanding of the law and its proper enforcement is a lesson that the state and its minions are still to learn. While the grounds for detaining these writers were wholly irrelevant, the court went on to point out the value of free speech in eloquent terms. It relied on the excellent exposition of Justice Holmes, where he talks about every idea being an incitement that should be allowed to canvass for its

own acceptance. Free speech should be permitted, felt the judge, so long as there is no danger of imminent public disorder. Justice Holmes pointed out that a distinction could be made between an expression of opinion and incitement to violence based on the speaker's desire. Commenting on the criminal propensities of the communist ideology, he pronounced that the communist discourse then before the U.S. Supreme Court had no chance of starting a conflagration. Such was his confidence in American democracy and its ability to withstand the communist onslaught. It was this confidence which made him declare:

If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance to have their way.

In the long run, the forces and ideas fighting for dominance will have a chance if they are allowed to propagate freely without early intervention by the stifling of free speech. An idea becomes an incitement if it attacks the social order and for that very reason secures a following from the vast majority of totally marginalised peoples kept in unspeakable penury and indignity. Justice Chinnappa Reddy, following the trend set by Justice Holmes, describes poetry as the spontaneous outpouring of powerful feelings, where passion and extravagance go hand in hand:

These cannot have any rational connection with public disorder. Were these three poets creating public disorder by breaking with the poetic tradition and writing about the social forces at war with *status quo*? Can their writings be dissociated from the revolutionary movement and described in abstract as outpourings of restless souls looking for light? If the Constitution itself provides the objectives and the obligations, should forces working for change be condemned as criminal?²⁶

It is not enough to dodge the law intelligently and secure either personal liberty or free speech; rather, these must be based

²⁶Jwalamukhi & Ors. v. State of A.P., 1972.

firmly on rights. Jurisprudentially and within the legal system, the forces working for social change should not be characterised as criminal or as a threat to security. As long as the right to bring about social change remains unrecognised in law, changes will continue to be partisan and violent. If the state is defeated in its effort to contain freedom using one enactment, it will pull another out of its quiver and employ this to contain freedom a second time and on the same grounds. That is what happened to the revolutionary writers. The same writings banned already became a subject of criminal prosecution for sedition and conspiracy to wage war and overthrow the government.

Prior to the arrests of the writers, three volumes of their poems —*Jhanjha*, *March* and *Le*—were proscribed under Section 99 of the Code of Criminal Procedure. The poems in these collections were declared seditious, based on the report of an official translator in the police department. They were notified as proscribed in the official Gazette, and all copies of the books were seized. It is open to an affected or interested party to apply to have a proscribing order heard by a special bench of three judges and revoked. Jwalamukhi filed the application and the matter came up before Justices Obul Reddi, Sriramulu and Madhava Reddi. Two of these judges upheld the order but Justice Madhava Reddi wrote a dissenting judgment, which is remembered. He described Marxism as a theory that deals with economic, social and political justice, one that has become part of school and college curricula:

These poems only educate the literate Telugu people in these ideas and theories, but as observed by Justice Holmes, 'every idea is an incitement' and the propagation of every such idea cannot, in my opinion, be termed seditious.²⁷

He did not believe that circulating these poems would kindle

²⁷Justice Madhava Reddi, in *Jwalamukhi v. State of A.P.*, ILR 1973, AP 114. The dissenting opinion of Madhava Reddi was upheld by the Supreme Court in *The State of Uttar Pradesh v. Lalai Singh Yadav*, 1976 SCC (Cri) 556.

a flame, or that they would create public disorder or violence in the immediate future. The majority judgment, on the contrary, held them to be seditious on the basis of the judgment rendered in the case of Bal Gangadhar Tilak and other freedom fighters. *Le* (meaning 'Arise') came before the same bench. The poems in this volume were of the same tenor. They criticised our warring with China as a way of resolving border disputes. The criticism was of war as an instrument for resolving any dispute. There was also a poem criticising the role of the courts in a class-based society; it extolled armed revolution as the only way to put an end to exploitation. After receiving adverse judgments for *Jhanjha* and *March*, the traditional precedent-oriented method would have led again to sedition. Instead, I produced before the court copies of the poems 'On Liberty' by Robert Burns, 'After Blenheim' by Robert Southey, a poem by Dylan Thomas, some writings of D.H. Lawrence and others traversing the subjects which these poets had written about. I read out some of these poems and not much more argument was needed to convince the same bench that the proscribing order must be lifted. In a four-line order, the bench quashed the order proscribing *Le*.

In Andhra Pradesh between 1969 and 1974, around 22 conspiracy cases were initiated against the Srikakulam movement and its participants. Principal among them were the Parvathipuram case, the Nagi Reddy conspiracy case, and the Secunderabad conspiracy case. In the last, the accused were the principal members of the Revolutionary Writers Association and others, including Kondapalli Seetharamaiah. The sessions judge who finally heard this case and delivered the judgment was Rama Sarma. He divided the accused into two categories: writers and activists.

Among the writers were Jwalamukhi, Nikhileshwar, Cherabandaraju, Nagnamuni, Ranganatham, M.T. Khan, Raja Lochan, K.V. Ramana Reddy, Tripuraneni Madhusudan Rao, B. Tharakam, Vasireddi Seetha Devi and Vara Vara Rao. Like Sartre, all of them believed:

If I am given this world with its injustices, it is not so that I may contemplate them coldly, but that I might animate them with my indignation, that I might disclose them and create with their nature as injustices.

To criticise the violence unleashed by the state can never be seditious, unless we fall back on the precedents set by Strachey or Justice Davar against Bal Gangadhar Tilak. Yet the writings of the revolutionary writers were proscribed. Successive experiences like this should make us look beyond the events of the moment, if only to preserve democratic values, for the only regime in which writing has any meaning is democracy.

A threat to a writer is a threat to democracy. Thus, a clerk or a blacksmith may be personally affected by fascism, which does not, however, obstruct the practice of his calling. But repression affects both a writer and his work. A writer contests the values entrenched in the regime through the act of writing about them. The writer's fight has been against absolutism since the time of Milton, so that 'the determination of true and false, of what to be published and what suppressed, might not be in the hands of the few who may be charged with the inspection of books: men commonly without learning and of vulgar judgment and by whose license and pleasure no one is suffered to publish that which may be above vulgar apprehension.' When the government is in perpetual insurrection against its own people, it is plagued by fear and can never rise above 'vulgar apprehension'.

The cases against the revolutionary writers was intended to contain the Srikakulam movement and the spread of this peasant uprising to the backward Telangana region that had already witnessed an armed uprising organised by the communists. The uniqueness of the Srikakulam armed uprising lies in the very positive role played in it by these and other writers. Neither by their preventive detention nor by proscribing their writings has this aspect has come through clearly. It is not as if they had no role to play in encouraging the youth to join the ranks of the revolutionaries. Large numbers of young people read their writings and were enthused to join the movement or remain

steadfast sympathisers. The court's perception that their writings had limited reach and could not lead to an immediate conflagration was naïve. It was unprepared to structure an alternative jurisprudence based on the right to social change in the pursuit of equality and human dignity. The result is a patchwork version of British colonial jurisprudence, where power continued to limit rights. Ertatism mixed with the rhetoric of rights is all that we have been given by the interpretations of the court.

The case went on for a full fifteen years. The sessions court was itself listed in the telephone directory as the Revolutionary Writers Court! These writers were not just prosecuted under 124A IPC. They were prosecuted for waging war, conspiracy to wage war and other provisions under the chapter on offences against the state—the political crimes of our penal code. The earlier prosecutions, the preventive arrests, the proscribing of their writings and the decisions rendered by the court in those matters were totally ignored. Double jeopardy, too technically defined, enabled repetitious prosecution in different courts of concurrent jurisdictions, and the conspiracy charge enabled the state to prosecute them over again for conspiracy to commit the offences for which they had already been charged and prosecuted. These methods had the approval of the courts because they looked at these cases from the perspective of the jurisprudence of power and not from the point of view of rights. The Marxism classes the writers taught, their literary discussions and their public meetings were all treated as conspiratorial and seditious. Reacting strongly to the atrocities committed by the Nazi regime, Gustav Radbruch, a German jurist, arrived at this formulation:

Where the violation of justice reaches so intolerable a degree that the rule becomes in fact 'lawless law', the law has no claim to obedience.²⁸

²⁸W. Friedmann, *Legal Theory*, London: Stevens and Sons Ltd., 1967, p. 351.

It is interesting that similar positions were taken by Tilak, C.R. Das and Gandhi. There are continuities between the colonial and post-colonial periods, and disturbing parallels between the measures introduced by the British to counter conspiracy and sedition and the period between 1967 and 1975 when the independent Indian state found itself going through the same exercise, this time too to counter political unrest against an increasingly repressive state.

The Media and Freedom of Expression

The media regards freedom of speech and expression primarily in business terms. It trades in freedom of speech at the proprietorial and entrepreneurial level, but it is a livelihood for the employees, from the editors down to the stringer in the rural area. In a sense therefore, the quality and content of our right to free speech and expression is determined by profits for the media owners and job security for the employees working in the media.

In 1958, the Express group of newspapers contended before the Supreme Court that the Working Journalists Act constituted an impediment to a free press and therefore violated the free speech and expression guaranteed by Article 19(1)(a) of the Constitution. The media company Bennett Coleman brought the right to free speech into the debate by impugning the newsprint policy passed by the government under the Import Control Act, 1947. In his dissenting judgment, Justice Mathew pointed out the dangers a monopoly press may pose to free speech and was of the view that a monopoly in opinion was a worse tyranny than one in commerce. Whether taxing newspapers would be a restraint on free speech was brought up again by the *Indian Express*, Bombay, in 1986 before the Supreme Court. In all these cases, businesses have raised the slogan of free speech for commercial advantage. They are attempts to provide business security to the media. Our media enterprises claim to be champions of free speech and the cause of democracy, and no doubt some of them stood up against the

imposition of Emergency in 1975 and the politically oppressive system it sought to legitimise. One could speculate whether, if Indira Gandhi had been notably anti-Soviet and pro-American at that time, the press would have taken a similar stand. Business expediency and exigency dictate the media's politics. This is a major limitation on the freedom of speech and therefore a self-imposed limitation on the freedom of the press. Like every institution of the state, the media too claims neutrality between the rich and powerful on the one hand and the poor and deprived on the other.

Another major limiting factor is the job security of employees in the media. It is true that quite a few have served for long periods and retired, but that has always been at a price. The risk of loss of livelihood acts as a major constraint on the free practice of the profession of journalism. In countless instances, experienced editors have been shown the door for not conforming to the management's stated or unstated policies. The third major constraint on a free press is the largesse which governments bestow on particular journalists, not as a charitable act or in furtherance of their right to livelihood, but to regulate the flow of information to the public without any visible control. Despite these and other constraints, our media is private and formal censorship is absent, so we find them exposing governmental malfeasance as also that in the corporate sector. Media exposés have led to the initiation of public interest litigation.

An alternative to the press as presently constituted is to set up democratic media that addresses the issues faced by the working class and other deprived sections. Workers in the organised and unorganised sectors, Dalits, women and other deprived communities, who collectively have the potential and the strength to bring about social, economic and cultural transformation, need an alternative media, a radical press, because their issues and the problems they face very often go unrepresented in the mainstream media. However, because these sections are so fragmented, the dream remains unfulfilled. Many groups have their own news bulletins and sheets. There was until the split of

the communist movement an alternative media for the working class. But the left is now so fragmented that circulations are limited to the respective churchgoers. Setting up a left-wing or broad-based democratic press appears to be impossible at this juncture. The national print media and its language counterparts are like the curate's egg, good in patches. We should strive to increase the good patches and negate the idiom if we are interested in preserving democracy. By the very nature of its business, the press is often compelled to take a stand on issues of free speech. Thus we found the *Indian Express* and the *Statesman* defying Emergency. Quite a few language papers left their editorial columns blank on 26 June 1975. The tradition of independence is one basic character which the press has always claimed. Similarly, there have been fine editors who have been uncompromising on the question of freedom of the press: witness Kuldip Nayar courting arrest in defiance of Emergency. It is always a few who lend credibility to institutions. A few uncompromising judges have been largely responsible for the credibility of the judiciary. It was not the progressive judges but a few conservatives who set aside Emergency detention orders in Andhra Pradesh, and it is Justice Khanna who alone in the Supreme Court had the courage and conviction to pronounce the Maintenance of Internal Security Act invalid. When he was superseded there was not even a murmur of protest from the other judges. I do not know how many journalists protested the arrest of Kuldip Nayar.

It was during the period immediately preceding Emergency, when the Naxalite movement gained ground in Andhra and other parts of the country and the movement led by Jayaprakash Narayan grew rapidly in Bihar and elsewhere, that investigative journalism was born in India. The media played major roles again during the anti-reservation stir, Advani's Rath Yatra, the destruction of the Babri Masjid and during various communal riots. The press showed itself openly against reservation, never perceiving it as a facet of equality. There were no screaming headlines when those rampaging against reservation destroyed public transport and public property. The agitation was

portrayed as a fight for the retention of merit in education and employment. The press used photographs of self-immolation by young misinformed students as a powerful statement against reservation. This was one instance where the views of the management coincided with those of the reporters, and it made the press more undemocratic. It is pointless to belabour the rank communal nature of the Rath Yatra and the demolition of the mosque. Some English-language and vernacular papers lent their support, overt and covert, to these ventures, without realising their responsibility of protecting the minorities and assuring them equality of treatment in law and society. This is all the more necessary now, as other minorities are being targeted.

The way the politics of violence gets represented in the media is interesting. During the Emergency and shortly thereafter, the coverage of atrocities against the radical left was fairly democratic, as was the coverage of Justice Bhargava's commission of inquiry into encounter killings. Although there is no separate human rights space in the newspapers, this subject gets fairly good and prominent coverage. Yet there has been practically no editorial support for human rights campaigns. For instance, the A.P. government killed 275 people in encounters in 1998 and the following year over 130 persons. While every one of these deaths was reported, there has been no editorial comment condemning them in unequivocal terms.

There has been a gradual shift in media emphasis from state violence to political violence with the rise of Khalistan militancy in Punjab, the increase in violence in the North-East and the continuing Naxalite violence in Andhra Pradesh. The violence in Jammu and Kashmir is reported according to the political exigencies of the ruling party. All these regions of political turbulence abound with violations of human rights till they become endemic. Yet these violations do not get reflected in the news media, either electronic or print. Human rights stories often do not get told because reporters in rural areas are afraid of being implicated as terrorists. For instance, in the Adilabad region of Andhra Pradesh, rural stringers of Telugu newspapers were charged under TADA for reporting on police harassment

and encounters. Editorial policy has undergone a change after the appearance of 'the terrorist' and after political dissent outside the parliamentary system has been redefined as and subsumed under the all-encompassing category 'terrorist violence'. As a result, state violence against Naxalites and other militant and dissident groups does not receive the focus it ought to. This is not to underestimate the character of some of these political movements, who use violence not only against innocent people but also against the press, their offices, editors and journalists. Instances have never been wanting: *The Tribune* in Punjab, the *Punjab Kesari* and the *Srinagar Times*. This is a reality the press has to face when it operates in politically turbulent areas. Civil liberties activists have been mauled and gunned down by the police, but these are the hazards of conscience-keepers in turbulent times. They cannot however be an excuse for refraining from reporting or exposing state violence. These are actions beyond the limits of law and should be seen and written about as such.

There is a U.N. General Assembly resolution that extra-judicial killings have to be investigated and the culprits punished. There is a similar resolution with regard to disappearances. The press, more than any other institution, has the responsibility to expose human rights violations and not judge whether or not they are newsworthy. To do so would, in fact, be a human rights violation, particularly if there were no follow-up after reporting. The official violence during the tenure of Police Commissioners Ribeiro and Gill in Punjab went largely unnoticed. On the contrary, the chorus of protest by the editors of almost all the major newspapers when Gill was punished for misbehaviour with a female official demonstrated their attitude to human rights. Constantly projecting terrorist violence in the media only legitimises police violence against the villagers, who have always been the immediate suspects and therefore victims of illegal custody, torture and custodial rape.

The muzzling of political dissent and even the shooting of criminals should not be permitted to become part of administrative practice, as is true today in several states in the

country, notably Andhra Pradesh, Maharashtra, Uttar Pradesh, the states in the North-East, Punjab, West Bengal, Tamil Nadu and Kerala. During the Kargil war, the rapid escalation of the conflict and the return of the bodies of dead soldiers were both reported in chilling and voyeuristic detail by the electronic media, resulting in a war hysteria which masqueraded as patriotism and nationalism. In situations like this, fascism is not far behind, as Gujarat has recently demonstrated. Only an informed press—both editors and reporters—has the reach to campaign for democracy against such febrile and delirious trends in the body politic.

Banning Organisations

Two orders were issued by the government of Andhra Pradesh, one for the Andhra area and the other for Telangana. The Criminal Law Amendment Act of 1908, a statute that was struck down decades ago, was used for the Andhra area and the truncated Hyderabad Public Security Act 1348 Fasli for Telangana. Under the former act the banning notification was issued under Section 15(2)(b) of the Indian Criminal Law Amendment (Madras) Act of 1950.

More recently, Deendar Anjuman was banned under the Unlawful Activities Prevention Act of 1967. The ban was confirmed by a tribunal headed by a High Court judge. The Peoples' War Group and Deendar were banned under two separate enactments. These are not purely legal issues. They are seen and experienced as injustices, making the resulting disorder intractable. The activities of these organisations were not new. They have been with us from the dawn of Independence. After decades of protest yielded no result, all of them turned violent, as if saying the state does not have a monopoly any more on the use of force.

The Peoples' War Group has been under a *de facto* ban for over two decades now. The *de jure* ban is meant to muzzle human rights organisations and the news media. Editors are contacted by phone and asked to cooperate with the authorities,

as if they were friendly fascists, while the reporters and stringers in the rural areas are threatened. They are told that reporting encounters, deaths in custody, or publishing the statements of the PWG will be construed as aiding and encouraging unlawful activities and will be looked upon as interference with the administration of law and order.

An atmosphere of fear has been generated that brings all protest within the definition of militancy and terrorism, and a range of organisations—active and defunct—have been branded as secessionist. Even before the Prevention of Terrorism Ordinance (POTO) was passed, the state had notified all militant organisations operating in Jammu and Kashmir, the United Liberation Front of Assam, the National Democratic Front of Bodoland—Peoples Liberation Army, the United Liberation Front, the Manipur Peoples Front, the All Tripura Tiger Force, the National Liberation Front of Tripura, a few other organisations of recent origin in the North-Eastern states, the currently defunct organisations Babbar Khalsa International, Khalistan Commando Force, Khalistan Zindabad Force and the International Sikh Youth Federation, and even the Peoples' War Group in Andhra Pradesh, which was already under a state ban. All these organisations represent minority groups, indigenous/adivasi groups or communists, and most have self-determination as central on their agendas. They have grown over the last fifty years, during which resistance to decaying governance has been treated as a law and order problem to be crushed by the untrammeled use of special repressive laws which are still in place.

POTO is more effective than large-scale arrests under a preventive detention law, which can invite publicity. A district court is a low-profile, low-priority institution. The ordinance has power to ban the right to association. Our incipient Supreme Court ruled in 1952 that this and other rights could not be restrained on the basis of subjective satisfaction, as was adequate for preventive detention. The prevailing law is that the deprivation of this right has to be on the basis of objective adjudication. However, today a growing number of people

welcome the suspension of rights under the spurious belief that this will wipe out terrorism. And the judiciary is as always under pressure by the ruling parties to succumb to the imperative of repressive governance as the only answer to increasing resistance.

The Question of Academic Freedom

The Supreme Court in 1994, in *Gajanan Vishweshwar Birjur*,²⁹ pointed out that thought control was alien to our constitutional scheme and values. It went on to say that suppressing ideas only drove them underground. As a policy, suppression can never be successful. Any surface serenity it creates will be false. Our Constitution permits free trade in ideas, said the court. This is an expression used by the U.S. Supreme Court. The Holmes-Brandeis tradition, which has been commended by our court, is a complete vindication of the right to free speech.

In *Abrams*, Justice Holmes spoke about free trade in ideas. The issue was the language used in two leaflets published by Russian immigrants who claimed that they were socialists and anarchists who supported the Russian Revolution. This was immediately after the seizure of power by the Bolsheviks. In that context, delivering the dissenting judgment, Justice Holmes said:

But men have realised that time has upset many fighting faiths. They may come to believe that the ultimate good is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation on some prophecy based upon imperfect knowledge.³⁰

Continuing this thought, Justice Brandeis pointed out that men had burnt women as witches out of fear, and that the function of free speech was to free them from the bondage of such

²⁹*Gajanan Vishweshwar Birjur v. Union of India*, (1994) 5 SCC 550.

³⁰*Abrams v. United States*, 250 US 616 (1919).

irrational fears. He then proceeded to set down the ambit and scope of free speech:

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence... Such must be the rule if authority is to be reconciled with freedom. Such in my opinion is the command of the Constitution.³¹

This should be the perspective except in periods of grave emergency. It formed the basis of Justice Madhava Reddy's dissenting opinion when a collection of poems entitled *March* was proscribed by the government of Andhra Pradesh. It was this dissenting judgment which was upheld by the Supreme Court when our High Court had acted to proscribe. Justice Iyer recommended to the government the dictum of Mao: 'Let a thousand flowers bloom.' The Holmes-Brandeis tradition informed our approach to free speech.

Kancha Iliaiah's 'Spiritual Fascism and Civil Society', published in the *Deccan Chronicle* of 15 February 2000, invited censure from the registrar of Osmania University, couched in the form of advice. Copies of the registrar's letter, dated 6 May 2000, were marked to the secretary and vice-chancellor of the university and to the principal of the University College of Arts and Science. Clearly, the letter was an official communication that would go into Iliaiah's personal file. The second paragraph of this letter reads:

Basically being teachers, we are bound to contribute towards upliftment of society, of every segment of society, promote social harmony and emotional integration. We have to positively ensure that either our writings or any other action do not in any way lend a slant to accentuating existing prejudices and inflame hatred among different sections of the people. You are requested to keep these in mind and discharge your role as a teacher with greater vigour and vitality to the betterment of the society as a whole.³²

³¹*Whitney v. California*, 274 US 357 (1927).

³²Emphasis added.

The letter is a finding and a censure rolled into one. The cited paragraph sets out parameters for academic writing, not only for Dr. Ilaiah but for others as well, and raises questions on free speech and academic freedom. Ilaiah's writing focuses on the unfulfilled promises made in the Constitution and on the views of Dr. Ambedkar. In the article in question, he touches upon the RSS, Godse and the like without being vitriolic. But that is the point. Genuine criticism is more than defamatory or vitriolic. It unsettles and upstages the wielders of power.

While Dr. Ilaiah was not accused of sedition, is it right to say his writing sparked hatred between castes and communities? Can a citizen who works for the abolition of the caste system be accused of promoting hatred between castes? A misconceived approach to these issues may bring about preventable results.

In 1986, a citizen moved a petition in the Calcutta High Court to ban the Koran. He wanted the court to direct that all copies of this book be forfeited to the state. The petition was dismissed, but not before the court pointed out that the petitioner had acted in a manner to promote hatred between the communities. In 1988, someone wanted the courts to withdraw the license to screen the film *Tamas*, based on Bhisham Sahni's story about Partition. The film portrayed the carnage and violence that happened during that period. The case reached the Supreme Court, which refused to grant the request. As with the article in the *Deccan Chronicle*, the petitioner was of the view that the violence depicted in the film would incite further communal violence. But the court held that depicting history was not an offence: 'It is out of the tragic experience of the past that we can fashion our present in a rational and reasonable manner and view our future with wisdom and care. Awareness in proper light is a first step towards realisation.'³³

Conclusion

The Constitution of India guarantees that caste, race, religion and sex are irrelevant considerations in the social and economic

life of the people; that every person has a right of access to public tanks, places of public resort, hotels, etc.; that every person has a right to enter places of public worship; that Scheduled Castes, Scheduled Tribes and backward classes, on account of centuries of social deprivation, are entitled to protection, and that their right to reservation of seats in education and jobs in government services are a part of the equality assured in Articles 15 and 16 of the Constitution. In view of the plurality of religions and sects in our country, freedom of conscience has been guaranteed. Bonded labour and child labour have been abolished. The Constitution's Directive Principles and Preamble clearly set out the duties of the state and its institutions and the objectives to be achieved by them.

Yet, more than fifty years later, no institution in this country is totally committed to the realisation of these constitutional goals. A party whose members swore to uphold the Constitution when they entered Parliament brought down a government for upholding the principles of secularism and reservation, and then pleaded for an uninterrupted five-year period for themselves. Bonded labour and child labour abound despite subsequent legislation to regulate or eliminate these practices. Violence against women and discrimination against them continue. Violence against Dalits and Adivasis are on the increase, despite special penal legislation passed twenty-five years after the Constitution to check it. Social and economic deprivation and misery are on the increase. Most of this is borne by the Dalits and backward classes. Attacks on religious minorities, two for the present, are on the increase. In many rural areas untouchability, including barring of temple entry, is still practised. Those speaking out against this gross injustice have, for over three decades now, faced the banning of free speech and the right to free association.

³³Ramesh Chotalal Dalal v. Union of India and Others, AIR 1988 SC 775.

30

Coca-Cola and the Peoples' War Group

The world is currently resounding with American violence. Amidst this earth-shaking violence, nobody is taking any notice of the violence indulged in by the Peoples' War Group. Compared to the scale of violence one has witnessed since September 11, 2001, that of the Peoples' War Group (PWG) looks very retail, as if they were small-time hoods in rural India. But if we cannot condemn American violence, we have no right to condemn any form of violence. The TV programme, 'The Big Fight', has never come around to unequivocally condemning American violence, which has reduced all of Afghanistan to unlivable terrain for several decades to come.

Before America's Afghan War, we were concerned about the violence which has become endemic in our state. The violence of our government occurs with impeccable regularity, as if to enhance our tolerance of it. The violence of the Peoples' War Group, which till recently lacked a Marxist or Maoist perspective, was quasi-feudal, by contrast. The PWG seemed to be clearing the ground for a proper revolution; they were busy eliminating competitors, informers and covert operators from the

field. Vendettas against the state for killing their men and women in staged encounters occupied most of their revolutionary time. In a vendetta, between the plan and the execution there may be many a slip. To offset such lapses, they targeted public places like rural railway stations, telephone exchanges and local government buildings. This form of protest was a hangover from our freedom struggle, for which we have not yet found a substitute. After three decades of sporadic violence they finally realised that they had still not identified a genuine class enemy! After globalisation, class enemies no longer come incognito. They are all over us in the form of multinational corporations. People and groups other than revolutionaries took them on. It was they who forced Kentucky Fried Chicken to hide behind the protection of security guards. I do not recollect anyone being called to account for not barring the entry of this prime symbol of the American way of life into our culture.

On 22 October 2001, the Telugu daily, *Vaartha*, under a screaming banner headline, informed everybody with clinical detachment about the bombing of civilian populations in Afghanistan. In the space left in the margin of the first page was a small headline followed by the news that the Peoples' War Group had used an improvised bomb to bring down partially the Coca-Cola factory located near Mangalagiri in Guntur district. I felt that at last the Andhra revolutionaries had learnt to identify their class enemies. At about the same time my telephone rang. The call was from the Secunderabad representative of a major TV channel. I was to hold a long-distance discussion with their Delhi correspondent on the blowing up of the Coca-Cola factory. I felt that I had been called upon to show cause! I do not know why I or any other human rights activist should offer explanations for the explosions or killings of the PWG. Why the ridiculous presumption that those who protest against the unlawful and brutal actions of the state against political dissenters of whatever hue, even terrorists, are themselves supporters of terrorists? The logic appears to be: If

you are in politics you must join electoral politics or join ranks with the terrorist. Either it is black or white; no intermediate shades are allowed. A very fascist formula, this!

This logic has been accorded a global status by U.S. President George Bush, who declared after 11 September: 'Those who are not with us are with the terrorists.' This principle is naturally acceptable to all the states in the world, because it is on this principle that they repress their own people on a large scale with impunity.

The day-and-night violence by the U.S. on Afghanistan, on a scale and magnitude never witnessed before in history, has legitimised violence as a way of resolving issues and settling disputes. What was given to Kofi Annan and the U.N. was not the Nobel prize for peace, but terminal benefits for services rendered. Violence has truly become a non-issue.

I can understand the TV stations being concerned by the destruction of the Coca-Cola factory. Perhaps this company is their highest revenue earner. This incident has not produced any noticeable response otherwise, for why should anybody worry about what happens to Coca-Cola or any other multinational? Have these corporations ever cared about what they are doing to the societies where they operate?

To take just one instance, look at what they have done to the game of cricket. Earlier, there was a particular season in which it was played, but now it is played all the year round, night and day and even when there is a power outage. It was known as a gentleman's game and, by and large, those who took to this game behaved like gentlemen. A third umpire was not even dreamt of. The game had only two umpires and their decisions were accepted without any misbehaviour, either from the batsmen or the bowlers. Cricket was once a synonym for fairness. Within a few years, however, the game and its players have been converted into advertising vehicles for the multinationals' products. Today's cricketers dress themselves in multi-coloured outfits befitting buffoons in a circus. On account of the affluence this game brings, the competitiveness between the players, in the same or

different teams, turns very aggressive, and we hear them swear and snarl at each other. The advertising revenues they earn binds them into complete acquiescence. This is violence, too, more destructive and enduring than physical violence.

31

Veerappan and the Rule of Law

Veerappan and the Kannada film actor Raj Kumar must by now have learned to live together. Perhaps they have exchanged notes about their lives, discovering the similarities in their humble beginnings and the difficult periods they went through on their respective roads to prosperity and fame. One became an outlaw, lord of the forests spanning the border between the states of Karnataka and Tamil Nadu. The other attained prosperity and fame by enacting make-believe worlds for popular consumption and of course for consideration. If the biographer of Veerappan is to be believed, his life provides an excellent theme for a film where Rajkumar plays the role of Veerappan. Faced with a story like Veerappan's, the analytically inclined talk about Robin Hood and offer a leftish explanation about circumstances and an exploitative society. However, people like Veerappan, though they operate outside the legal framework, are very much a part of the exploitative order. People who had nothing to complain about so long as the government connived at their flouting the law and its institutions. Veerappan can never argue for the overthrow of the system, for the latter provided him the space

for his phenomenal rise. If you interview him he will tell you that we should not vote for the corrupt and that we must opt for clean politics. He will even give you acceptable reasons for some of the crimes he has committed. After all that has been said and written about him, you will not grudge this subaltern his rise to fortune and fame. His story shows that for a few this system permits mobility from the log cabin to the White House, from a street vendor to a capitalist controlling governments, from a mere rowdy to a don.

Both in this country and in the U.S. there is a distinguished tradition of admiration for scoundrels like Veerappan. All of them were great supporters of democracy and the *status quo*. Joan Robinson, in *Freedom and Necessity*, quotes from an interview with Al Capone.¹ When the interviewer made sympathetic references to his own harsh life growing up in the slums of Brooklyn, Capone bristled. 'Listen,' he said, 'don't get an idea that I am one of those goddam radicals. Don't get the idea I am knocking the American system.' As though an invisible chairman had called upon him for a few words, he broke into an oration upon the theme. He praised freedom, enterprise and the pioneers. He spoke of 'our heritage'. He referred with contemptuous disgust to socialism and anarchism. 'My rackets,' he repeated several times, 'are strictly run on American lines, and they are going to stay that way.' 'This American system of ours,' he stated, 'call it Americanism, call it capitalism, call it what you like, gives to every one of us a great opportunity if we only seize it with both hands and make the most of it.'

The system operating in this country gives predators great opportunities. Veerappan seized these like Capone in order to emerge as a political leader and a totally free man. To this end he kidnapped a very proper person, a darling of the state of Karnataka. The necessary orchestrations have already been made, including political demands, the release of a biography, and sympathetic articles in the press. He has not yet made the grant of amnesty a condition for the release of Raj Kumar. The

¹Joan Robinson, *Freedom and Necessity*, Unwin Hyman, 1970.

demands made so far appear trivial and totally uninformed. The obvious effort of his intermediary is to help himself and his friends and to provide a political image to Veerappan, who expects a 'golden handshake' from his previous business. But the abduction, the demands and the orchestration have alerted the actor's family and friends, and their moves are likely to jeopardise the life of Raj Kumar, while their anger against Veerappan is likely to be as blind and brutal as Veerappan's deeds.

Look at the consequences of our failure to secure the release of Raj Kumar. Veerappan is a Tamil and language riots are not new to Karnataka. If the attempts fail, attacks on Tamils cannot be ruled out. There is a sizeable community of Tamils settled in Karnataka; they should not be made to pay for the deeds of a corrupt set-up which allowed Veerappan to grow to his unmanageable size, nor should they pay for his deeds of brutality.

Setting him free after all his plunder and 134 alleged murders is unthinkable. Of those murdered, 34 were policemen. One police officer's parent has gone to court, stalling the release from jail of the fifty-plus prisoners demanded by Veerappan. His grief and anger cannot be questioned. The question is, who should be punished? These are the facts of the case against Veerappan:

In the year 1992, two crimes were registered at the Ramapuram police station. The next year a further two crimes were registered by the M.M. Hills police. Against these four crimes, four cases were registered by the designated court, then four charge-sheets were filed between 28 November 1997 and 28 March 1998, and charges were framed thereafter. A total of 143 persons have been arraigned as accused; among these, 103 persons are Veerappan and his gang. 46 members of this gang have died in encounters and skirmishes with the police; another 24 are said to be on the run; and charges against 22 have been dropped. Among those in prison in connection with Veerappan are villagers from the areas where his gang operates, numbering around 121. On a review and following the directions given by the Supreme Court in *Shaheen Welfare Association*,² around 70

persons were released on bail. These facts were before the Karnataka High Court when writ petitions were filed to quash TADA charges. These writ petitions were filed at the behest of PUCL and Peoples Watch, an NGO from Madurai. These petitions were dismissed on 11 February 2000. We decided to proceed with the trial.

I do not think that in examining these cases there is any place for indignation, judicial or righteous. The Chief Minister of Karnataka, a latecomer on the scene, cannot be blamed for the growth of Veerappan's gang or the kidnap. The peremptory dressing down he got from the Supreme Court was unfortunate. We are in the midst of an enveloping ineptitude, and one cannot assert that a particular institution has not been functioning well.

The crime was registered in 1992, but it did not proceed to trial until the filing of the forty writ petitions on 11 October 1999. TADA itself came into force in 1987 for the second time. Thereafter it has undergone four extensions of two years each. The explanation given to the Supreme Court was that the trial was postponed for want of court premises, which were not secured till 23 October 1999. The act mandates speedy trial, but the court building was secured four years after the expiry of the act and twelve years after it was passed originally. Veerappan and his gang were not apprehended at all over these years, and the 121 arrested villagers had been forgotten. And what was their crime? That they were all acting at the bidding of Veerappan's gang, for which he was providing them with a livelihood. Living under fear and duress, can anybody behave otherwise?

When PUCL and Peoples Watch took up these matters, they were arguing for quashing of the TADA charges alone, for we had a principled objection against TADA. Even now we hold the same view. If two governments can be browbeaten by this abduction, should there be any further evidence to convince us that the 121 villagers were just as frightened of Veerappan's wrath? These 121 villagers, including the fifty in prison, are not accused of any overt acts against the victims of Veerappan. Should they be harassed by continuing these proceedings?

Abductions on political grounds, we know, are of a different

²*Shaheen Welfare Association v. Union of India*, AIR 1996 SC 2957.

order. An ordinary criminal like Veerappan, by a simple act of abduction, is asking the authorities to pay minimum wages, to grant bail to prisoners who have been detained for long periods without trial, not to use preventive detention as a substitute for punitive detention, and to settle river disputes equitably and without rancour. How and why did abduction become a substitute for the rule of law? Should not the court work in tandem with the government in such situations and devise ways and means of easing tensions and provide guidelines for an equitable resolution of such issues without jettisoning the rule of law and our constitutional objectives?

32

The Andhra Pradesh Civil Liberties Committee

Civil liberties movements invariably come into existence along with the rise of radical political movements. Governments that maintain an exploitative order tend to become violent the moment political movements threatening it gain a foothold. In the late 1960s the country was in the grip of a crisis from which we have not yet got out. War with China led to a diversion of funds to defence at the cost of development. Prime Minister Nehru, the biggest draw in Indian politics since independence, died in 1964. There was a steep fall in food production from 88 million tons in 1964–65 to 74 million tons in 1965–66. This combined with increasing inflation and rising unemployment created a sense of insecurity among the people. But under these very conditions, it was the upper classes who gained effective control over available resources. The Mahalanobis Committee observed in 1964 that India's planned economy had encouraged the concentration of economic power by facilitating the growth of big business. The benefits of planned investment and enhanced government expenditure had increasingly flowed to the upper classes. When the people organised themselves, it posed a

threat to the security of the state. Even democratic processes were viewed as threats and all norms looked like obstacles.

The only way to abolish norms is to consolidate power. Populism embellishes totalitarian politics and creates an illusion. Mrs. Gandhi had arrived at this stage by 1969. Suddenly, the Directive Principles of the Constitution, which had been neglected by politicians and the justice system alike, became her favourite. This period saw the birth of the movement started by Jayaprakash Narayan (JP), and also the Naxalbari movement. In 1974, JP founded the Peoples Union for Civil Liberties and Democratic Rights.

By 1969 the Srikakulam movement had begun in Andhra Pradesh. There were agitations for a separate state of Telangana. The old Suppression of Disturbances Act, 1947, passed by the province of Madras, had been carried over in 1967 to the state of A.P. created from the unified province. The entire tribal area from Srikakulam to Adilabad was notified under this act as a 'disturbed area'. Once an area has been so notified, any officer above the rank of Sub-Inspector can shoot to kill if he deems it necessary. It was in these notified areas that encounters began to be staged. A few thousand tribals were imprisoned in the initial stages.

As repression and violence by the state became brazen, protest movements started. One early organisation was the Defence Committee set up by the advocates of Hyderabad. Among the founders was Bhakti Bushan Mondal, a former minister from West Bengal and representative of the Forward Bloc and the late Ravi Subba Rao, an advocate of the Andhra Pradesh High Court. I was elected convenor. This organisation was set up for the defence of Naxalites arrested in staged encounters. Instead of searching for political solutions to the issues raised by the Naxalite movement, the entire matter was treated as a law-and-order problem and handed over to the police. In a sense, a state of emergency had been declared in Andhra by 1969, while the 1970s saw atrocities against the rural poor increase. Several hundred tribal villages were set on fire. It was at this time, in 1973, when repression in Andhra was at a peak, that a few

writers, poets and teachers got together and set up the A.P. Civil Liberties Committee (APCLC). The famous Telugu poet Sri Sri was its first president.

The organisation was targeted during the national Emergency. Many of its members, including its first secretary, P. Venkateswarlu, were arrested. After the Emergency I became the organisation's second president and continued in this post for 15 long years before I retired. After 1980 the organisation was again singled out for violent treatment by the state. When N.T. Rama Rao first became chief minister in 1983 there was some respite, but soon after he returned to power in 1984 (which period he called the restoration of democracy), he gave full power to the police. It was during his tenure that the first civil liberties activist was killed. Dr. A. Ramanathan, a fine person and a paediatrician, was shot dead by the police in broad daylight on 3 September 1985 while he was working in his clinic. There has never been any enquiry. On 7 November 1986 our senior executive committee member, Japa Laxma Reddi, was shot dead by the police in Karimnagar. In this case too there has been no enquiry. Even earlier, on 13 January 1985, Gopi Rajanna, a young advocate and convenor of the Karimnagar cell of the APCLC, was shot dead by youth belonging to the right-wing ABVP party for daring to defend alleged Naxalites in that area. The secretary of the organisation, Dr. K. Balagopal, was arrested repeatedly and held in both legal and illegal custody. At one time the police hired goons to maul him and once he was kidnapped by the police themselves from Khammam. Half of the APCLC's executive committee was incarcerated on false charges during Rama Rao's chief ministership. In October 1987, plainclothes policemen came with hooligans and assaulted members of the executive gathered at my house. On 7 December 1991, Narra Prabhakar Reddy, a 32-year old advocate practicing in Warangal, was shot dead by the police. He was the secretary of the Warangal Bar Association and sarpanch of his village in Jangaon. His village had been judged the best twice. His only crime was that he had systematically arranged for the release of arrested Naxalites on bail.

Despite their violent animosity towards us, when some of their top bureaucrats were kidnapped by Naxalites in December 1987, the state asked the APCLC to intervene and secure their release. This type of intervention was a first for human rights organisations in this country. Afterwards, the APCLC felt that no radical political movement should reproduce state terror and that it is important for any revolutionary movement to build up a human rights tradition if it is to avoid distortions in a post-revolutionary society. But there is still a debate on the theoretical formulation of this point. The APCLC has intervened effectively in other kidnaps, but I as the president have received anonymous communications that I am likely to be eliminated by the police.

The APCLC is committed to fighting against gross violations of human rights. It has also been taking up the issues of hunger and drought, starvation deaths and the environment, violence against women and attacks on Dalits. However, the greatest focus has always been on staged encounters and custodial deaths. The organisation has a large membership that is unmindful of the grave risk involved in working for human rights and democracy in this country.

33

Koyyuru: Reflections on a Kidnap

The government will not re-establish respect for the law without giving the law some claim to respect. It cannot do that if it neglects one feature that distinguishes law from ordered brutality. If the government does not take rights seriously, then it does not take the law seriously either.

Ronald Dworkin, *Taking Rights Seriously*

Koyyuru and the area around it was where Alluri Seetharamaraju organised the Pithuri revolt against the British. He was arrested while bathing in the tank in the village of Mampa, a few kilometers from Koyyuru. He was brought to Rajendrapalem, a hamlet of Koyyuru, tied to a tree and shot dead. Encounters are a colonial tradition in this area. The officer who performed this gallant act was Major Goodal. Seetharamaraju's body was brought by the British to K.D. Peta, a few kilometers down the road to Narsipatnam from Koyyuru, where it was cremated. Our police follow this tradition scrupulously. Seetharamaraju was barely 27 when he was killed in 1984. This is still the average lifespan of revolutionaries, including Naxalites. Arjun Rao, a civil

servant of our time, while serving in various capacities in the area, initiated steps to erect memorials at the places where Seetharamaraju was caught, shot and cremated.

Balaraju was a good adivasi leader and MLA, one who consistently worked for the uplift of Andhra's tribals, trying hard to implement legislation protecting them from the exploitation by plains people that had caused them to revolt repeatedly. He had the support of the tribals in and around Koyyuru. The Peoples' War Group kidnapped him along with Srinivasulu, a project officer, and four employees of the Girijan Cooperative in order to secure the release of two Naxalites, Ramanna, lodged in the Secunderabad jail, and Kranti Ranadev from the Warangal jail. Many had felt aggrieved that the reservations so prevalent elsewhere did not extend to abductions. But for the politics of the Peoples' War Group, these constitutional niceties were irrelevant.¹

Abducting persons unconnected with the specific issue in contention, whether by the police or the Naxalites, can scarcely be condoned. In terms of political practice there is no difference between the two. Yet there is no public outcry when the police resort to illegal detention and custody, because those detained are always the poor and disinherited. The A.P. government's utter disregard for constitutional values and its failure to perform its fundamental obligations have been largely responsible for the spread of the Naxalite, Dalit and anti-liquor movements in the state. The Nazi propagandist Goebbels said, 'The state must have the courage to break its own laws.' The Indian state has appropriated this dictum in dealing ruthlessly with the various movements that have confronted it.

I and other human rights activists knew the capacity of the government to inflict large-scale rights violations in the process

¹The Naxalite movement in Srikakulam commenced in the late 1960s, forty-five years after the death of Seetharamaraju. Despite the systematic physical liquidation of the Naxalites, the movement continues even today. Nearly seventy years after Seetharamaraju, one finds the same deprivation and poverty in the areas where he organised his revolt.

of securing the release of legislator Balaraju and the others. Without the support of the government, however, effective intervention would not be possible. This difficulty was resolved when a senior bureaucrat called Dayachari approached us with an urgent request to help. We proceeded to Narsipatnam on 4 February 1993, where we met Arjun Rao, the same who had resurrected the memory of Seetharamaraju and the special officer authorised to negotiate the exchange.

It took three days before we could meet the leaders of the Peoples' War Group. The prisoners Ramanna and Ranadev said they wanted to leave the movement and lead normal lives. The PWG then stopped pressing for the release of Ramanna but suspected that Ranadev had disavowed them under duress. They wanted his statement verified by an independent person. We thought of Kaloji Narayan Rao, someone with an impeccable reputation. But Ranadev did not cooperate and further contact with the PWG became impossible because the police had begun roughing up the adivasis. On 11 February only four of the six hostages were set free near K.D. Peta. We waited till the 17th before returning to Hyderabad. Before leaving we appealed to the PWG to release Balaraju and Chinnam Raju without waiting for Kranti Ranadev, and we offered to return to Koyyuru for further negotiations.

The government had earlier agreed in principle to secure bail and release Ranadev to join his comrades if the hostages were released. To lend strength to this assurance they took steps to secure bail in the cases pending against him in Warangal and Khammam, but the cases in Maharashtra remained unattended. This was the stage at which the four hostages were set free. In a letter addressed to Arjun Rao sent with them, the PWG reiterated their earlier demand that Ranadev should be brought to Narsipatnam. Arjun Rao and I felt that Vizag prison would be better and accordingly suggested shifting Ranadev to the Vizag central prison. While in Hyderabad we were in constant touch with Arjun Rao and Dayachari, discussing ways and means of removing the impediments to Ranadev's release. While the chief minister agreed in principle to release Ranadev, he wanted

the two hostages to be released first. For the chief minister this became a matter of prestige, while the PWG insisted on simultaneous release because they did not trust the government. While Arjun Rao convinced the chief minister of the wisdom of resolving the issue without force, Mysoora Reddy, the home minister, was talking to the press about 'wiping out' the Naxalites, and announcing that the government would not yield an inch, much to the annoyance of the people at Narsipatnam, Koyyuru and other surrounding areas.

Politically, Chief Minister Vijaya Bhaskar Reddy was not in as bad a fix as N.T. Rama Rao during the earlier kidnap of senior bureaucrats from near Gurthedu in 1987. There was no danger of impending presidential rule. N.T. Rama Rao had acted speedily to ensure the continued rule of his party in the state; concern for the safety of the kidnapped officers was secondary. In this he had the support of the state's top civil servants and police officials, though for different reasons. By contrast, Vijaya Bhaskar Reddy faced only internal opposition within his party, the Congress (I). Some of these dissidents, led by Dronamaraju Satyanarayana K. Ramakrishna and other Congress legislators of that area, organised protest demonstration in Narsipatnam, preempting the use of force there, and offered to resign their seats. But the chief minister countered by forwarding their resignations to the speaker.

Still, Member of Parliament Ramakrishna and the other legislators, and even Balaraju's wife, Radha, managed to put the government under enormous pressure. Wedded as we are to the adversarial system, we are precedent-oriented not only in law but also in politics. The people in Narsipatnam, including the Congress dissidents, cited Gurthedu and the kidnap of Congress legislator Sudhir Kumar as instances where the government had acted with lightning speed, in contrast to the dithering in this case. The Gurthedu incident happened while the Telugu Desam Party was in power, while Sudhir Kumar was abducted when the Congress was in power. In the latter case the chief minister was N. Janardhan Reddy. When Koyyuru happened, the Congress was still in power but the chief minister was now Vijaya Bhaskar

Reddy. Prisoners were exchanged in both previous kidnaps. Ultimately, the PWG released Balaraju and Chinnamraju on 21 March 1993. It was the ethic of the faction-riven Rayalseema area, namely 'keeping one's word', that prevented the government from reneging on its assurances, and so Kranti Ranadev was released a few days thereafter.

Arjun Rao and Dayachari played a commendable role in ensuring that the issue did not end violently. They had utilised to the full the personal relationship they had with Inspector General Subba Reddy of the police, as he waited in readiness at Koyyuru with an armed force of considerable strength. At Hyderabad they knew the personal secretary to the chief minister. However, my experience at Narsipatnam illustrates how no official, even one specially deputed, is allowed to take a decision on the spot, and how within the bureaucratic set-up, civil administration is subordinate to police administration.

With a few notable exceptions, our bureaucratic apparatus suffers from the total absence of a world-view. Their initial training only teaches the bureaucrats to be elitist. As Marx points out in his *Early Writings*, all people are neatly divided by them into two classes: the active ones who administer, and those who are passively administered. Having appropriated the business of administration to themselves, they confine accountability to within the hierarchy: criticism can only be in the descending order and accountability in the ascending order. Finding the sorry state he encountered when he entered service continuing that way as he ages in the job, the bureaucrat concludes that the people themselves are responsible for their condition. This rationalisation provides the justification for switching from initial optimism to crass materialism and for converting the purpose of the state into his private purpose. If the latter coincides with the philosophy of his political masters, he is in clover!

But the present conditions of distress will ensure that the existing social order cannot continue in peace. Meanwhile, even an attempt to operate insurgently within the existing system is looked upon as a threat to the security of the state and put down ruthlessly. Because the Constitution has been systematically set

aside by our governments, there is widespread violence to change the *status quo*. If the people organise themselves to compel the state to enforce its own laws and the Constitution, it is called rebellion, while it is downright treason if anybody demands the strict observance, both procedural and substantive, of criminal law. As for the media, their approach is totally apolitical. Working within the constitutional set-up, they hardly realise that the Constitution is a political document which, to be at all useful, has to play a transforming role. The problem is not the Naxalite movement but the exploitative state. The officers of the state rarely understand the central role played by the bureaucracy in continuing our iniquitous system.

Meanwhile, the police has been increasingly used to maintain existing inequalities. It has slowly gained ascendancy over the civil administration since independence. Today a district magistrate is a nonentity for the police; the functions assigned to him under the Criminal Procedure Code are of no consequence to the police. The entire system of executive magistracy, entrusted with the statutory task of enquiring into cases of unnatural deaths in custody, has been subordinated to the task of preparing a preliminary report to hide the capital crimes committed by the police. These are the enquiries flaunted by all levels of the government as confirming that there has been no violation of human rights. The government doggedly believes that a lie that is repeated becomes the truth. The government, unable and unwilling to deal with political dissent, treats movements like that of the Naxalites as law-and-order problems and hands them over to the police establishment, leading to a hegemonic politicisation of the police force. In particular, the language used by the police has broken the conventions of administrative culture, in which subjective reactions are supposed to be voiced with utmost restraint.

What is important is the emergence of this politics of vengeance as an epitome of contemporary politics. Can there be a politics of this type at all? How can regression be a principle of politics? Behind all the kidnaps and violent destruction of property, there has always been a demand for an enquiry into

an encounter, a disappearance, an illegal custody, etc. The response to a movement that resorts to violence after very legitimate demands should not be the closure of all redressal forums. It is true that the Peoples' War Group does not believe in the Constitution, but the same is true of the police force also, and it is the latter that has caused the escalation of violence in our society. I and other rights activists have always been of the view that no political movement working to overthrow an exploitative order has any right to reproduce the brutalities practised by it. To use abductions for political ends is counterproductive. It may at some point alienate the very people for whom the Naxalites have been waging an unremitting struggle, undergoing severe privations and putting their lives at great risk.

There has been a steady degeneration in governance, in the content of our politics, even in the response of the public to atrocities and injustice. All of us have been reduced to the position of spectators, afraid even to take sides. Our responses are very often moulded by our prejudices and our own politics, and the habits of thought such politics inculcate in us. In a crisis-ridden society such as ours, it is not the government alone that is in crisis; all of us are. That is why I think we are confused about such important issues as violence on Dalits, reservations in jobs, the necessity of a secular polity if social transformation is to take place at all, and the necessity for promoting a human rights tradition.

For human rights activists, Koyyuru and the earlier Gurthedu² raise issues regarding the concept of human rights itself: what is the advisability of expanding the concept and thereby enlarging its field of operation? What are its relations with radical and democratic movements? What is its potential for transformation while working within the institutions available in a democratic set-up? Finally, should a human rights movement merely confine itself to maintaining a crime audit of the state?

²The abduction of government officers in 1986 by Naxalites. Civil liberties activists were requested by the state government of N.T. Rama Rao to negotiate their release.

34

In the First Person

Emergency

When a state of emergency was declared in June 1975, the people were unprepared. A large number of arrests were made on the 25th of that month. From midnight to 7 a.m. I received a series of phone calls from those who had been taken to the Sultan Bazar police station in Hyderabad. They included M.T. Khan, Cherabanda Raju and Partipati Venkateswarlu, the secretary of the Defence Committee.¹

The next day I filed a writ petition on behalf of Venkateswarlu's wife, challenging MISA and challenging the validity of the Emergency. This was one of the first such cases to be filed in the country. It was a bizarre scene in the courts; I found a police inspector there saying, 'Henceforth we will rule.' Venkateswarlu's petition, a writ of *habeas corpus*, came up for hearing in the afternoon. During my submissions to the court, I contended that I could see no grounds for the arrest of

¹The Defence Committee had been formed in 1972 to defend the Naxalites who had been arrested in large numbers, particularly from the tribal areas. They had not been given bail, or the surety was so steep that they could not afford it. Bhaktibhushan Mondal, a Forward Bloc member from West Bengal, set up the Defence Committee.

Venkateswarlu, and that if there were any the public prosecutor should be directed to produce both the order of arrest and the grounds.

Doing these political cases, especially during the Emergency, has made a big difference to my life. It was important to participate politically and operate insurgently; in order to preserve freedom and democracy, one has to fight within the institution.

On Personal Liberty and Privacy

I was warned that my phone had been tapped and that police were recording everything. But I was not really worried. Later, when I was working for the Bhargava Commission after the Emergency, there was talk that I would be attacked. Justice Muktadar phoned me and said to be careful. The threats continued, but none of us talked about them. Now it is all part of history, but at the time, I remember, Balagopal was beaten up, as was Kodand. During an executive committee meeting at my house, we heard that six men had been beaten. The police had come with a bunch of hooligans and beaten them up. We used to get threatening letters that said: 'We will burn you,' 'we will kill you,' and so on. We never talked about all this, nor did we ever go to the press. We used to go ahead with our work normally. A large number of people worked with me and built tremendous credibility around themselves. It is very important to build that credibility. It is important to make sure that your style of living does not fracture your reputation. If that integrity is maintained then you can work wonders with this institution. That has been my personal experience. I strongly believe that the ends do not justify the means, even in a struggle. This is a principle which Gandhi and Tolstoy followed but which the Marxists dismissed. Ultimately, the fundamental question is, what means do you adopt to secure what ends? That was the big debate in those days; it must continue even today.

What I have learned during my professional life is that operating with credibility and moral strength demands a

particular style of life. And it sets a limit to compromise. With the Emergency I thought: on freedoms, no compromises; on human rights violations and personal liberties, no compromises. When you base your career on these principles, then the institutions and the persons operating them develop tremendous faith in you. They are confident that you are right.

Gradually, several goals have been filtered out. And that has helped. I once appeared for a hooligan called Kotha Das. He had been arrested under a preventive detention law and taken away to Rajahmundry. He wrote me a letter from jail saying, 'All the convicts say, "Go to our sir, he will pull you out of this." ' My assistants had instructions: if anybody wrote me from jail, they were to prepare a petition and inform me, so that I could go and argue it. This fellow had already filed a writ of *habeas corpus*, which had been dismissed. I looked up the law and decided that we could argue the case. It came up and the moment I got up to speak, Justice Kuppuswamy asked, 'Are you appearing in this case, Mr. Kannabiran?' I quipped that perhaps I was appearing for the future chief minister of the state. By contrast, I could never bring myself to appear in excise cases, although I knew all the excise contractors personally. An assistant who I had put in charge of the entire Secunderabad conspiracy case, Prakash, his family, his family circles, and his friends, all came to me and begged me to take up excise matters. I always refused, because these contractors were adulterating toddy and the poor people who drank it got killed. They went to another lawyer, who built two houses within a year. So there are choices all along: should you judge the values involved, do you take everything that comes your way, or do you take up only certain cases.

For human rights lawyers and activists to be really successful, the first struggle is to establish credibility, and just as importantly, not to become a pawn of radical or militant groups. You should always be in a position to maintain your independence. You can appear for radicals, but if you identify with them there will be problems aplenty. This independent attitude has enabled me to intervene effectively. If I had been one of them, I could not have made many of the attempts I did.

I went into my cases fully confident that they respected me and would listen to me if I appealed to reason. This is not possible if you are linked to a party. You may like their politics even if you do not like their methods. You are not really concerned with their politics, nor are you going to judge it. You just keep your distance. Do your legal work on their behalf firmly and steadfastly; this will pay rich dividends. It is tempting to be part of them or be seen that way, because you want to be popular. It is a heady feeling, being associated with militant groups; it gives you a taste of glamour and power. It is difficult to stay away from that, but the price of joining them will ultimately be very high.

I remember when Jeevan Kumar was arrested by Superintendent of Police D.T. Naik and held in custody overnight. Naik sent for Kumar's wife and told her, 'I can make you a widow in a moment.' This is the culture of our police and characteristic of their brutality. I called Delhi and couldn't get anybody. Finally, I managed to get Unnikrishnan of the Congress and talked to him. He phoned the home secretary, who called Naik and said, 'Release that man, nothing should happen to him.' Then Unnikrishnan called me and told me it was alright.

In another instance, when I got information of Pradeep's arrest, I immediately faxed a message to the chief minister and also to the collector of Warangal. The SP who had arrested Pradeep asked him, 'Suppose your daughter reads in a newspaper tomorrow that you have been killed in an encounter, how would she feel?' It is this violent attitude that must be curbed.

I see violent attacks on personal liberty in the context of people—women, Dalits, tribals and others—protesting for their rights. Unless political liberty is maintained, no movement can progress; it can even get suppressed right at the start. So unless you have personal liberty, the right to association, to assembly and to free speech all become meaningless, without effect. I foresaw that, sooner or later, it would become very important for the state to suppress these movements. When Indira Gandhi said that the Constitution's directive principles should take

precedence over personal liberties and fundamental freedoms, I was the first person to write that for directive principles of state policy to be enforced, the citizens should have the right to organise and enforce them if the state refuses to do so. In India at least, the conviction has always been that it is the business of the state to bring about these things; and since they are not legally enforceable, that they cannot be enforced at all. I was among the first to insist that personal liberty, that is, the freedom of speech, the freedom of expression and the freedom of association, are the three basic rights necessary to compel the government to fulfil its obligations. In the Srikakulam and Parvatipuram conspiracy cases, where the offence was sedition, I argued that to organise a party to politically enforce what is contained in the Constitution's chapter on directive principles of state policy, when the government has not performed these constitutional obligations, and to call for the overthrow of such a government, cannot amount to sedition.

On violence, there was a debate as to which is primary and which secondary. We felt that all aspects of violence have to be taken into account. The original APCLC bylaws said that as a landlord is equal to a state, a landlord's exploitation becomes a civil liberties issue. Then, as definitions of violence expanded, we began to take into account the rise of various movements. As far as I am concerned, the primary issue is human life, that it should not be crushed as is happening now. When people ask why I keep talking about encounter killings, I answer that they are the foulest of human rights violations. They have to stop. It is not possible for me to ignore them and take on other matters. I do not enter new areas.

The Niyogi Assassination

The murder of Shankar Guha Niyogi by his employers was one case that actually got investigated. The trial court convicted Niyogi's boss and sentenced to him to life, while the contract killer, Malla, was sentenced to death. Nandita Haksar sat through the entire trial to see that it was not unnecessarily

disrupted or postponed, as that may lead to a plea for acquittal. Even the CBI played a good role by securing the service of a good prosecutor and seeing to it that witnesses were produced. Strangely, the witnesses repeated what they had told the police, describing the events leading up to the murder and the events after the murder. All of this led to convictions and sentences. In the whole of our trade union history this was perhaps the only case where an employer was sentenced to life. I could hardly believe it.

I had known Shankar Guha Niyogi for long. He was a young man when I first met him in Delhi. I think this was when he had come to present a memorandum to the authorities that there was an attempt to kill him. The president would not look at the matter and the government ignored the complaint. Niyogi told me he wanted me to come and settle down in Chattisgarh and stand for Parliament from there. I just laughed but he was quite serious: 'It is your place. You should stand for Parliament and look after your constituency.'

He was the only trade union leader who thought of campaigning for the unorganised sector. And he did it very successfully. He had a hold on the workers because of his style of life: he was very open and never did anything underhand. He also tried to instil a sort of workers' ethic. Like one fine morning, he called the workers and they assembled in the thousands. He made them all swear that they would not drink again. The women were given the authority to levy penalties on their husbands. It was a fascinating experiment that worked. When the workers stopped drinking the excise contractors lost business heavily. Niyogi was arrested under the National Security Act and taken under preventive detention. Then Anil Sadgopal and others went to Jabalpur to file writ petitions.

Niyogi organised the unorganised workers comprehensively and compelled the employers to pay minimum wages. The Contract Labour Abolition Act is supposed to have put an end to contract labour, but in reality promotes it. Instead of taking steps to abolish contract labour gradually, the government has chosen to regulate it. There was tremendous abuse of the act's

provisions at that time in Chattisgarh, Bhilai and all over the country. The judgments of the Supreme Court did not really help to interpret these provisions, which supported the employers although the rhetoric was in favour of the employees.

Niyogi was shot through a window by one Paltan Malla, but there was clear evidence of a conspiracy. As noted, the case ended in a conviction, which was appealed to the Jabalpur High Court. There the counsel for the employer was a well-known lawyer, an old fox called Rajinder Singh. He was a big shot in Madhya Pradesh, so all lawyers were expected to go visit with him. This is a problem with lawyering; one is not a free individual. If one accepts a brief for the working class it is just not on to go talk to the management's lawyers. You may joke with them outside the courthouse but you cannot go and have a drink with them. The public prosecutor, Tulsi, was found spending most of his time with the defense counsel. Rajinder Singh practised in the Supreme Court, as did Tulsi. So Niyogi's people said they wanted their own lawyer, to please appoint K.G. Kannabiran. Then the CBI got in touch with me and Rajinder Sachar called me. A PUCL lawyer from Madras called Suresh assisted me. From the beginning the bench, a corporate lawyer-turned-judge called Dubey, was hostile. The moment I commenced my argument, he asked how long I would take. When I replied that I'd take more than a week, he said, 'Why one week? One or two days should be sufficient.' That is what public prosecutors do. Knowing the judges, they finish early, whether the case is going in their favour or against them. Dubey was a bit stunned that so many people had come from Chattisgarh and were waiting for me to commence my arguments. He said suddenly: 'Turn towards them and argue in Hindi, so that the people you have brought here appreciate what you say.' I told him curtly that I was not in the habit of bringing an audience along and for his information, these people belonged to Niyogi's trade union, who had come to watch our performance. I told him that his remarks were not in good taste. He realised that there were limits to his arrogance and apologised.

I argued the case threadbare for nearly two and a half weeks.

We were staying in a guesthouse owned by the Methodists. We set ourselves up there and borrowed a computer. We used to set out our arguments in the evenings. The evidence was much stronger than in the Kehar Singh conspiracy case. I mean the Indira Gandhi assassination case, where Kehar Singh was convicted on slender imaginary evidence. I placed the entire series of conspiracy cases before the judges, and told them that for the past thirty years I'd been breaking conspiracy cases. But here for the first time in my life, I had to establish a conspiracy, and I believed I had not come across stronger evidence for it. So I took them through the whole thing: how the killers went to Nepal to purchase arms, the arms store they visited there and what they bought. I explained how they had systematically implicated Niyogi in several cases by lying about him, for instance that he was a CIA agent. Paltan Malla's flight reinforced the idea of a conspiracy. There was also a letter from one of the Moolchand brothers to the other indicating that the job had been done and that Paltan Malla needed to be paid. But it is very easy to accept or reject conspiracy evidence in law; it can be quite subjective. Conspiracy is the only charge where hearsay evidence is permitted. In my favour was the conduct of Chandrakant, Moolchand and Navinchand throughout. They had not reacted well to the labour disputes raised by Niyogi and refused to attend any conciliation proceedings. They had obtained injunction orders against his strikes and implicated him in several criminal cases, so he was kept busy running around securing bail for himself. That is how the criminal justice system is used by these scoundrels; almost all employers behave like this. I needed a 'neutral' judge, but I was saddled with an employer who had become a judge. I told him I had done trade union work for almost twenty-five years and always appeared for the workers. 'Oh, so did I, but I was appearing for the employers,' he replied from the bench. If the judge is a good fellow, nothing bad happens, but I had to insist that the trade union leaders should be present in the court.

Abductions

By 1986–87 the PWG had started kidnapping people. Malhar Rao was kidnapped from Karimnagar. After he'd been gone three days, someone from his family wrote me a letter asking me to intervene. Malhar Rao had been very supportive of the PWG when they were fighting against atrocities such as illegal arrests and staged encounters. Before I could do anything, however, the police started a manhunt, and the PWG shot Malhar Rao and threw out his body. That is how their first kidnap ended, but their abductions only became more frequent, although they released a number of people in response to appeals in the press. A mandal president was kidnapped from somewhere near Bhongir or Jangaon, and soon after, as a retaliation, Balagopal was kidnapped by the police. He was released only because of tremendous public pressure from all over the country. And then, I think it was in December 1987, there was a major kidnap of three or four IAS officers and their entire entourage. They were returning after visiting tribal areas. The IAS officers, important people, were taken to a forest, while some seventeen people were left in Gurthedu and instructed not to leave. At about 1.30 a.m. that night, Yugandhar rang me up and said, 'Sankaran has been kidnapped, what should I do?' I told him, 'If you are issuing a statement please add my name to it, that's all.' He called again soon after and insisted I do something. 'What do you think I can do?' I asked. 'I can't really go into the forest in search of Sankaran or try and meet the PWG and talk to them. Because most likely I'll be shot. I cannot intervene as a mere citizen. They will simply kill me and claim I was killed in the crossfire. So I should be authorised by the government to go and hold talks with them and try to secure the release of the officers.' Chief Minister N.T. Rama Rao was not willing to give me an authorisation letter. He relented after I told him that all his top bureaucrats wanted something done to save their colleague Sankaran.

Armed with his letter and somewhat satisfied that the government would not harm me, I traveled to Rajahmundry.

There at the station I met a police officer for the first time. As a matter of principle, I refuse to interact with the police except on the witness stand. From Rajahmundry we went to Rampachodavaram, along with seven prisoners who were to be exchanged for the IAS officers. After receiving an assurance that there would be no double-cross, I talked to the prisoners, who were all young and worried that I was with the police. It took a while to convince them that I was not.

After waiting till very late that night, we still had no word from the kidnappers, so we decided to go ahead. Yugandhar and I got into a jeep I'd arranged, but they put a policeman in it without telling us. The prisoners spotted him right away, so I made him get off and we went ahead, after I'd made the police take off the prisoners' chains and shackles.

We reached Gurthedu around 11 p.m. Suddenly, a PWG youth appeared and said we would have to proceed on foot into the forest. I left Yugandhar behind and took the prisoners with me. After walking some forty-five minutes, we reached a culvert and they were all there. The prisoners were handed over and Sankaran and the other officers were released. After we got back to the car Sankaran wanted to leave right away, but the prisoners had told me to give them some time to disappear into the forest or they would be shot. I had agreed, so I took the IAS officers to the guesthouse and suggested that we eat before returning. Sankaran was not hungry, but I said, 'Sorry, I'm a diabetic, so I'll have to eat.' So everybody get fed and we left after that.

Later on, I had a lot of explaining to do to my fellow rights activists as to why I had intervened to help the government. Kodand asked me the next morning if I would rescue a kidnapped police officer. I said I might, depending on who was abducted. There was a heated debate and I called for an executive committee to decide if I was answerable. If they thought I had done the wrong thing, I would resign, I said. The committee met in Khammam and debated the issue from 8 in the morning to 8 in the evening. I got scalped, but I stuck to one point: 'Look here,' I said, 'I am the president. I am available and I am acceptable. People call me in crisis situations and ask me to

intervene. Should I call for a state executive each time? If something were to go wrong in the time it takes to call a meeting, who will be responsible? Ultimately, they relented.

The Concerned Citizens' Committee and Radical Politics

The Concerned Citizens' Committee was set up to involve a large cross-section of the people in the peace process, on the premise that one could not depend on the legislative parties alone. You have to expand the debate so that people know what is happening. Those most likely to benefit from the process must be involved. The trouble is that people are either publicity shy or they are aggressive publicity seekers. I have my politics. What I have been doing for the past thirty years keeps coming through and I can't escape it. You may agree or disagree. I do not criticise the Peoples' War Group because of a gut feeling that if there is to be social transformation, youth like them are the ones who will achieve it, as no one else has that kind of commitment. The PWG commits mistakes, even blunders. Sometimes I am disgusted by them. But then, I seldom allow the disgust to overwhelm me. Because then I have to become inactive and fall back on our old traditions like the *Sundarakanda*, *Mahabharata*, *Bhagavata Gita* and all that. It is too late for me to go back to that now. When people turn sixty they retire, turn to the scriptures, go out only to attend religious gatherings and then return home. There are no problems or tensions that way. But when you have chosen my kind of life, it is very difficult to retire. I keep thinking of retiring, but I am not able to. I do a lot of writing, which I never used to find the time for. I sit at the computer and type up my articles using one finger. I do everything the difficult way; that is my style.

(Based on an interview with Deepa Dhanraj in 2001)

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