BOOK REVIEWS

LAW, PRAGMATISM AND DEMOCRACY (2005). By Richard A. Posner, Universal Law Publishing Co. Pvt. Limited, Delhi. Pp 398. Price Rs.215/-.

IN HIS book,[1] Richard A. Posner, critically focuses on the point that law and democracy are the twin pillars of the liberal state. He takes the reader through the concepts of democracy and legality rather than a determination of the scope and limits of governments as such. The book[2] is about American democracy and the American legal system and the author leaves it to others to explore the possible application of the analysis to other countries.

The question then is how to persuade the academic world to set aside grand theorizing and to adopt a very pragmatic approach to the functioning of the government and the law.

Posner persuades the readers to understand the concept of pragmatism and examines its implication in terms of philosophical theory on the one hand and everyday application on the other. Moving into the world of legal pragmatism, the author cites the now greatly famous dictum of Holmes: "The life of the law has not been logic: it has been experience." In support of this, the book narrates how Holme's theory of contract law has come to occupy as the core of pragmatic adjudication and an example of legal pragmatism and makes twelve generalizations regarding legal pragmatism among which, systemic consequences and reasonableness seem to be very prominent. From Holmes the author moves to Marshall, declaring the latter as a pragmatic judge and concluding that influential judges tend to be pragmatic judges and that in the twenty first century America there is no alternative to legal pragmatism.

John Dewey too is discussed in great detail and is adored for his view that philosophers should play an active, constructive role in society rather than a merely academic one. However, the author does not find much support in Dewey's idea of "distributed intelligence" as being not well connected to the realistic conditions of modern democratic political governance. But then he finds solace in the "Logical Method and Law", which he says is a clear statement of the pragmatic theory of adjudication.

The point that is well brought out in the book is that one can determine the pragmatic approach of the courts only through their decided

1. Richard A.Posner, *Law Pragmatism and Democracy* (2005).
2. *Ibid.*

cases. What makes the court to go away from the beaten track or find legislation unacceptable is the emergent situation. According to the author an 'emergency', rightly or wrongly trumps the law! and courts do this as a way of crisis prevention through pragmatic adjudication. In support, *Bush* v. *Gore's* decision is quoted as an excellent example of pragmatism in the application of law.

In India the courts and judges have been pragmatic to interpret law to sustain the democratic ideals and constitutional values.

The theme of "every day pragmatism" could very well be accepted in India. For such of the scholars who would like to attempt a comparative analysis of law and pragmatism in India and USA, the contents of this book will undoubtedly be a very useful material for study and research.

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THE CONSTITUTION OF JAMMU & KASHMIR ITS DEVELOPMENT & COMMENTS (4th edition 2004). By Justice A.S. Anand. Universal Law Publishing Co. Pvt. Ltd., Delhi. Pp xxix + 508. Price Rs. 450/-.

HON'BLE DR. Justice Anand's work has long been established as the most authentic and comprehensive, if not the only, work on the subject. Its four editions in quick succession, especially since the second, amply testify its popularity among the readers. As the world is moving from nationalism to pluralism and multiculturalism, constitutional arrangements in India tend to attract the attention of scholars around the world. India's diversity and, therefore, its pluralism and multiculturalism are phenomenal in time and space. Perhaps no country in the world can compare its historicity and geographical expanse with India in sustaining and valuing diversity. That could also be the reason for the longevity of the Indian civilization. Even though the wave of nationalism from the west led to the division of the country in 1947 the divided India did not compromise with its tradition of respecting diversity. While India had an unprecedented challenge to its unity in 1947 the people of India did not see any contradiction in unity and diversity and gave to themselves a constitution that gives due expression and respect to its diversity. Without adhering to any existing model of constitutions, they devised a constitution which suited their immediate and future needs consistent with their age old traditions and culture. The Constitution of India is *sui generis* in several ways. Among them is also the arrangement it provides for the general and regional governments. Like several federal constitutions it provides for the general and regional governments but as a rule the regional governments do not have their separate constitutions. But recognizing the difference in different regions and unique history and culture of some of them it makes special provisions for the governance of those regions. Provisions about Jammu and Kashmir (JK) are an outstanding example of this. These provisions, which let JK to have its own constitution along with the Constitution of India, are the subject matter of the work under review.

As is well known since 1947 the status of JK has not only been of special interest for the constitutional scholars, it has also drawn attention of the international community and has been the most contentious issue between India and Pakistan. It is but natural that it also drew attention and curiosity of Dr. Justice Anand as an upcoming young lawyer from JK. He took up the subject for his Ph.D. from the University of London

in early 1960s which finally evolved into the work under review. Obviously no place could be better suited than the University of London for pursuing the research on this subject. At no other place would one get so much relevant material and documentation as could be found in London about the position of the state during British rule or even before and what happened since 1947. Making best use of the available resources the author produced the most authentic and comprehensive work on the subject. The work continues to hold its unique position because nobody had undertaken that kind of research on the subject before him, nor has anyone made any improvement over his work since then. As the constitutional position of JK has been in constant process of evolution the author has taken due account of it in each successive edition of his work. His work has thus maintained its reputation which it had acquired long as the most authentic, comprehensive and updated account of the Constitution of JK as well as of JK's position under the Constitution of India.

After a short introduction of the JK issue in national and international context the author has traced the political history of JK from the earliest times going into the details of the constitutional arrangements in the state during the British period. He also traces the rise of nationalism and demand for a democratic constitution in JK during the British period and under the native rulers which led to the promulgation of a constitution in 1939. The details of that constitution and subsequent developments until the declaration of independence of India from the British rule in 1947 have been critically examined. As the current controversy about JK is related to the era immediately following the independence in 1947 the position of the state at the time of independence and soon after that leading to the accession of the state to India and subsequent constitutional and other political developments until the publication of the current edition have been closely examined. This discussion leaves little doubt that JK is an integral part of the Indian union legally, politically and factually based upon special arrangements mutually agreed upon between the legitimate rulers of JK and the rest of India at the relevant time. Under these arrangements the author traces the origin of article 370 of the Constitution of India and the special arrangements that have been made or developed since then between JK and the rest of India including the creation of a separate constitution for JK in 1957. Before entering into the details of the JK Constitution the author comprehensively examines the application to that state of the provisions of the Constitution of India. As JK is one of the states within the Union of India its constitution can be understood only with reference to the Constitution of India. Therefore, this discussion is an important aspect of the book and legitimately forms its substantial corpus.

The Constitution of JK, 1957 is discussed in one major chapter with which it also concludes. It is both a narrative of various aspects of that constitution including its background and nature as well as a commentary on its provisions from the preamble to its last article. Most of the provisions of the Constitution of JK including its preamble are suitably modified replica of the provisions of the Constitution of India. There is hardly any notable difference between the form and operation of government in JK under its constitution and the form and operation of government in other states under the Constitution of India. The only notable difference is the mention of permanent residents of JK and absence of the fundamental rights in the Constitution of JK. The permanent resident status is somewhat similar to the status of permanent residents introduced much later in Hong Kong under the "one country two systems" rule in China that gives some protection to the comparatively vulnerable and less developed people of JK from the unregulated and uncontrolled migration of people from the rest of India who could exploit the resources of JK to their advantage at the cost of comparatively less advanced local population. Such arrangements have been made under the Constitution of India with respect to tribal areas too. The people of JK are, however, citizens of India like those in the rest of the country and do not hold any dual citizenship of the state in addition to the citizenship of India. As regards the fundamental rights the Constitution (Application to Jammu and Kashmir) Order, 1954 applies them to JK with minor modifications and adjustments. Therefore, the people of JK also enjoy the guarantee of fundamental rights like the people in the rest of India.

From the Constitution of JK, the application of the Constitution of India to JK and the constitutional developments, since independence, about JK, as discussed in the work under review, it is clear that the gaps between JK and the rest of India in the matter of constitutional governance are successively narrowing down. Though of course differences and misunderstandings on the Constitution of JK continue on several issues, which sometimes draw international attention too, the process is in the direction of realization of constitutional arrangements and practices in the rest of India. Slowly the people seem to realize that the self-rule lies in the creation and operation of constitutional order laid down in the Constitution of India to be applied with such modifications as suitable to the special conditions of JK. Creation and operation of a constitutional order which India has been able to give to itself is no mean achievement in this part of the globe. The reviewer doubts if a non-democratic constitutional order provides a better guarantee of self-rule in the name of regional, ethnic, religious or any other similar autonomy. Dr. Justice Anand's work slowly and carefully takes us towards the realization of that great secret. By the time one

reaches its final pages one realizes that JK is on the right path towards constitutionalism and the Constitution of India and its functionaries have been carefully paving and strengthening that path.

Besides seven substantive chapters the book also has as many as fourteen appendices, a comprehensive bibliography and a subject index. The appendices contain some of the rare documents such as Treaty of Amritsar, 1846 and a letter from Maharaja Hari Singh to Lord Mountbatten dated 26 Oct 1947 requesting the accession of JK to India. They also include all the relevant documents and constitutional developments, including a judgment of the Supreme Court that state and help in understanding the constitutional position of JK. The reviewer cannot conceive of anything that is missing on the subject. It is comprehensive and complete. The only weakness at places concerns editorial aspects. The author has long been holding positions of great responsibility occupying all his attention and time and so it could not be expected of him that he could check every typographical error or defects in typesetting and style and duplications and repetitions. The copy editors and printers must have taken the responsibility of seeing to it that these small matters do not smear the immense worth of the book. The publication industry must also raise its standards to the international levels so that the good works like the present one are not subjected to ridicule in international market for these minor lapses.

Before concluding, the interest of scholars in the constitutional arrangements in India[1] may be looked into. The western legal scholarship is primarily engaged in the constitutional evolutions of the west, but when it takes note of constitutions beyond the west it pays comparatively less attention to the constitutional developments in India than it pays to several recent constitutions which have borrowed a lot from the Constitution of India. There are, however, quite a few lessons which anybody can learn from the constitutional arrangements in India. The west, which got territorially divided into small states on the idea of nationalism based on uniformity of race, religion, language, culture etc, cannot any longer contain the growing multiculturalism on that ideology except on the risk of redrawing territories. As such redrawing is neither feasible nor beneficial to anyone they are naturally drawn towards Indian example where much bigger diversity, than the west could ever have, is operational under its constitution. It has been possible because in India despite dissent from small groups the dominant will of the people has always favoured preservation of autonomy of different religious, ethnic, linguistic and other groups. In the process India might be losing on the side of creating a strong nation but if it has a choice between creating a

1. See, in particular, the writings of Will Kymlicka such as *Politics in the Vernacular: Nationalism, Multiculturalism, Citizenship* (OUP, 2000).

strong nation by force and having a weak nation by consent the reviewer would side with the latter. That was the vision of the constitution makers and that continues to be the vision of those who have been operating the Constitution. By making special arrangements for JK in the constitutional scheme of India the people of India have created an alternative vision of society which India has been cherishing from time immemorial. Let us preserve and strengthen that vision because it has every potential of turning into a world vision. Dr. Justice Anand's book takes us a long way in appreciating the importance and realization of that vision. For that reason, if not anything else, everybody must read it.[2]

*Mahendra P. Singh**

2. For a brief and pointed account of the message of the book also read author's, C.L. Agrawal Memorial Lecture: Accession of Kashmir – Historical and Legal Perspective (1996) 4 SCC (Jour) 11.

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TRADE MARKS AND THE EMERGING CONCEPT OF CYBER PROPERTY RIGHTS (2002). By V.K. Unni. Eastern Law House Pvt. Ltd. Kolkata. Pp. 28+365. Price Rs.550/-.

THE PRESENT work[1] does not deal with the issues relating to trade mark law in its interplay to the field of cyber property law in its entirety. Cyber property law, as being practiced globally and even in this country, encompasses much wider area of which e-commerce is one out of many other important components thereof. The present work is restricted to issues relating to domain names as dealt within, or relatable to, various international institutions and the specifics of the Indian trademark law. The main text of the book divided into nine chapters runs into 214 pages. There are six appendices running into 148 pages containing useful text material relatable to registration of domain names and the full text of the Trade Marks Act, 1999 and the Information Technology Act, 2000.

Chapter 1 gives a broad overview of the historical development of domain name as an institution in the hands of ICANN and WIPO and through a recent U.S. legislation, namely, Anticybersquatting Consumer Protection Act. Author has rightly pointed out that India does not have an exclusive "domain name" dedicated legislation. Provisions of the Trade Marks Act, 1999, including the definition of "trade mark" and "mark" therein, are broad enough to cover the domain name and the conflicts relatable thereto. Supreme Court in *Satyam Infoway Ltd.* v. *Sifynet Solutions Pvt. Ltd.*,[2] has held that a domain name may have all the characteristics of a trademark and thus a passing off action may lay in relation thereto. A domain name may pertain to provision of services within the meaning of section 2(z) of the Trade Marks Act, 1999. Since the Trade Marks Act, 1999 provides for the registrability of service marks which was not available under the Trade and Merchandise Marks Act, 1958, the proprietors of domain names shall have full IPR protection under the new Act.

Any technology related legal writing without giving the full backdrop of the conceptual maze of the technology involved shall be incomplete. Chapter 2 succinctly brings out the mysteries of internet and domain names and at the bottom level a description of the kinds of domain

1. V.K. Unni, *Trade Marks and the Emerging Concepts of Cyber Property Rights* (2002).

2. 2004 (28) PTC566SC.

names and the concept of DNS and the institutions associated with the work like ICANN, NSI, etc. Since much of early developments in relation to computers and matters related thereto like internet, etc. took place in U.S.A., the author has made a mention to a great extent of the institutions developed in U.S. and thus there is nothing in the chapter uniquely associated to the working of internet in other countries including India.

ICANN and the other US institutions have done useful preliminary work and now internet is no more confined to the territories of a country or group of countries. It, being a global medium, requires regulatory control at the hands of an international organization. Chapter 3 brings out the WIPO's role in the management of domain names. It brings out the interplay of ICANN and WIPO in formulating the policy by eliciting opinion of the governments with specific emphasis in the area of generic Top Level Domain (gTLD) and country code Top Level Domain (ccTLD). The whole chapter is devoted to the finalization of the WIPO Interim Report and the various recommendations made therein.

Chapter 4 describes the available institutional framework devoted towards a uniform dispute resolution policy. Institutional framework described is again much out of the interplay in between ICANN and WIPO. Conceptual framework and the resultant institutions are in a constant state of flux. Reader of the book shall be benefited by referring to more recent documents prepared by WIPO in this regard.[3]

Chapter 5 contains a brief description of a few important cases decided by the WIPO Arbitration and Mediation Centre. It includes quite a good number of cases relating to Indian companies. In all cases, except one, described therein the domain names of the Indian companies have got favourable response from the WIPO centre.

In chapter 6 titled "Trade Mark-Domain Name Disputes (The Global Scenario)", the author has described the case law as developed in U.S.A., Britain, New Zealand and India. He heavily banks upon the cases decided in U.S.A. under the Anticybersquatting Consumer Protection Act – a federal legislation enacted in derogation of Lanham Act and specifically devoted to domain name disputes. Legal position in Britain, New Zealand and India continues to be that domain names are manifestation of trade marks and hence the matters related thereto are covered under the usual trademark laws. Any person looking for the relevant Indian law in the area will have to be directed *to Satyam Infoway Ltd.* v. *Sifynet Solutions Pvt. Ltd.*,[4] wherein the Supreme Court has approvingly cited judgments of various high courts, namely, *Rediff Communication Ltd.* v. *Cyberbooth*

3. New Generic Top-Level Domains: Intellectual Property Consideration; WIPO offers new toll for analysis of UDRP Trends, www.wipo.int.

4. *Supra* note 2.

and another,[5] *Yahoo Inc.* v. *Akash Arora*,[6] *Dr. Reddy's Laboratories Ltd.* v. *Manu Kosuri*,[7] *Tata Sons Ltd.* v.*Manu Kosuri*,[8] *Acqua Minerals Ltd.* v. *Pramod Borse and Another*,[9] and *Info Edge (India) Pvt. Ltd and Another* v. *Shailesh Gupta and Another*,[10] The interesting part of *Satyam* judgement is that the Supreme Court has given recognition to the registrations held by both the appellant and the respondent with the international organizations like ICANN and WIPO and based upon those registrations has decided the dispute in question relating to passing off action. Delhi High Court in a case decided on 15.2.2005[11] has approvingly followed the dictum laid down by the Supreme Court in the *Satyam Infoway Ltd*. Author did not have the benefit of much of these judgments including the Supreme Court judgments since those were delivered after the publication of the book under review.

Chapter 7 titled "Criticism against Trade Mark Owners" raises certain ethical and moral issues relating to exclusive right to use domain names where innocent users of domain names have been charged without any valid reason. Again the use of a domain name also involves issues relating to abuse of human rights of the individuals or the public at large. It has been rightly pointed out that the internet should be administered on principles compatible with the United Nations Universal Declaration of Human Rights. Author has rightly pointed out the abuse being made of two-letter code allotted to individual countries. Certain small island countries have found the leasing of their two-letter code to big corporate sharks as a sustainer of their economies.

Chapters 8 and 9 deal with the issues of registration of domain names of identifiers like nonproprietary names for pharmaceutical substances, the names and acronyms of international intergovernmental organizations, personal names, trade names and geographical terms for which WIPO launched a process known as the Second WIPO Process. Section 13 and section 23 of the Trade and Merchandise Marks Act, 1958 and the similar provisions contained under the same section numbers under the Trade Marks Act, 1999 adequately cover the field in India. The central government by issuing necessary notifications under these sections can specify the marks not to be registered. Many notifications in this regard have been issued from time to time.

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5. AIR 2000 Bom 27.
6. 1999 PTC 201 Del.
7. 2001 PTC 859 Del.
8. 2001 PTC 432 Del.
9. 2001 PTC 619 Del.
10. 2002 PTC 355 Del.
11. *Buffalo Networks P Ltd* v. *Manish Jain*, 2005(30) PTC 242 Del.

In conclusion, the author deserves congratulations for the stupendous job done by him in a virgin area where there is hitherto no publication available. He has to a great degree of success tried to correlate the extant provisions of the trademark law in India and its interface with the emerging field of domain names and their registrablility.

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LAW, POVERTY AND LEGAL AID: ACCESS TO CRIMINAL JUSTICE (2004). By S. Muralidhar. Lexis Nexis Butterworths. Pp. lxv + 454. Price Rs.325/-.

A SOCIALLY marginalized and economically disadvantaged person, due to lack of economic resources, cannot assert his constitutional right 'to consult' and 'to be defended by a legal practitioner of his choice'.[1] The denial of legal representation to a person on account of his social and economic inequalities in criminal proceedings, in which the adversary party, generally the state, is better equipped, not only offends spirit of the constitutionally guaranteed right to equality[2] and the right to life and personal liberty[3] as it invariably leads to unjustified deprivation of his 'liberty', property and [even] 'life' but also makes the criminal justice system unfair and unjust. 'If the end of justice is justice and the spirit of justice is fairness', observed Fawcett J, 'then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely, and fairly, before the court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice-advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance.'[4]

Section 304(1) of the Code of Criminal Procedure, 1973(CrPC), plausibly realizing consequences of denial of access to criminal law processes to an economically disabled person, assures legal assistance at the state expenses to the accused when it appears to the court that the accused has not sufficient means to engage a pleader. However, a plain reading of the provision reveals that legal assistance at the state expense is restricted to accused facing trial in a sessions court. It, obviously, leaves an 'accused' facing 'non-session trials' to his fate. Contrary to the constitutional imperatives of article 22(1) of the Constitution that assures an 'arrestee' 'to consult' and 'to be defended by a legal practitioner of his choice' not only at the time of his 'arrest' but also at the trial, revision and appeal, section 304 of the CrPC also does not

1. Art. 22(1). Its material part reads: 'No person who is arrested — shall — be denied the right to consult, and to be defended by, a legal practitioner of his choice.'

2. Art. 14.

3. Art. 21. It reads: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

4. *Re Leewelyn*, AIR 1926 Bom 551.

render any relief to an accused facing sessions trial in the pre-and post-trial phases of criminal justice system.

The Constitution (42nd Amendment) Act, 1976, *inter alia*, through article 39-A directs the state to secure that 'the operation of legal system promotes justice, on the basis of equal opportunity, and 'provide free legal aid, by suitable legislation or schemes or in other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities'.

Ultimately, the Legal Services Authority Act, 1987 (LSAA), which came into force in 1995, has institutionalized the delivery of free legal service to the weaker sections of the society. It endeavors 'to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities', and 'to secure that the operation of the legal system promotes justice on a basis of equal opportunity'. The legal aid movement in India that culminated in the LSAA has a very long history. Mere existence of a legal framework, however, does not *ipso facto* ensure equal opportunity to weaker sections of the society in securing justice unless the legislative scheme is implemented with utmost sincerity to make the legislative spirit a reality.

The book under review,[5] authored by a lawyer practicing at the Supreme Court of India, traces evolution and development of the right to legal aid; offers a comprehensive analysis of the legislative paradigm-constitutional as well as statutory—of, and schemes designed by the government—central and state—to render, free legal aid; scans a plethora of judicial pronouncements articulating the right to access to justice; identifies challenges to the right to equal access to criminal justice, and highlights the nexus between the denial of the right to state-sponsored legal service and the loss of liberty and dignity.

The author, scanning committee reports,[6] statutory rules[7] and schemes,[8] offers an evolutionary sketch of the concept of legal aid in India from the pre-independence period, particularly from 1898, when the (old) Code of Criminal Procedure for the first time formally recognized the right of an accused to state-sponsored legal presentation, to the formulation of the LSAA.[9] He reveals to his readers that the

5. S Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* (2004).

6. A reference may be made to the reports of: the Bombay Committee (1949), the Arthur Trevor Harries Committee (West Bengal) 1949, Law Commission (14th Report, 1958), the Gujarat Committee (1971), the Expert Committee on Legal Aid (1973), the Tamil Nadu Committee (1973), the Madhya Pradesh Committee (1975), the Rajasthan Committee (1975), and the Juridicare Committee (1977).

7. The Kerala Legal Aid (to the Poor) Rules, 1957.

8. The Central Government's Scheme for Legal Aid (1960) and the Centre for Implementation of Legal Aid Scheme (1980).

9. S*upra* note 5, chapter 2.

early recognition of the dimension of law and poverty and recognition of the right of an underprivileged person to claim equal access to justice emerged in the Kerala Legal Aid (to the Poor) Rules, 1957 that, on the insistence of the then Labor Minister of Kerala, V R Krishna Iyer, who was subsequently elevated to the Supreme Court and Chaired the Expert Committee on Legal Aid appointed in 1972 by the Central Ministry of Law and Justice, provided a poor person legal aid in proceedings before the high court, court of sessions, and the court of district magistrates in all criminal trials, appeals and revisions. And the expert committee subsequently recommended that counsel at state expense be provided at every stage from the point of arrest till disposal of the appeal. Further, the Juridicare Committee, admittedly 'an extensive revision, updating, revaluating and adding to' the Expert Committee's Report, submitted to the Central Government the National Legal Services Bill, 1977, which, with a set of modifications, ultimately culminated in the LSAA.[10]

Primarily, the Constitution of India, the CrPC, and the LSAA offer legislative paradigm for rendering state-sponsored legal assistance and services to the indigenous persons. The author in the third chapter of his book under review, captioned 'Legal Aid in the Criminal Justice System: the Constitution, the Statutes, the Schemes', therefore, opts to offer a penetrating analysis of these legislative instruments.

Though the Constitution assures in article 22(1) an arrestee the fundamental right to be represented by a counsel of his choice, it, the author reminds his readers, does not specifically makes mention of the right of an indigent person to seek state-sponsored legal assistance in criminal proceedings and article 39-A, inserted in 1976, recognizes the right of a socially marginalized and economically disabled person to free legal aid as merely a non-enforceable constitutional right. Nevertheless, recalling that the Supreme Court has used the directive principles of state policy 'to expand the ambit and scope of the right under article 21 of the Constitution', he opines that 'the inclusion of the right to legal aid as a directive principle does not necessarily dilute its importance or its enforceability' but the right to legal aid, recognized as forming part of the right to life under article 21, gets 'further strengthened' by article 39-A.[11]

However, operation of section 304 of the CrPC, the author demonstrates, has emerged merely as a statutory and procedural right rather than a fundamental right to a just, fair and reasonable procedure.[12]

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10. For details of the 1977 Bill and its comparison with the 1987 Act see, *supra* note 5 at 103-106 & 114-116 respectively.

11. *Id.* at 82-83.

12. For further details and judicial pronouncements see, *supra* note 5 at 84-92 and chapts. 4 and 5.

He, therefore, feels, and rightly so, that 'the constitutional mandate remains a formal declaration particularly since the subordinate courts do not have the powers of the constitutional courts to protect and enforce the fundamental rights'.[13]

The LSAA, with a view to ensuring effective 'free and competent legal service to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities', *inter alia*, provides for the setting up of legal service authorities at the national, state, district and *taluka* levels, their composition and functions, and lays down criteria for seeking legal assistance. However, the author of the book, supported by penetrating analysis and statistics, paints a dismal operational facet of the LSAA. His 'analysis' of (ununiform) rules and regulations framed by states under the LSAA discloses that the subordinate legislation has indeed defeated 'the intention of the legislature in creating a network of institutions to subserve the object of providing legal aid to the needy person' and 'most of the State Governments' do not 'feel the need to make a concerted effort to prepare schemes by building into it the positive features of the existing schemes and removing the defects which had been shown up in the actual working of the scheme'.[14] Further, he points out that the focus of the subordinate legislation under the LSAA is on 'the institutions dispensing legal services' rather than on 'the beneficiary of legal services', and that a 'sizable portion of the budget' allocated to these authorities is spent on 'salaries of staff and maintenance of the establishment'.[15] Quoting with approval an observation of a scholar, he feels, rather demonstrates, that the LSAA is 'not radical enough to give the necessary push to social justice revolution'.[16] He, therefore, pleads, and rightly so, for structural overhauling of the LSAA and better 'incentives', including restructuring the prevailing fee-scale and recognizing legal aid cases handled by a lawyer while designating a lawyer as a 'senior advocate', to motivate lawyers of good standing to sincerely participate in the state-sponsored legal aid program.

The book under review also offers a very comprehensive comparison, for convincing reasons, between the legal aid system in India and the UK, the USA, South Africa and Bangladesh.[17] The author has undertaken the exercise to assess, in the backdrop of the criminal legal aid in the identified legal systems, the efficacy, substantive as well as procedural, of the legal aid to poor in India and to give some tips to the planners

13. *Id.* at. 92.
14. *Id*. at 117.
15. *Id*. at 119.
16. *Id*. at 121.
17. *Id*., chap. 7.

and practitioners in India to make the legal assistance to poor more effective. He highlights the nature of the right of access to justice and the state intervention therein; the significance of characterizing the right to legal assistance as a non-derogable constitutional right *vis-à-vis* its enforceability and availability, and the consequences resulting from a breach of the right. His emphasis is on: an audit, evaluation and cost effectiveness of the functioning of legal aid institutions; independence of the legal aid institutions *vis-à-vis* executive; adoption of the system of public-defender; preventive and rehabilitative legal aid; enhancement of the quality of legal service to increase credibility and acceptability among its recipients of the legal aid, and appropriate incentives to lawyers to ensure their effective participation in the system.

The two chapters devoted to 'judicial response',[18] which assess judicial contribution in the evolution and development of legal aid and the concept of access to justice in India make an interesting reading. Similarly, the chapter captioned 'Poverty, Law and Legal Aid'[19] illustrates the interaction between the criminal justice system and the poor and pleads for a better legal aid system for vagrants, sex workers, juveniles and the mentally challenged persons.

Premised on his analysis—substantive, procedural as well as operational—of the legal assistance to indigent people in India and its comparison with the systems prevailing in the UK, the USA, South Africa and Bangladesh, the author offers a well-reasoned and convincing 'Action Plan' for legal aid in the criminal justice system in India.[20]

The book under review, which makes an interesting reading, indeed offers an insight into the evolution, development and operation of legal assistance to poor and their access to criminal justice system in India. It not merely highlights, with supporting statistics and convincing analysis, key issues—substantive, procedural and operational—concerning legal assistance to poor in India but also offers a set of suggestions worth considering for ensuring effective access of indigent persons to criminal justice system in India. It indeed makes an immense contribution to the poverty jurisprudence in India. The author really deserves high appreciation for his wonderful contribution.

K. I. Vibhute[*]

18. *Id*., chapts. 4 & 5.
19. *Id*., chap. 6.
20. *Id*. at 393-396.

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LAW OF ARBITRATION & CONCILIATION – PRACTICE AND PROCEDURE (2nd Ed., 2004).By S. K. Chawla. Eastern Law House, New Delhi. Pp. 1060.Price Rs.875/-.

IN A recent judgment of the Supreme Court, an issue arose which did not have any authoritative ruling by the apex court to rely on. The question was whether the court has *suo motu* power to set aside an arbitral award. The three member bench headed by R. C. Lahoti CJI through a judgment delivered by the chief justice himself relied expressly on the opinion expressed in the book under review. Thus, Justice Chawla's book has entered the category of classical text books worthy of august reliance by the Supreme Court of India. It may be apposite to quote the words of judgment:[1]

> We need not multiply the number of authorities on this point as an exhaustive and illuminating conspectus of judicial opinion is found to be contained in Law of Arbitration and Conciliation – Practice and Procedure by S. K. Chawla (Second Edition), 2004 at pp. 181-184 under the caption – 'Whether the Court has *suo motu* power to set aside the Arbitral Award-' and the answer given in the discussion thereunder is in the affirmative.

Undoubtedly, Justice Chawla has produced a light house for the guidance of lawyers, judges and jurists to find their way in the constant flux in which the law of arbitration has found itself in India. As already acknowledged by the reviewer, his interpretations and references would be valid at least until the law is amended in view of the recommendations suggested by the Law Commission of India. Till such amendments take place, the book is of great relevance and assistance. The book was initially published almost immediately after the present arbitration law was enacted by the Parliament in 1996. After the said first edition in 1998 the provisions of the Act underwent immense churning not only at the hands of several high courts but also at the hands of the apex court Unexpected interpretations were read into the provisions. The changed provisions of international law also found its way through judicial interpretation into our law. Justice Chawla has taken great pains to bring in almost all the decisions of the Supreme Court up to 2004 into this new edition.

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1. *Dharma Prathishtanam* v. *M/s Madhok Construction Pvt. Ltd*., 2004 (3) RAJ 530 (SC).

If the reader is surprised at the depth of the commentary, he needs to be reminded of the experience which the author had in the area of arbitration and related matters as the judge of the High Court of M.P., Chairman of M.P. Arbitration Tribunal and *Up-Lokayukt* of M.P. However, it is clear that the analytical genius exhibited by him is befitting to the disciple of Justice G.P. Singh, the celebrated author of the *Principles of Statutory Interpretation*.

The author deserves compliment for his treatment, especially of the case law and interpretation under sections 8, 9, and 11 of the Arbitration and Conciliation Act, 1996. Section 8 of the present Act has no application unless an action is pending before a judicial authority. The similarly between section 8 of the present Act and section 20 of the Arbitration Act 1940, in that judicial authority refers the parties to arbitration under the former provision while the court refers the dispute to arbitrator under the latter provisions is deceptive. In this context, the Supreme Court has observed:[2]

> Section 8 of the new Act is not in *pari materia* with s. 20 of the 1940 Act. It is only if in an action which is pending before the Court that a party applies that the matter is the subject of an arbitration agreement does the Court get jurisdiction to refer the parties to arbitration. The said provisions does not contemplate, unlike s. 20 of the 1940 Act, a party applying to a Court for appointing an arbitrator when no matter is pending before the Court.

Moreover, no reference of any dispute is made under section 8 as was done under section 20; but only parties are referred to arbitration. As observed by the Supreme Court,[3] "there is no provision in the new Act for referring the matter to an arbitrator by intervention of court, when there is no suit pending or by order of the court when there is a suit pending, have been removed".

According to the author, it is wrong to take the aid of section 41 (b) read with second schedule to Arbitration Act 1940 in interpreting section 9 of the present Act empowering a court to grant interim measures. Under section 41 (b) of the Arbitration Act 1940, the court had powers to grant interim measures 'for the purpose of, and in relation to, arbitration proceedings'. In *Sant Ram and Company* v. *State of Rajasthan*,[4] interpreting these words, it was held that pendency of proceedings in court in relation to arbitration proceedings was a pre-

2. *Sundaram Finance Ltd.* v. *NEPC Pvt. Ltd.*, (1999) 2 SCC 479.

3. *Konkan Railway Corporation Ltd.* v. *Mehul Construction Company*, 2000 (3) Arb LR 162.

4. (1997) 1 SCC 147.

condition for the exercise of power by the court to grant interim relief under section 41(b) read with Second Schedule of Arbitration Act 1940. This limitation of pendency of arbitration proceedings in court does not now exist, considering the language of section 9 of the present Act in which the words 'for the purpose of, and in relation to, arbitration proceedings' are missing. The court may now granting interim measures 'before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced'. In *Sundaram Finance Limited* v. *NEPC India Ltd.*,[5] the Supreme Court has observed that meaning has to be given to the words 'before' occurring in section 9. Accordingly, the court has power to grant interim measures even before the commencement of arbitral proceedings. Such a provision, it was observed, was necessary to enable a party to get interim relief urgently even before the commencement of arbitral proceedings. But where an application under section 9 is filed before the commencement of arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to arbitral proceedings. The court may also pass a conditional order under section 9 and put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings.

Section 10(1) of the present Act, providing that the number of arbitrators agreed shall not be an even number, was held by the Supreme Court way back in 1996 as part of the machinery provision not having the effect of rendering arbitration agreement providing for even number of arbitrators to be invalid.[6] The Supreme Court has now gone a step further and has held that the provision of section 10(1) is a derogable provision and objection based on it could be waived.[7]

Justice Chawla has found that a significant deviation had been made in section 11 of the present Act from the model law, in that the word 'Chief Justice' is used in section 11 instead of the word 'Court' used in article 11 of the model law. This deviation accounts for controversy that raged in the Supreme Court for sometime over the question whether the chief justice or his nominee discharges under section 11 administrative or judicial functions and the order passed by him is an administrative or a judicial order. At first, a two- judge bench of the Supreme Court declared in the case of *Sundaram Finance Limited*[8] that the chief justice or his designate is not required to pass a judicial order while appointing an arbitrator/ arbitrators. This decision was confirmed by another two-judge bench of the Supreme Court in *Ador Samia Pvt. Ltd.* v. *Peekay*

5. (1999) 2 SCC 479.
6. *MMTC Limited* v *Sterlite (India) Ltd.,* (1996) 6 SCC 716.
7. *Narayan Prasad Lohia* v. *Nikunj Kumar Lohia* 2002 (1) Arb LR 493 (SC).
8. *Supra* note 2.

Holdings Ltd.[9] to state that order passed under section 11 is not an order passed by any court exercising judicial function nor is it a tribunal having trappings of a judicial authority. The chief justice or his designate acts in an administrative capacity. Then came a three-judge bench Supreme Court case of *Konkan Railway Corporation Limited* v. *Mehul Construction Company*[10] laying down that the chief justice or his nominee while discharging functions under section 11(6) would be acting in administrative capacity. And the order passed in such proceedings would be a administrative order. But thereafter a two-judge bench of the Supreme Court in *Konkan Railway Corporation Limited* v. *Rani Constructions Pvt. Ltd.*[11] observing that if the order of the chief justice or his nominee under section. 11 were held to be an administrative order it would result in greater delay of arbitration proceedings, referred the matter for being placed before the chief justice for the matter being re-examined. The matter was re-examined by the constitutional bench of the Supreme Court which has now laid down that the order of the chief justice or his designate under section 11 appointing an arbitrator is not an adjudicatory order and that the chief Justice or his designate is also not a tribunal.[12] The constitution bench has also observed that there is nothing in section 11 which requires a party other than the party making the request to be even noticed.

In addition to the detailed discussion on the above provisions, the book deals in depth with topics such as powers and duties of arbitrators, procedure of arbitration, termination of mandate, arbitral award and its enforcement, setting aside arbitral award, role of conciliators, international commercial arbitration and enforcement of foreign awards. The appendices containing relevant Acts and rules, besides the repealed statutes like the Arbitration Act 1940, the Arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961 as their importance still continues. The author has included in the appendix the schemes for appointment of arbitrators framed by the Supreme Court of India and by most of the high court besides the full text of English Arbitration Act 1996 (1996 c. 23) noticing its special features where needed and a short introduction to the ICC International Court of Arbitration as also the ICC Rules of Arbitration 1998 together with the ICC Rules of Arbitration and Optional Conciliation 1988.

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9. (1999) 8 SCC 572.

10. (2000) 7 SCC 201.

11. (2000) 2 SCC 388.

12. *Konkan Railway Corporation Ltd.* v. *Rani Constructions Pvt. Ltd.* 2002 (2) Arb LR 326.

The subject-index, cross indexing method adds to the utility of the book. The old case laws bearing on general principles are referred to and at the same time, a large bulk of obsolete case laws has been omitted. In the footnotes reference from a single law journal has usually been given. This, in fact, reduces the inconvenience of the readers since in order to find corresponding reference from other journals the reader has to hip-hop to the nominal index of cases.

The book is also useful to the researchers, especially since it refers to the relevant provisions of UNCITRAL model law and other relevant law in addition to the reproduction of related legislation in the appendixes. The schemes of appointment of arbitrators framed in the different high courts, the model arbitration clauses and the rules of arbitral institutions, in addition to the old and new case law, will be of great assistance to practitioners.

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MILITARY LAW: THEN, NOW AND BEYOND (2005). Compiled and edited by Maj. Gen. Nilendra Kumar. Published by The Judge Advocate General Deptt. Army Head Quarters, Sena Bhawan, New Delhi. Pp. 285, Price and ISBN not indicated.

MILITARY LAW directly governs more than a million strong armed forces in India. Further, it indirectly affects more then three million ex-servicemen, their family members and next of kin. Moreover, its basic facilities are of direct relevance to the residents of all north-eastern states and Jammu & Kashmir where provisions of the Armed Forces (Special Powers) Act are applicable.

The instant publication is a welcome effort to highlight and analyze diverse issues relating to military law and jurisprudence. All connected aspects like military law enforcement, litigation, human rights and humanitarian law, training and futuristic trends have all been adequately covered. A narration of the historical perspective facilitates an in-depth assimilation. The interview with the Chief of Army Staff renders requisite legitimacy and an insight into policy perspective.

The book appears in the form of illuminating articles by experts in the field *viz.* lawyers, judges, academicians, senior serving and retired military officers and media personnel. The articles have been meticulously arranged in various chapters. The editor has included the special features pertaining to the air force and naval law besides a resume of rules concerning coast guard. Carefully selected and captioned pictures together with readable quotes placed as fillers would enhance the interest in the book.

An unparallel work that is a must for all law libraries and to those interested in study of military science and security jurisprudence. The publishers could have taken care to reveal the price of the book and source for procuring it, which has not been indicated.

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THE NEW UNIVERSE OF HUMAN RIGHTS (2004). By Justice J.S. Verma. Universal Law Publishing Co. Pvt. Ltd. Delhi. Pp.xiv+377. Price Rs. 395/-.

JUSTICE VERMA, former Chief Justice of India and former Chairman of the National Human Rights Commission, is the most apt person to write on the *New Universe of Human Rights* not only because he has adorned both the offices but also because of his commendable attempts through judgments like *Vishakha,* to read into domestic law the principles of international human rights principles and his timely but unprecedented intervention, as the Chairman, NHRC, in the Gujarat riots issue and issues of similar nature. He has also set an example as the NHRC Chairman by intervening and successfully thwarting the attempt to enact the Prevention of Terrorism Bill, 2000. Hence it was with respect and even some amount of awe that the review of his book was undertaken

In the opening sentence of the book, by identifying human dignity as the quintessence of human rights, the author gives us the unmistakable feeling that here is a jurist who has rightly understood the crux of human rights jurisprudence. He has mentioned almost all the human rights issues in this work. Starting from human development, which he rightly believes to be an indispensable part of human rights, he passes through issues like gender justice, right to health, right to safe drinking water, adequate nutrition, adequate livelihood, right to corruption-free governance etc. He does not concentrate on conventional issues of human rights alone like right against torture. He assertively states that eradication of poverty; health care issues and basic amenities for every individual are the real human right issues. He agrees with Amartya Sen in that banishment of the three "unfreedoms" of illiteracy, lack of health care and malnutrition is required for rendering development the real freedom of mankind.

However, it is felt that his discussions with respect to the question of development do not mention the confusion that exists with respect to development. Development is a term, which could be interpreted differently depending upon the outlook of the person interpreting it and the criteria he uses to define it. Justice Verma profusely quotes Mahbub ul Haq - the creator of the *Human Development Report*, a UNDP publication, which started in the year 1990 - and agrees to many of the views expressed by Haq like the one that economic growth does not automatically translate into human development unless accompanied by distributive justice and to ensure this is one of the key challenges to

human rights in the new millennium. However, the statement of Justice Verma that the Human Development Index (HDI) is the new measure of development recognized in 1990s leaves one with the feeling that he could have also mentioned the points of disagreement among the international community about the acceptability of the HDI as the best mode of evaluating the development of a nation. The figure of HDI is calculated on the basis of longevity, knowledge and income.[1] As rightly said by Sunstein, any "index" would be controversial. Sunstein feels that the equal weighing of the three variables is arbitrary because the three are interrelated and income can buy the other two.[2] Moreover it is alleged that the HDI is insensitive to ethnic, racial, regional and other differences. It is said that other nations, especially those in Scandinavia, have implemented interesting alternatives to HDI.[3]

Another area where some amount of confusion is caused is with respect to the statement of the author about economics of knowledge.[4] For example, the author, in the opening page of the book itself states:

> It is said: 'a nation's ability to convert knowledge into wealth and social good through the process of innovation is going to determine its future.' If the emphasis earlier was on tangible assets as the index of wealth, there is now a paradigm shift towards emphasis on intangible assets. That is why the 21st century is considered to be the century of knowledge. Economics of knowledge is the scientific study of improving governance through human development and therefore, it assumes great significance. Today knowledge has come to be identified not only as a significant form of wealth but also as power. *Acquiring knowledge and using it profitably to convert it (sic) into wealth and social good has to be the goal. Human development linked with human rights to achieve this end must be the aim* (emphasis added).

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1. Cass R.Sunstein, *Free Markets and Social Justice* 118(1997). It is stated: "Longevity" is determined on the basis of life expectancy at birth. "Knowledge" is calculated by a formula based on adult literacy and mean years of schooling, with literacy weighed twice as heavily as mean years of schooling. To take account of the diminishing value of income, the "income" ingredient is based on an adjustment of per capita GDP, understood as standard of living. The UN measurement weighs the three variables equally.

2. *Id.* at 122.

3. *Ibid.* The Swedish assessment of "standard of living" is more disaggregated and less mathematical than the UN approach. The assessment takes account of health and access to health care; education and skills; housing; security of life and property; employment etc. In addition to the Swedish factors, the Finnish approach emphasizes the quality of the biological and physical environment, including air and water pollution.

4. J.S. Verma, *The New Universe of Human Rights*, pp. 15, 27, 48 and 66.

However, the above statements are confusing in that, R.A.Mashelkar (it would have been more appropriate had the author disclosed the source while quoting Mashelkar) himself admits that tomorrow's war will be fought in the knowledge markets and that the war in the knowledge markets will be expensive.[5] Mashelkar further added thus:

> I made a reference earlier to the expensive wars in the knowledge market that the Indian industry will have to face, as it integrates its economy with the global economy. Intellectual Property Rights (IPR) will be crucial in fighting these wars! Indeed in the world of knowledge-based competition, IPR will emerge as a key strategic tool. India is way behind the rest of the world and the continuing illiteracy in IPR will hurt us badly.

Even the *Human Development Report 2000*, a publication of the UNDP, has warned against the treacheries involved in the global race for knowledge. It states that though the recent great strides in technology present tremendous opportunities for human development, achieving that potential depends on how technology is used.[6] The report expresses its anxiety in the way in which the new rules of globalization–liberalization, privatization and tighter intellectual property rights–are shaping the control and use of the new technologies with many adverse consequences on human development such as, widening the global gap between the "haves and have-nots" and between the "knows and know-nots."

It also recognizes that tightened intellectual property rights keep developing countries out of the knowledge sector and though the new technologies promise many advances for human development, globalization and its new rules are shaping the path of the new technologies and the risk is poor people's and poor countries interests being left on sidelines.[7] Thus it becomes quite evident that acquiring knowledge and converting it into wealth and social good cannot most often go hand in hand and social good then becomes the casualty. It is, therefore, quite disturbing that though Justice Verma speaks on the economics of knowledge on many occasions, not even once has he bothered to strike a note of caution in this regard. These issues may lead one to the apprehension whether the author is going superficial on human rights issues of vital importance.

While discussing the recent judicial trends in India, the author, many a time, reveals the mannerisms of a former judge of the Supreme Court

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5. R.A.Mashelkar, "Economics of Knowledge" http://www.ias.ac.in/currsci/jul25/articles14.htm visited on 30.10.05. He adds, "The war on a patent right, which took place between Eastman Kodak and Polaroid, was settled for about one billion dollars recently. This is half of India's R&D budget!"

6. *The Human Development Report* 57(1999).

7. *Id.* at 66.

of India. He is reticent in openly criticizing many decisions about which he shares the views of the critics. For example, while discussing the *Narmada Case*[8] though he takes note of the criticisms against it, but does not express any opinion himself, and simply states: "Time alone would show whether the judgment is correct or the critics are right". This is despite the fact that one gets the feeling on reading the book that the author, at least in his mind, approves the views of the critics. As the Chairman of NHRC, he should not have hesitated in speaking his mind out.

While analyzing women's human rights issues and connected cases most often one may find lack of sensitivity on the part of the author. For example, *Gita Hariharan* v. *Reserve Bank of India*[9] was cited by him as "a definite step taken to advance gender equality and promote gender justice." But that decision is the best example of judicial insensitivity to gender issues. In that case it was alleged that section 6 of the Hindu Minority and Guardianship Act is discriminatory since it stated that the natural guardian of a minor in respect of his person as well as property is his father and after him, the mother. The Supreme Court of India, after discussing elaborately the International Convention on Elimination of all sorts of Discrimination Against Women (CEDAW), reached at the conclusion that if the word "after" is interpreted to mean "in the absence of" the apparent discrimination in the provision could be eliminated. One is at a loss to understand why the court was reluctant to strike down the words "after him" instead of interpreting it to mean "in the absence of". This interpretation is despite the express statement of the Law Commission of India in its 133rd Report that the provision challenged in the case was discriminatory against women. The commission reasoned thus: [10]

> Apart from the fact that there is no rational basis for according an inferior position in the order of preference to the mother, vis-à-vis the father, the proposition is valuable to challenge on several grounds. In the first place, it discloses an anti-feminine bias. It reveals age-old distrust for women and feeling of superiority for men and inferiority for women.

In chapter 26 entitled "Social Inclusion (Gender and Indigenous and Tribal Peoples)" also this insensitivity towards gender issues is writ large. While discussing gender equality he refers to almost all issues like super cyclone in Orissa, spread of HIV/AIDS, poverty, illiteracy, and death during pregnancy etc. But nothing is seen on the real issue,

8. *Supra* note 4 at 32.
9. AIR 1999 SC 1149.
10. *133rd Report of the Law Commission of India* at 8, 9.

i.e., gender inequality, other than that of the skewed sex ratio or the issue of the missing women. It is quite disappointing that a person like him, who from the very outset agreeing with Mabub-ul-Haq, has stated that "human development, if not engendered, is fatally endangered".

While talking on "Secular Tradition in India"[11], the approach of the author, it is submitted with all due respects, is not of a human rights jurist, but of a philosopher or rather, of a pious human being who believes in the practicing of one's own religion without interfering with others' similar rights. The crux of his talk is about the need for religious tolerance rather than the complex legal and human rights issue of secularism may be because it was Archbishop Alan de Lastic Memorial lecture. The author discusses secularism again in chapter 32 entitled "Humanism-The Universal Creed". Most of the space of this chapter is utilized for explaining his stand in two earlier judgments – *Ismail Faruqui* v. *Union of India*[12] and *R.Y. Prabhoo* v. *P.K. Kunte*[13] - which attracted much criticism from different quarters. In the former case Justice Verma, while speaking for the majority, made the controversial statement that "A mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslims can be offered anywhere, even in open."

The latter case was an appeal from an election petition. In that case the election of the appellant was challenged on the ground of corrupt practices under the Representation of People Act, 1951. It was alleged and proved that he and his agent Bal Thackeray appealed for votes for the appellant in the name of his religion.[14] Though the appeal was dismissed on the ground that the language used in the speech amounted to attempt to promote enmity or hatred between Hindus and Muslims in the name of religion, Justive Verma indulged in the unnecessary and untimely discourse of what is 'Hindutva' while delivering the judgment.

Both the above mentioned cases involved volatile situations and it was highly essential on the part of the judiciary to keep restraint. The fact that the statements of the court found favour with one of the communal groups and that they started quoting it, as expressly admitted by the author himself[15] proves that the criticisms were not unfounded. It is, therefore, submitted that there is no point in saying that the criticisms

11. *Supra* note 4, chapter 27

12. AIR 1995 SC 605, popularly known as the *Ayodhya* case.

13. AIR 1996 SC 1113.

14. Excerpts from the speech of Thakeray revealed highly inflammatory remarks.

15. He says: "It is unfortunate that this decision has been misconstrued and misused by many for narrow interests by quoting it out of context." See, *supra* note 4 at 263.

were unfair.[16]

Another point of difference which one could feel, while going through this work, is with respect to his discussions in connection with civil liberties and anti-terrorism activities in the light of the September 11 incident. He rightly warns against combating terrorism by counter terrorism. However, he fails to mention the counter terrorist activities by the USA in Afghanisthan and Iraq under the cover of the 9/11 incident. These activities by the USA, which are still going on, have attracted criticism worldwide.

While discussing the penal reforms in south-east Asia, the author suggests, by way of reforms in police structure, separation of law and order wing from the investigation wing. This is a plausible suggestion and it will help to improve the efficiency of both the wings. However, he also suggests the separation of prosecution wing from the investigation wing for he feels it necessary for freeing the former from the institutional bias. This, it is submitted, does not appear to be a welcome step. Because it is strongly felt that for the correct appreciation of the case during the trial procedure, it is essential that those who investigated the case must prosecute the case. In adversarial systems of criminal justice administration like India where the complainant is represented by the state, one of the problems encountered by the criminal prosecution is the lack of training by the police and their callous way of handling criminal cases. A trained investigation wing, which is separate from the law and order wing, could solve this problem to a great extent. However, if the investigation wing is separated from the prosecution wing the benefit of training to the former will be lost. And further, there is no justification for having the fear that a properly trained investigation wing will always have an institutional bias which could adversely affect fair trial and the rights of the accused.

The Convocation Address of National Academy of Medical Sciences delivered by the author in 2001,[17] is outstanding in its deep sense of professional ethics of doctors *vis-a-vis* the human right to health of the general public. The author appears to be deeply concerned about the commercialization of medical education and the resulting decline of ethics in the medical profession. He observed:

> The disturbing trend of mushroom growth of medical institutions indulging in commercialization of medical education must be arrested. A similar trend in legal education is being curbed. I am not sure how far the decision of the Supreme Court of India in *J.P.Unnikrishnan* v. *State of A.P.* (AIR 1993 SC 2178) has

16. *Ibid.*
17. *Supra* note 4, chap 30.

> helped to control this trend in medical education. If it has not, to the desired extent, it should be one of the areas of your concern so that you can highlight the loopholes and suggest the required modifications to prevent commercialization of medical education. The quality of medical education imparted in the medical colleges will determine the quality of medical professionals of the future. Advancement in the medical sciences in the future will depend on their calibre and ethical values.

The statement of Justice Verma is notable in the light of the recent judgments of the Supreme Court of India with respect to professional education.[18] The lack of a sense of human rights aspects, as shown by Justice Verma, while deciding those cases will be felt by many while going through those cases. However, it is disappointing that Justice Verma does not mention anything about these judgments in his talk in Jamia Milia Islamia on "Significance of Ethics in Education", which was delivered on 28th October 2003, *i.e.*, after the decision in *T.M.A. Pai* case was delivered. Moreover, it would have been more appropriate, had the author updated his topics while publishing it as a book at least by adding notes to the talks, wherever necessary.

Justice Verma ardently upholds that clean environment is human rights imperative and warns against eco-terrorism.[19] While he states that the short-term gains to satisfy man's greed are at the cost of the long-term interests and intergenerational equity he proves that he has rightly imbibed the spirit of environmental jurisprudence. He opines that a healthy environment conducive to the health and well being of human beings is an essential component of the right to life enshrined under article 21 of the Constitution of India and which is also a basic human right inherent in human rights.

Thus Justice Verma, in his book deals with a whole range of human rights topics with a sensitivity rarely seen among judges of present generation. But one main problem with the work is that it goes only skin deep into the subjects. Had these papers been well studied and exhaustive, it would have been treasured by human rights students and jurists.

Repetitions are understandable in a book, which is a collection of talks, and the author himself has taken the caveat about it in the preface itself. However, papers, which simply reiterate what is already stated, should have been avoided while collecting the speeches and papers for

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18. *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697 and finally the recent decision in *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537.

19. *Supra* note 4 at 164.

shaping it into a book.[20]

Despite the shortcomings mentioned above the book under review is worth reading. It is nicely printed and reasonably priced. It should find a place among good books on human rights.

*T.G. Agitha**

20. *Id*., pp. 8,22,9,23,10,24,12,26106,116,162,168,169 etc.

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CONTEMPT OF COURT (2004). By Justice J.D. Kapoor. Universal Law Publishing Co. Pvt. Ltd., New Delhi, Pp.xxxii + 719. Price Rs.595/-.

FREEDOM OF speech and expression is the foundation of any democracy besides being a valuable freedom in itself. The freedom of thought and expression is not only valuable freedom in itself, but is basic to a democratic form of government which proceeds on the theory that problems of government can be solved by the free exchange of thought and by public discussion. Almost all the constitutions whether democratic or socialist ensure this freedom to their citizens. However, as per the constitutional scheme, this freedom, like any other freedom is not absolute and is subject to reasonable restrictions enshrined in the Constitution.

Article 19(1) (a) of the Constitution secures to every citizen the freedom of speech and expression. This clause should be read with clause (2) which enables the state to impose reasonable restrictions on the exercise of the said right, inter alia, in relation to contempt of court.

However, in a democratic society there are other values also to be attained as well apart from this cherished freedom of speech and expression. At times these values may come in conflict with the free speech. One such value is fair and impartial administration of justice. This social interest is sought to be protected by the inclusion of, what is called 'Contempt of Court', which, as stated above, is one of the restrictions contained in article 19(2) on the freedom of speech. It is this major problem in balancing these two competing social values that has engaged the attention of the courts while exercising this jurisdiction.

The higher judiciary in India has the power to punish those who interfere with the administration of justice. This is an extremely wide power which has been given due recognition by the Constitution[1] and which has been the subject of the Contempt of Courts Act, 1971.[2]

In recent years, the contempt power has become the subject of considerable controversy.[3] This power has come to be visualized as an

1. Articles 129 & 215 of the Constitution of India make the Supreme Court and the High Courts respectively "Courts of Records" with power to punish for contempt

2. This is the extant law on the subject.

3. Recently (November 12, 2003) the Karnataka High Court initiated *suo motu* contempt proceedings against several newspapers pursuant to publication of certain news reports pertaining to the "Mysore episode".

arbitrary power which is reposed in the judiciary and which can be used for purposes other than facilitating the administration of justice.

The concept of 'Contempt of Court' goes back to the times when the ruler or the king used to dispense justice himself. When he delegated this power of dispensing justice to courts presided over by the judges, the courts, naturally, demanded respect and obedience; and any disrespect to the court was treated as an affront to the dignity and authority of the king. Today, however, the judges do not exercise the delegated authority from the king but act as one of the wings – legislature, executive and the judiciary – of the government of a democratic republic. In this changed scenario the courts should mould the archaic jurisdiction to subserve the values of a democratic republic by protecting free speech without, however, trampling upon the equally important other social values.

The book under review begins with historical evolution of the law of contempt. After giving a brief account of the history of the law of contempt, a detailed section-wise commentary on the Contempt of Courts Act, 1971 follows. Justice Kapoor has very painstakingly referred to judicial trend of UK, USA and Australia on the subject of contempt of court. The book contains quotations from the judgments of the courts profusely which makes the work a ready reckoner on the subject for students, teachers, lawyers and judges alike. The book is a culmination of vast experience of the author on the bench. This book analyzes and evaluates the case law in greater detail. The author has very carefully selected cases while avoiding plethora of material on the subject. In analyzing cases, the author has first mentioned facts of the cases in nutshell in a very lucid manner. Thereafter author under the head "HELD" has given the decision of the case alongwith the *ratio.* This, at once, saves the valuable time of the readers otherwise spent in culling out the same from law reports directly. This makes the book more useful for advocates, judges and researchers.

The book in the beginning contains table of cases and subject index at the end for easy reference for the readers. By way of appendices, the author has incorporated extant Indian and English statutes on the subject. Besides, the rules framed under the Act of 1971 by various high courts have also been incorporated by the author in the book which makes the work a practitioner's paradise. Further the author has taken care to incorporate the Report of the Sanyal Committee which is the bedrock of extant contempt law in India. It also contains in full the Phillimore Committee Report on the subject (this committee was set up to re-examine and re-assess the English law of contempt of court). This further makes the work useful for the researchers.

The book indeed, is a scholarly presentation of case law on the subject. It has been written in a flawless fashion by an author who has

held judicial offices for over 30 years. The book, being valuable source of information on the subject, is worth keeping in all the libraries.

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BOOKS RECEIVED FOR REVIEW

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MADHAVA MENON & BANERJEA, *Criminal Justice India Series* (2005), Allied Publishers Pvt. Ltd. in collaboration with National University of Juridical Sciences, Kolkatta, Price (varies from vol.-vol.)

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PARUL SHARMA, *Welfare State, Right to Life and Capital Punishment in India* (2005), Sampark, P 34, Kalindi Housing Scheme, Kolkatta 700089, Pp.200, Price Rs.450/-.

P. K. DAS, *The Right to Information Act – 2005*, Universal Law Publications, C – FF – 1A, Dilkhush Industrial Estate, G. T. Karnal Road, Delhi – 110033, Pp. viii+376, Price Rs.325/-.

P. K. DAS, *New Law on Hindu Succession* (2005), Universal Law Publications, C – FF – 1A, Dilkhush Industrial Estate, G. T. Karnal Road, Delhi – 110033, Pp. viii+259, Price Rs.250/-.

R. PRAKASH, *Payment of Gratuity* (5th ed., 2005), Eastern Book Company, 34, Lalbagh, Lucknow-226001, Pp. xl+550, Price Rs.545/-.

PROF. V. NARAYANA SWAMY, *Pleadings & Practice in Civil & Criminal Courts* (2005), Lawyer's Law Book, 820 D, 2nd Cross, K. N. Extension, Yeshwantpur, Bangalore – 560 022 , Pp. lx+1013, Price Rs.590/-.