JUDICIAL JUSTICE : A NEW FOCUS TOWARDS SOCIAL JUSTICE (1985). By V.R. Krishna Iyer. N.M. Tripathi Private Ltd., Bombay. PP. X+164. Price Rs. 85.

THIS BOOK[1] contains three lectures delivered by Justice Krishna Iyer before the students and teachers of the Delhi University. The first lecture is "Processes of Social Justice", the second "A Justice Audit of the Punjab Crisis" and the third "Quo Vadis Indian Justice". The common theme running underneath all the three lectures is the distance between the ideal justice system and the functioning system of justice.

In the first lecture, the author starts wth the observation that the law and justice as delivered by the courts could never see the suppressed and tortured Indians who were below the judicial vision. The colonial legal system was bound to have such upper visibility but the same system continued after independence by virtue of article 372 of the Constitution. This must have been done by the Constitution-makers in order to preserve a continuum and to avoid a vacuum but "by gross inaction of the Establishment on the legislative, judicial and executive fronts."[2] it has resulted in perpetuation of the colonial legal culture. The author laments that "we have, by and large, inherited and preserved a system which does little justice and much injustice."[3] Among various reasons responsible for such failure of justice, the inaction of the legislatures is the most important. The "traditional lawyer's illiteracy, and the orthodox judge's ignorance"[4] are also to be blamed. The judges are "drawn from a *class* and raised to a *class* which is allergic to the socio-economic commitment to the widening poverty sector."[5] This is bound to be so because even after forty years since the coming into force of the Constitution, the criteria for appointment as a judge of a High Court or the Supreme Court are professional income and professional expertise. What kind of expertise? The person's contacts with the political big wigs is another latent criterion which although the author has not mentioned has of late become important. The author rightly observes:

> Even moral delinquencies like tax avoidance and professional deviance and human weaknesses are of no disqualifying consequence! The active commitment of the candidate for judgeship, from the angle of egalitarianism, social justice, dignity of the individual, allergy to executive authoritarianism, scrupulous

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1. V.R. Krishna Iyer, *Judicial Justice : A New Focus Towards Social Justice* (1985).
2. *Supra* note 1 at 13.
3. *Id.* at 12.
4. *Id.* at 14.
5. *Id.* at 15.

> secularism, field work among the poor by way of social service, free legal services and the like, hardly weighs with the selection process or protocol or agencies.[6]

The author, therefore, rightly observes that "Indian judges, notwithstanding rhetoric, are guarantors of the status quo...".[7] The author's prescription for this is "a professional *movement*, fuelled by a 'people' commitment, radicalising both the Bench and the Bar in the direction and destination of a new remedial jurisprudence..."[8] which will secure real social and economic justice. In India, unfortunately, the consumers of justice have been helpless against the government as well as against the judges and the lawyers.[9] The lawyers generally lack exposure to skills for collecting and marshalling the facts and co-relating factual evidence with legal interpretations. *Brandeis* brief is still unknown to a large number of lawyers. Even now many lawyers and judges have a very mechanistic notion of the judicial process. We have still to combat the view that judges do not make law but merely interpret the laws. The author is right in saying all this, but unfortunately he does not see this as emanating from a faulty system of legal education that prevails in the country. Such skills as are required for preparing the *Brandeis* briefs are not part of the training given by our law schools. The courts, the judges, as well as the lawyers have projected a very low profile of the legal education. If we desire to have an activist lawyering as well as activist justicing, we must have a dynamic and career-oriented legal education.[10]

The author examines the existing adversary process of justice and gives various suggestions for making justice accessible, cheap and less technical. Excessive insistence on the adversary procedure has been the cause of a lot of injustice.

This and such suggestions have been made in the past also. What is needed now is the quantification of such hunches. If the Evidence Act is bad, we must be able to pinpoint exactly what is wrong and how it could be remedied. No concrete research proposal for quantifying the distortions and perversions of the Evidence Act or the adversary procedures in the Indian setting is in sight. It is high time that such a research project be undertaken by the Law Commission of India.

He then points out how the present processes are incapable of meeting the situations of mass disasters such as Bhopal gas leakage tragedy. He

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6. *Ibid.*

7. *Id.* at 16.

8. *Id.* at 17.

9. See Upendra Baxi, "The Pathology of the Indian Legal Professions", 13 *Ind. Bar Rev.* 455-484 ((1986).

10. See generally S.P. Sathe, "Legal Education in Maharashtra", 10 *Ind. Bar Rev.* 188 (1983); "Access to Legal Education/Legal Profession" (Memio) submitted to Commonwealth Legal Education Association (1987); Rajeev Dhavan "Means, Motives and Opportunities: Reflecting on Legal Research in India", 50 *Mod. L.R.* 725 (1987).

recommends codification of the law of liability (law of torts) and wants it to be based on strict or absolute liability of the huge corporations whose manufacturing processes involve possibilities of hazards to adjoining human populations. The government's record in dealing with the victims of Bhopal tragedy has not been exemplary.[11] The lawyers have also not shown enough concern for the plight of the innocent millions.[11] The Supreme Court's *obiter* in *M.C. Mehta* v. *Union of India*[12] on making multi-national corporations absolutely liable (to the extent of making *Rylands* v. *Fletcher*[13] without the exceptions specified therein the law of liability in India) came after the above lecture was delivered but it vindicates the author. The author suggests that "[t]he Parliament could, and therefore, should, make substantive provisions creating *strict liability* and *standardising* compensation for mass application."[14] There are other radical suggestions such as that the "Indian Evidence Act must be given a long holiday because its subtleties and technicalities are apt to defeat truth and justice in situations..."[15] where the victims of such disasters cannot prove the colossal damage done to them. The author makes valuable suggestions for dealing with such situations. He suggests "various short-term and long-term remedies".[16] He suggests the setting up of a two-tier system consisting of (*a*) commission and (*b*) courts. The former would deal with investigational and rehabilitational programmes and the latter, an Environmental Division of the High Court, should deal with the remedial/compensatory justice.

The author obviously did not have the advantage of the later developments such as refusal of the American Court to lend its jurisdiction to the compensation claims by the Government of India[17] and Judge Deo's award of interim relief to the extent of Rs. 350 crores.[18] These developments, particularly the latter, have partially alleviated the Indian judiciary of the charge of unresponsiveness and uninnovativeness.

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11. A lot has been written on this in newspapers. See "Bhopal: The Final Betrayal", *The Indian Express*, December 6, 1987 (Bombay); "Settlement or Sell out" in *Sunday Observer*, November 8, 1987. Govt's failure to give medical and other relief has been documented by various visiting groups. See Marc Galanter, "Legal TORPOR: Why So Little has Happened in India After Bhopal Tragedy", *Texas International Law Journal* 273 (1985); Upendra Baxi and Thomas Paul, *Mass Disasters and Multinational Liability: The Bhopal case* (1986) (Indian Law Institute). See particularly Upendra Baxi, introduction at p. 1.

12. 1987 1 S.C.C. 395: A.I.R. 1987 S.C. 1086.

13. *Rylands* v. *Fletcher* (1866) L.R. 1 Ex. 265.

14. *Supra* note 1 at 39.

15. *Id.* at 42.

16. *Ibid.*

17. See Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* 1-34 (1987).

18. Judge Madhavrao Wamanrao Deo, Dist. Sessions Judge, Bhopal ordered the Union Carbide Corporation (UCC) to deposit Rs. 350 crores in the court for payment of substantial interim compensation and welfare measures to the 5,50,000 gas victims. See *The Times of India*, 18 December 1987. See *id.*, editorial "Justice at Last", 19 December 1987.

If Bhopal disaster was one challenge which the Indian legal system faced, another is faced by the Punjab situation where terrorism has claimed many innocent lives. This genocide of human beings irrespective of religion sex, *etc.* has shocked the Indian society so much that many good-minded and humanistically motivated persons are also showing willingness to sacrifice procedural due process for meeting the threat of terrorism. This is the test of the Indian society. Our democracy is really on trial. The learned author rightly observes that: "de facto death sentence on processual justice, even in extremes of social climate, is a cowardly blow on the Preamble to our Constitution."[19] The legislation authorising detention without trial of suspected terrorists suffers from various draconian elements. The author observes:

> Prima facie, the anatomy of the Special Courts Act is incredibly terrorist in operation. Legal terrorism is not an answer to illegal terrorism, and if the hit list tactic of the extremist is horrendous, the police-operated and politically fuelled hit list of the executive extremist may be doubly deadly.[20]

The author rightly raises a question. Is processual justice a luxury to be had only when all is well and to be dispensed with when an extra-ordinary situation arises? Is government terrorism or legal terrorism an answer to extremists' terrorism? This calls for the re-assessment of our canons of processual justice in the light of technological innovations and post-colonial need to reorient and face lift the police image. If it is true that an innocent person must never be punished, is it also not true that the guilty person must not escape punishment? Are our present processes not exploited by the criminals who use sophisticated methods of crime commission and whose resources as well as terror enable them to buy or frighten the witnesses? Justice Krishna Iyer has himself found such glaring perversions in our processual justice in *Prem Chand Paniwala's* case,[21] which he himself decided.

In the third lecture, the author undertakes a social audit of the justice system. It is unfortunate that there is a tendency among some lawyers and judges to involve the penal laws of defamation and contempt of court to stiffle genuine and legitimate criticism of the justice system. We have yet not buried the ratio of the *Namboodiripad's*[22] decision in which the Supreme Court had condemned a Chief Minister for his views on the judicial system.

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19. *Supra* note 1 at 53.

20. *Id.* at 64.

21. *Prem Chand (Paniwala)* v. *Union of India*, A.I.R. 1981 S.C. 613.

22. *EMS Namboodripad* v. *T.N. Nambiar* A.I.R. 1970 S.C. 2015. See generally S.P. Sathe, "Freedom of Speech and Contempt of Court" in 5 *Economic and Political Weekly*, October 17, 1970 at p. 1741; see also S.P. Sathe, 'Constitutional Law I", pp. 1, 12, VI *A.S.I.L.* (1970); Upendra Baxi, Introduction to K.K. Mathew, *Democracy, Equality and Freedom*, pp. I, XVII (1978).

Although since then the apex court has shown greater tolerance towards systemic or institutional criticism,[23] at lower levels the threat of contempt proceedings against criticisms of the system still prevails. This reviewer had to face a prosecution for defamation for an academic study of the legal profession[24] and the book's author had to face a prosecution for contempt of court for a speech made at a seminar.[25] Such immunity from criticism or from social audit tends to make the judiciary and the legal profession rather intolerant towards and insensitive to people's reactions. The learned author unorthodoxically recommends that "public pressure must be brought to bear on the judiciary to catalyse them into a sensitive conscience."[26]

The author makes various suggestions, recruitment of socially sensitive and conscientised judges, simpler procedures, easier access, technological innovations to speed up various processes, *etc.* A xerox machine, not a technological wonder, is not available in most courts. Even today to get a copy of a court proceeding is an exasperation for the indigent man. Countless other technical devices including electric typewriters with memory, new short-hand methods, dictaphones and tape recordings would relieve the courts of many mechanical burdens which afflict the small litigating persons.[27] The author recommends computerisation and other mechanical aids which would modernise the judicial process.

There are certain sacred cows of the existing system. One is the orality unlimited in advocacy at the trial and appellate levels, investing litigation with insufferable immortality."[28] Long-winded arguments consume more time, which is not so much of inconvenience to the rich litigants who can afford the expenses of such long court sessions but they do incalculable harm to the poor. The learned author observes:

Indeed, the horrendous length of forensic submissions in the

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23. *In re S. Mulgaonkar*, A.I.R. 1978 S.C. 727; *In re Sham Lal* (1978) 2 S.C.C. 479; *M.R. Parashar* v. *Farooq Abdullah*, A.I.R. 1984 S.C. 615. See S.P. Sathe "Constitutional Law I", XX *A.S.I.L.* 333, 346, (1984).

24. S.P. Sathe, Kunchur, Kashikar, "Legal Profession: Its Contribution to Social Change" A Survey of the Pune City Bar (1982) ICSSR (Mimeo.) An abridged report was published in *ICSSR Research Abstracts Quarterly*, vol. XIII, no. 1 & 2 p. 111 Jan-June 1984. Also published as "Pune Bar: A Study in the Sociology of the Profession" 10 *Ind. Bar Rev.* 47 (1983). Prosecution for defamation under sections 500, 501 and 531 against the three authors and the editor of "*Kesari*" a Marathi local newspaper (daily) in which reports of the above Report was published was filed before the Judicial Magistrate First Class on 19th July 1982. A criminal application was filed by this reviewer, one of the accused, under article 227 of the Constitution in the Bombay High Court (Application No. 473 of 1982). The High Court granted stay against the criminal prosecution. The main prosecutor Mr. Nagre tendered apology and withdrew the prosecution. He obtained withdrawal from the Magistrate's court. Final order of acquittal was issued on 17.8.1984.

25. *Supra* note 1 at 83.

26. *Ibid.*

27. *Id.* at 97-98.

28. *Id.* at 104.

Indian courts is a poor compliment to the judges of the higher courts.[29]

Overburdening of citations of precedents, bad drafting of laws are other causes of the delays in litigation.

Of late, the Supreme Court has liberalised the access of the small man by entertaining letters as petitions or relaxing the rules of locus standi or appointing the commissioners to investigate facts regarding the violations of human rights.[30] This whole litigation known as public interest litigation (PIL) has been an object of criticism by some well known jurists and human rights advocates.[31] Often it is criticised as being outside the scope of judicial function. The court is criticised either for over-reaching or for being populist or for having undertaken functions which do not belong to it. Justice Iyer very tellingly argues in favour of the PIL and points out its suitability for meeting the challenges in India. The judicial activism of this type, which is essentially for the poor and affirmatively social justice directed, has a special purpose in the Indian situation. He illustrates with the help of a number of landmark decisions of the Supreme Court (many of which he himself has authored as a Judge of the Supreme Court) how the Supreme Court has taken the decisional law nearer to human justice. It is strange that those very people who admired the court's activism in imposing basic structure doctrine as a limitation on Constitutional amendment,[32] a power which no other apex court possesses, should find fault with the court's activism in the PIL cases.[33] The learned author exposes the fallacy very tellingly. He points out how our courts are "de facto monopolised in time by the rich and their lawyers", and the poor and their justice get much less time and attention.[34] The author criticises irresponsible judicial tendency to grant stays, suspensions, injunctions, etc.[35] The State is the largest litigant and it is unfortunate that no effort is made to settle even such disputes which are capable of resolution out of court. In a case where a widow of an only bread-winner of the family was to get compensation, the

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29. *Id.* at 119.

30. See S.P. Sathe "Judicial Activism for Social Justice"; Sectional Presidential, Address at the Indian Social Science Congress delivered on 14.7.1987 at Mysore. To be published in (1988) *S.C.C.* Journal Section.

31. Justice Bhagwati (as he then was) has answered this criticism in *People's Union of Democratic Republic* v. *Union of India*, A.I.R. 1982 S.C. 1473. The learned Judge said: "The so-called champions of human rights frown upon it [Public interest litigation] as waste of time of the highest court in the land. These self-styled human rights activities forget that civil and political rights, priceless and invaluable as they are for freedom and democracy simply do not exist for the vast masses of our people." *Id.* at 1477.

32. *Keshavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.

33. An example of such criticism is Girilal Jain, "Constitutional Order in Peril: Dangers of Judicial Activism", *The Times of India*, 26 January, 1988. Replies to this article are to be seen in some letters to the editor, Atul Setalwad, *The Times of India*. 4 February, 1988 and S.P. Sathe, *The Times of India*, 6 February, 1988.

34. *Supra* note 1 at 118.

35. See V.S. Deshpande, "Stay Orders—Abuse", 28 *J.I.L.I.* 141 (1986).

State put all sorts of technical pleas to defeat her claim! Justice Krishna Iyer had criticised the Govt. attitude from the Bench.[36] The author makes various other valuable suggestions such as for decentralisation of the Supreme Court of India and also for decentralisation of the High Courts.

There is a whole chapter on Public Interest Litigation. The PIL has to be used with greatest care. If used indiscriminately, it can be counter-productive. Justice Krishna Iyer rightly says:

> Informality per se is not violative of fair procedure. Even so, broad guide-lines are required to be observed by the Court lest it should be derailed into unwitting error or injustice....Access to justice must be liberal but not frivolous, easy but not irresponsible. Therefore, some cautionary rules are necessary before action follows upon informal communications.[37]

The lecture contains useful suggestions regarding the epistolary jurisdiction and involvement of the social action groups. The PIL must be institutionalised. Even the deprofessionalisation of the grievances redressal has to be formalised in a minimal way. It must not depend on the vagaries of the social philosophies of individual justices or it must not be capable of being commercialised for the benefit of publicity seeking lawyers or judges. Ultimately, PIL is not going to solve our problem as long as it remains an island surrounded by the ocean of lack of accountability and legal anarchy. Inspite of all the talk of legal aid, we come across lots of helpless people who have to gulp down injustice only because redressal by courts is expensive, time-consuming and too technical. Legal aid is still not available. Justice Krishna Iyer's book doubtless stirs us out of our complacency. If more and more people feel disturbed, may be some little change may occur in the present archaic system.

*S.P. Sathe**

36. In *State of Haryana* v. *Darshana Devi* (1979) 2 S.C.C. 236, the state sought leave of appeal against the decision of the High Court which had extended the pauper's provisions to auto-accident claims. Justice Krishna Iyer observed:

> Here is a case of a widow and daughter claiming compensation for the killing of the sole bread winner by a State Transport bus; and the Haryana Govt. instead of acting on social justice and generously settling the claim, fights like a cantankerous litigant even by avoiding adjudication through the device of asking for court fee from the pathetic plaintiffs. *Id.* at 237.

37. *Supra* note 1 at 142-43.

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