THE FINAL REPORT

OF

LAW REFORMS COMMISSION KERALA

Ceremonially presented

By

Mr. Justice V. R. KRISHNA IYER

Chairman, Law Reforms Commission, Kerala

To

Hon'ble Minister M. VIJAYAKUMAR,

Minister for Law and Sports

On

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LAW REFORMS COMMISSION KERALA

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aa no bhadraah kratavo yantu vishvatah
Let noble thoughts come to us from every side- Rigveda, 1-89-I

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OF THE LAW REFORMS COMMISSION KERALA

A NATIONAL PERSPECTIVE

A PEOPLE'S REFORM COMMISSION SPEAKS TO THE INDIAN NATION AND ITS KERALA SECTION WITH A MILITANT VISION AND A VIBRANT MISSION

THE CHAIRMAN'S PROLEGOMENON

We, the People of India, won Swaraj, after a 'do-or-die' struggle, from the world's then largest British Empire; and this glorious, global event of supreme significance, sans war and violence, made a revolutionary impact on the dialectics and dynamics of the then unshakeable, static imperial establishment. It was an hour of cosmic wonder when Indian Independence incarnated with a tri-colour banner and found historic expression in eloquent diction through a profound speech made by Sri Jawaharlal Nehru, the first Prime Minister of India. "Long years ago we made a tryst with Destiny", he proclaimed, "and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance. It is fitting that at this solemn moment we take the pledge of dedication to the service of India and her people and to the larger cause of humanity." Thus begins our globally sublime chronicle of India that is Bharat as a Free People. Nehru's patriotic peroration exalted into a grand articulation when he continued: "Through good and ill-fortune alike, she has never lost sight of that quest or forgotten the ideals which gave her strength. We end today a period of ill-fortune and India discovers herself again." The Discovery of India is not a mere political—geographical phenomenon but a unique socio-economic emergence, a revolutionary transformation and national regeneration.

"The service of India means true patriotism", Prime Minister Nehru emphasized "and total commitment to Swaraj means that Indian humanity without a single exception shall be the beneficiary of the resources of the nation". His exhortation did not end there: "the service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us but as long as there are tears and sufferings, so long our work will not be over". This profound pledge is still our challenge and our grammar of nationalism. This majestic goal is an integral part of our Constitutional obligation, a perennial process of redemption of our sacred secular Swaraj, the star that enchants, an ever inspiring summons to action with creative millions of humans working unitedly to react a crimson revolution in finer fulfillment of our hallowed mission.

"And so we have to labour and to work and work hard to give reality to our dreams" urged Nehru then; and we now have to achieve this Himalayan objective as inspired nationalists. India is free but Indians, alas, remain unfree socially, economically and culturally, several decades after entering the comity of nations as an Independent member. To give constitutional shape and instrumental mandate to the political supremacy of Independence in every dimension, a Constituent Assembly was set up which strove for years and produced with consensual triumph a Paramount Jural-Political Parchment with a declaration of Power, Process and destination, the Constitution of India, which underwent progressive amendments from time to time. Some dubious changes were voided by court and Parliament. The Supreme Court of India which had plenary power to pronounce upon the legality and propriety of these mutations has upheld this Jural Parchment, the paramount law binding on the Nation. Judges and Ministers and every other constitutional functionary shall hold office only after taking oath under this Constitution. They are bound by their oath and cannot deviate from this basic text without peril to office under parliamentary impeachment. The vision of our Founding Fathers was universal and their developmental perspective was national. The trinity of high instrumentalities they organised triggered a vibrant administrative, litigative and judicial working in constitutional harmony inspired by the Preamble to the Constitution which inscribes the imperatives of our Republic. This prefatory but integral piece needs to be reminded as solemn undertakings:

"WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship, equality of status and of opportunity;

And to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
do HEREBY, ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

Law India, in its institutional structure and quasi-colonial texture, is a political heritage of British Indian vintage and Indo-Anglian jurisprudence. Our parliamentary methodology and privileges are Victorian and our forensic culture a Westminster imitation. Our court dress and diction in addressing judges is colonial. This jejune justice system and Bench bossism should be jettisoned by our renaissant generation with a new constitutional ideology, since it is distances away from the aspirations and raw realities of the rural and urban people and the holistic 'swaraj' vision which is the antithesis of dated imperialism. Our nation's Gandhian-Nehruvian perspective is dynamic and rich in agrarian and industrial development. Such is the democratic course of Bharat's march, not cheap factories polluting space, air and rivers. Such a radical humanism is far geared to quick money, the little human counting for less from the fossil feudal, structure and social philosophy. West-toxic spiritual-temporal transformation is a remarkable reform, the speed track need, the Himalayan operation. The vast economic disparities, the depressed socio-economic status of the masses and the alien legal system which is expensive, exotic, extravagantly paper-logged and imperiously unapproachable to the large numbers living below the poverty line a yawning, growing gap between families in poignant, pervasive poverty and their fundamental right to Justice Social, Economic and Political, pledged by the Preamble to the Constitution. This reveals a desperately wide disparity between Law and Life and desiderates a large Law Reform Process whose locomotion is constitutional compassion.

The rule of law has relevance only if it catalyses the Rule of Life. Humanity and legality mutually interact to generate a revolutionary reality.

Society is never static, values change and unless vibrant, vigilant legality keeps pace with life's twists and turns, degeneration and despair with a powerful motivation to restore the great guarantees of fundamental rights to the humblest and the forlorn we may write off the Constitution. No, never. We shall, by ceaseless struggles, win back our constitutional dharma, our broad egalite and social justice, our democratic realism as a joy of life for the least and the lost.

We are a federal republic, a secular, left-oriented, democratic polity. An ideologically inspired, an economically democratic, a culturally liberal and religiously pluralist Social Order is the Indian perestroika of the legal and political structure. This operation demands a great leap forward if the nation is to keep faith with its Preambular Promise. Each State, and, of course, the Union of India must awaken to this constructive responsibility. The leaders and cadres of public life must overcome the temptation of power-drunk, greed-gripped, pleasure-satiated opportunism, glamorous consumerism and arrogant aggrandisement. Austerity, not ostentation, simplicity labels, are verbomanic and not extravagance, moderation, not mafia—this life-style should be Institutionalised. No more phoney manifestoes, formally publicized by a Leftist coalition is never-the-less bourgeoisie. Surely, it sounds better in rhetoric and reality than the other communal, adventurist, power and lucre-loving politicos. This long prologue argues for a perennial Law Reform Operation so that India and its people may not suffer seppuku, bankrupted by Big Business, especially America Inc. Therefore we have a Law Reforms Commission with the following luminous terms of reference:

a. To rectify defects in the existing Laws.
b. To repeal obsolete or unnecessary enactments.
c. To consolidate, modify and reform the existing Laws.
d. To simplify or modernize the laws.
e. To adopt new and more effective methods for the administration of the Law.
f. To systematically develop and reform the law.

g. To provide training to the officers for legislative drafting.

h. To provide training for the legislators in the legislative process.

i. Matters to be implemented jointly by the Legislature.

Parliamentary Affairs Department and Law Department regarding Legislation.

j. Steps to be taken by various Government Departments regarding legislation.

k. Other matters to be considered in the field of legislation in the new world order.

Socialism, alas! once dear to Nehru and Indiraji, is now allergic to Manmohanji who practices a policy to the contrary! To embrace President Bush whose international policy is Big authoritarianism ad libitem, is the vanishing point of socialism, secularism and authentic democracy. I am reminded of an anonymous poem quoted in America Incorporated:

The law locks up both man and woman
Who steals the goose from off the common,
But lets the greater felon loose
Who steals the common from the goose.

Then why did you agree to be Chairman without salary, perk or car? Government offered but I refused. Why? A riddle wrapped in a mystery inside an enigma? No, in principle, I am against retired judges hungering for lucre and power. I never drew a salary or perks or car or bungalow as Chairman of Commissions appointed by the State, Centre or UNESCO or public organization. To serve on a Commission is a duty, not a lucrative occupation! But an impression spreads that retired judges are Commission-hungry, arbitration crazy judges and consultation-fee professionals now. However, I submit in all humility that the Indian Judiciary has offered more than half a century and sustained a high standard of excellent conduct, integrity impartiality and impregnability to influence. Although the obnoxious inhibitions are rare currently but crop of culpables is escalating.

The finest hour of a superannuated judge arrives when, sans salary and avaricious ambition, dedicated to social justice and developmental egalite, he sacrifices his energy to make humanity happier and legality a catalyst.

Law Reform is a grand march towards a revolutionary transformation deriving inspiration from our Founding Fathers and later profound amenders. It is the great potential objectives which have persuaded me to accept the Chairmanship of the Commission with utmost faith in the socialist democratic perspective of the State, fine-tuned to the values of the suprema lex. My conscience warns me of the grave risks underscored by Lord Scarman:

> ***"You will all remember the famous saying that war is far too serious a matter to be left to generals. We in England think that it is possibly also true that law reform is far too serious a matter to be left to the legal profession."***

There are many politicians and parties whose soul is sold away to a different developmental destination than silhouetted in the Constitution. More factories with more pollution of air and water and earth itself, more mega-technology with less employment but huge profits for super-corporations with foreign investments, more five star luxuries with concrete jungles displacing the habitations of the poor for the culpable alternative of manufacturing countless glittering automobiles leaving the have-not humanity to perish—this perversion of development is apt to affect the decisions and policies of Government itself, despite democracy and socialism as glowing phrases to win votes. My mission, made clear to the Government right in the beginning, is a contradiction of this pleasure-prone passion mis-described as Development. I must make it clear that all that I have written is a maverick's introduction to the Commission Report. I wonder whether the Commission, as such, will accept the pharmacopoeia of progressive perspective of law reform I have in view. My social philosophy is plain and, perhaps, is an insular view. It is mentioned here at length more as a 'prolegomenon' than as an integral part of the Report itself. Other members of the Commission will forgive me for taking up so much space. With their indulgence and of the Government itself I may be permitted to treat this prefatory portion as a personal contribution of the Chairman which is a long obiter dictum which binds none but me. My final word and warning is Robespierre's caveat:

> ***Any law which violates the indefeasible rights of man***
> ***is essentially unjust and tyrannical; it is not a law at all.***

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Part II

KERALA-SPECIFIC PERSPECTIVE FOR LAW REFORMS

Refined Resurrection of Maveli Jurisprudence on the Kerala Milieu of Theological Pluralism

The Kerala Government, in a sublime response to its constitutional responsibility, decided on the splendid idea of a progressive law reforms project, with an authentic commitment to the task of accomplishing, in real terms, the basic goals spelt out in the Nation's Founding Deed and for making the legal system and social structure of the State an intelligent instrument capable of controlling the powerful reactionary forces and dangerous developments like terrorism, corrupt mafia infiltrating into the bureaucracy, grabby consumerism, greedy commercialism, and chaos of communalism. A flair for Law Reform in its socialist, secular, democratic, modern milieu has inspired the grand idea of setting up a Law Reform Commission with a wide-ranging agenda and terms of reference. Society is rapidly changing, abuse of power is alarmingly escalating, Life, in serene stability, is steadily deteriorating, desiderating innovative, corrective legal experiments and pioneering socio-jural processes geared to a seminal transformation of the polity. Dialectical materialism and nationalist humanism catalysing Law Reform is a creative sign of awakened social engineering. This perspectival approach is the raison d'etre of the present Kerala Commission. Its jurisdiction is provincial but its jurisprudence is national, informed and illumined by the finest advances and traditions. The foundation of the Commission is the hallowed values of the Constitution. Its ambition is the accomplishment of the finer aspirations of the people, the legal elimination of the plural privations of the have-not human sector and the elegant attainment of their latent versatile potential, physical, mental, moral and spiritual. The task of the Commission is the redemption, in part maybe, of the tryst with destiny We, the People of India made on winning Independence. Our developmental enemy is allergy to swaraj values and our anathema is feudal, colonial, imperial submissiveness, our humble endeavour is the renovation, resurrection and facilitation through law and non-violent, democratic processes, a revolutionary transformation and swaraj-swadeshi pledge whose benefits will blossom in the hearts of the lowliest, the least and the last, catalysed, in all these functions, by the salutary values of the World Order. Our glorious goal is beaconed by the dream of the royal, but democratic martyr Maveli of ancient Kerala tradition. This egalitarian excellence of jurisprudence is our grammar of change with the entire Kerala humanity as our constituency and the wonder of a sanguine World Order as our fiat justicia mandate. Our Law Reform pharmacopoeia to heal the grave

pathologies afflicting Kerala is Maveli Jurisprudence which derives Truth, Justice and Humanism from the Upanishads, the Bible, the Quoran and all the noble teachings of the Buddha and Mahaveera'

Reform of Law and Life

Triggered by sensitized and sublime public opinion and stimulated by comprehensive social justice, the Commission guides itself by Operation Secularism and democratic progress. Inspired by the mission of social transformation, the Commission proposes new laws at once in keeping with the preambular trinity of values and needs of changed times. What is the zeist geist like? Our constitutional fundamentals have affirmative legislative directives which mandate necessary unifications, modifications and modernizations and mutations of statutes, rules, regulations, orders and procedures. Likewise, history, sociology and geography make political impact on the legal system. Above all, each fresh generation, under international pressure, gives rise to socially sensitive ideas in response to developments in national and global forces. Law Reform is social chemistry and jural engineering, reacting to contemporary environs, processes of production and distribution. Law is rarely static or moribund. Life is change and Law too. The rule of law runs close to the rule of life and dominant classes command the nature of laws. This dialectical thought, suggested by Marxian ideology and Jeffersonian realism, has fuelled the flame of the Kerala Cabinet's desire to innovate dynamic Law Reform through a Law Reform Commission. That, perhaps, is the genesis of the present Commission. The seminal social philosophy of this recommendatory instrumentality is best expressed by Dr. Ambedkar, who observed in the Constituent Assembly by quoting Jefferson: "Every generation is a distinct nation, with a right, by the will of the majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country". Our rapidly revolving generation has the sensitivity and duty to respond to the prevailing zeit geist by Law Reform.

In yet another part of his address, Ambedkar has said: "the Idea that institutions established for the use of the nation cannot be touched or modified, even to make them answer their end ---------- may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself". We can and must change laws when society, in its rapid locomotion, creates chaos or corners resources unjustly with mafia tactics or terrorist strategies.

History, Geography, Technology and Politics

Kerala has special features historical, traditional geographical, economic, social, cultural and political, which summon the State's concern. Territorially speaking, the State's terrain has a rich variety, not so common in other states, of large saline lakes, frequent hills and valleys, the high Western Ghats, all of which make the state scenic green with lovely woods, fertile lands with agricultural and industrial potential, medicinal herbs, stretches of plantations and precious spices. All these are Nature's treasure. They are liable to be traumatized by vandals for robbery unless Law preserves this wealth. There are Fortyfour Rivers which, if intelligently exploited, will enrich every part of this highly literate province. Every river is a joy in locomotion and is of multi-purpose social uses and inland navigation. Irrigation can reach everywhere; navigation is cheap and utilitarian, hydro-electricity can be generated as a least costly possibility, rain harvesting, if made ubiquitous, can banish water scarcity. Agriculture, with every source of cultivable commodity, spices, grains and vegetables, from paddy, pepper and banana to rubber, tea and tapioca, rare rudraksha and sarppagandi, is a marvel of production. So too, farm land, wet or dry, green and gray, is a happy resource. If we have creative talents, hard-working tillers and experimental explorers ready to use exotic seeds, plants and trees, Kerala will be a plantation paradise and unique inland navigation facility. Look at the long coast line and maritime potential! Natural harbours and shipping facilities, beauty of beaches and fishing wealth are Nature's boon to Kerala.

One of the exceptional features of Kerala is its flora and fauna. The abundant availability of herbal vegetation with unusual healing potency and the plentiful presence of wild animals in jungles and sanctuaries make this State an enchantment of panoramic charm. Atheism apart, it has been wisely said that God sleeps in the minerals, wakes in the vegetables, walks in animals and thinks in man. In this perspective, green Kerala is divine, provided we defend this divinity. Nurturing herbal farms and preservation of rare plants and trees need legal provisions to prevent extinction of these species and promotion of life- saving vegetation. Inland Navigation in backwaters and rivers, and coastal transport linking various parts of the State need legal regulations. Wild animals and varieties of snakes are a wonder and a living wealth and should not be abusively exploited by being killed for skin or trapped, tamed and tortured by greedy adventurists, and cruel vandals and barbarian tourists. Snakes with lovely hoods are in plenty in Kerala. Elephants, for instance, demand the State's special attention against violence, indiscipline,

injury to innocent anatomy, deprivation of tusks and bones and infliction of insufferable cruelty. These glorious pachyderms are a picturesque jungle glory but now real victims of festival revelry of religions and profit-making timber trader torture endured when inflicted in the name of religion and timber transport. Wild life should be humanely treated and freed from entertainment inhumanity and godly torment. We need a stern law here. Wild birds are our winging, tree-dweller ancestors and these singing, lovely fellow creatures, should not be caught and caged or stripped of their fine feathers or killed to be eaten for soft flesh and fine taste. How handsome are our peacocks and pheasants, parrots and doves and heavenly varieties which fly in numbers to our delight! Law must manifest protective sentiment and treat them affectionately, graciously and compassionately, giving them freedom to fly, rest sweetly on hospitable trees, flourish in flocks and multiply unmolested. The Central Legislation for prevention of cruelty to animals goes some way to carry out this pro-Nature objective. But Kerala-specific living creatures should enjoy special statutory immunity as a legislative devotion to aviary Nature. The Law Reforms Commission, in compliance with Article 51A (fundamental duty of compassion for living creatures) shows sensitive concern for the winged wealth of Nature. We must also provide for the preservation of plants and asylum for beasts and birds. Law Reform must ensure immunity from wanton vandals to wild animals and gentle birds. Forest wealth of Kerala is a petrified treasure. The wild beasts, in fearless freedom in their forest homes, shall not be victims of barbarous hunters and heartless pleasure-Killers. Alas, survival of rare creatures in the wilds is our cultural patriotism. They are now on the vanishing list. The Law Reform Commission must, with expert advice and fellow-feeling, make Law speak and act in a spirit of salvation. A glorious flora-fauna jurisprudence, with astonishing dimensions and creative imagination, is an imperative.

Nature is our universal asset. The Commission cannot neglect any part of this fortune of Nature. Kerala has a long sea-coast, charming beaches and little, lovely living creatures happily burrowing and hiding in the sands. They are a spectacular variety of tiny amphibian life, which are rich and rare and deserve utmost care lest they should perish from human callousness and cruel eating habits. This unique coastal treasure needs the Commission's legislative concern and investigative study by specialists and scientists. Not the Moon and Mars but the earth in its caves and sand, winds and waves are a challenge to technology and jurisprudence.

Indian humanity has an ancient culture and life-style rooted in the world's finest ancient civilization.

Max Muller regarded Rig Veda 'the first word spoken by the Aryan man'. These Aryans envisioned Truth without inhibitions and asked deeper questions. Evolving from this vigorous investigation came the Upanishadic monism. Says Nehru:

"The Upanishads are instinct with a spirit of inquiry, of mental adventure, of a passion for finding out the truth about things. The search for this truth is, of course, not by the objective methods of modern science, yet there is an element of the scientific method in the approach. No dogma is allowed to come in the way."

(The Discovery of India—
By Jawaharlal Nehru –Page 89)

Max Muller's celebrated observation is sublime:

"If we were to look over the whole world to find out the country most richly endowed with all the wealth, power, and beauty that nature can bestow – in some parts a very paradise on earth – I should point to India. If I were asked under what sky the human mind has most fully developed some of its choicest gifts, has most deeply pondered over the greatest problems of life, and has found solutions of some of them which well deserve the attention even of those who have studied Plato and Kant – I should point to India. And if I were to ask myself from what literature we here in Europe, we who have been nurtured almost exclusively on the thoughts of Greeks and Romans, and of one Semitic race, the Jewish, may draw the corrective which is most wanted in order to make our inner life more perfect, more comprehensive, more universal, in fact more truly human a life, not for this life only, but a transfigured and eternal life – again I should point to India."

Rajaji, in an eloquent passage, writes of the Upanishads:

> ***"The spacious imagination, the majestic sweep of thought, and the almost reckless spirit of exploration with which, urged by the compelling thirst for truth, the Upanishad teachers and pupils dig into the 'open secret' of the universe, make this most ancient of the world's holy books still the most modern and most satisfying."***

The Upanishads are the supreme wisdom of mankind. Greece and Rome, glorious though, come only next. The peaks of Indian thought are Himalayan high and universal in vision. It is vain for Indians to claim possessive pride over Vedic-Upanishadic flights of noesis and cerebration. While the world has title to these spiritual-temporal achievements Kerala has some special features to be proud of in the context. The Discovery of Kerala is a cultural Odyssey. Nowhere as in Kerala have we the miracle of all three great religions thriving in comity while rivalry of communal faiths has been disastrously divisive and politically aggressive in other parts of the country. Unitive jurisprudence has inspired the rule of Law in India. Amity among communities, fellowship of faiths and peaceful co-existence of godism, in its various versions, is a great phenomenon of Kerala's multi-theological estate. The most erudite, inspired incarnation of Advaita was Adi Sankara. This hallowed sage and scholar of vedic wisdom, where wealth of interpretation and semantic glory had, by sectarian pluralism, marred its profound universality and unitive philosophy, furnished a foundation of infinite divinity and supra-mental sublimity. His incomparable cultural conquest from Kalady (Kerala) covered the entire Indian humanity from Kerala to Kashmir and provided Bharat with a celestial source of universal revelation nobler than the global greatness of Greece and Rome. This supreme savant belonged to Kalady but was the Asian torch which illumined East and West. This cosmic vision and wisdom is integral to Kerala's cultural estate, infinite in its depth and vastness.

The Great Religions in the Commission's Perspective

Christianity arrived in India 2000 years ago when St. Thomas, a direct disciple of Jesus, landed in Kerala. Humble of origin, infinite of vision, spiritually revolutionary as incarnation, ineffable in his divinity, this frail but celestial wonder, Jesus was born in a carpenter's home but thrilled the harsh imperial world and Jewish high-priests with authoritarian godism with his charismatic personality and profound parables. He transformed the world with his anti-imperialist, pro-humanity commandments and elimination of deep-rooted gender injustice and religious unaccountability of a proud pyramid of high-priest altitude whom none dare defy.

The glorious grammar of the Cross, symbolic of the teachings of Christ and the way the wicked combination of sceptre and mitre guillotines great incarnations of supreme revolution, is against the Empire and militantly maintains the jurisprudence of the Kingdom of God! Jesus was and is being betrayed by multiplying numbers of Judases today. The intellectual liberalism and mellow morality of upanishadic universality made the facility with which St. Thomas spread Christianity in Kerala a phenomenal reality. Churches and schools, hospitals and orphanages with a Brotherhood humanitarian mission were started by Christians and gave them access to the vast Indian community oppressed by casteist lunacy and untouchable, unapproachable commoditisation of the weaker Hindu sector. In due course, the Christian church became an influential section of the Kerala population. Influence tempts and trade corrupts. Conversion gains power and pelf. The Cross becomes a patent and Jesus is jettisoned. Canon law commands and Cain wins. Today, it claims 'minority' status but only in a secular meaning it thus legitimatises not in its egregiously, ecclesiastical, political bigotry.

Let the church know without hesitation that the Law Reforms Commission—Kerala deeply appreciates the universality, anti-imperialism (Roman) pro-poor stance, allergy to those who amass riches and infinite compassion for those who suffer. H.G. Wells, in all admiration for Jesus observed:

> ***While he yet talked to the people, behold, his mother and his brethren stood without, desiring to speak with him. Then one said unto him, Behold, thy mother and thy brethren stand without, desiring to speak with thee. But he answered and said unto him that told him, Who is my mother? and who are my brethren? And he stretched forth his hand towards his disciples, and said, Behold my mother and my brethren! For whosoever shall do the will of my Father which is in heaven, the same is my brother, and sister, and mother.***
>
> ***And not only did Jesus strike at patriotism and the bonds of family loyalty in the name of God's universal fatherhood and the brotherhood of all mankind, but it is clear that his teaching condemned all the gradations of the economic system, all private wealth, and personal advantages. All***

men belonged to the kingdom; all their possessions belonged to the kingdom; the righteous life for all men, the only righteous life, was the service of God's will with all that we had, with all that we were. Again and again he denounced private riches and the reservation of any private life.

And when he was gone forth into the way, there came one running, and kneeled to him, and asked him, Good Master, what shall I do that I may inherit eternal life? And Jesus said unto him, Why callest thou me good? there is none good but one, that is, God. Thou knowest the commandments, Do not commit adultery, Do not kill, Do not steal, Do not bear false witness, Defraud not, Honour thy father and mother. And heanswered and said unto him, Master, all these things have I observed from my youth. Then Jesus beholding him loved him, and said unto him, One thing thou lackest: go thy way, sell whatsoever thou hast, and give to the poor, and thou shalt have treasure in heaven: and come, take up the cross, and follow me. And he was sad at that saying, and went away grieved: for he had great possessions.

And Jesus looked round about, and saith unto his disciples, How hardly shall they that have riches enter into the kingdom of God! And the disciples were astonished at his words. But Jesus answered again, and saith unto them, Children, how hard is it for them that trust in riches, to enter into the kingdom of God! It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God. (Page 527/528)

No modern socialist, no social justice crusader, no spiritual revolutionary has put radical humanist globalism more bluntly.

The Law Reforms Commission is not inclined to examine in depth the ancient Hindu teachings and their grandeur but is considerably concerned about many reforms required to promote harmony, solidarity, egalite, effective

abolition of casteism, untouchability and other feudal fossil practices still prevalent in the scattered regions of the country, including Kerala. Adivasis do not have a fair deal, being relegated to the panchama status, outside the four-fold caste system. Inter-caste inhibitions and apartheid still persist, social backwardness keeps the lower castes away from the higher teachings contained in the sacred books, vedic and upanishadic. There are no teaching courses for those below the Brahmin caste, nor opportunities to train the scheduled castes or other shudras to become priests in the temples of Kerala. If high level Sanskrit classes and scholarly classes for purohit functionalism were given to shudras, particularly the lowest untouchables, why should we not appoint them as priests in Guruvayoor and Sabarimala and other highly sanctified shrines? Abolition of casteism is tested by the presence of Hindu dalits as chief priests. Orthodoxy is diehard and law reform can promote abolition of casteism punitively. Practices inside temples are many which demonstrate caste distinction. Until castelessness becomes a rule of life inside shrines and holy places social solidarity will remain a myth. Sree Narayana Guru installed Siva in Sivagiri and a mirror in another temple as deity, elsewhere with profound meaning. Sree Narayana Guru was an Ezhava (Sudra, by birth) but higher than the highest Brahmins in the advaita way of life. His temples do not observe caste distinction and shudras function as priests. Non-Hindus are allowed at those temple festivals without any defilement. Perhaps, by Law Reform a dynamic equality, sans caste and community, can be made feasible thereby making advaita a spiritual-temporal reality. Other reforms can also be made by law getting rid of wasteful, bizarre, obdurately superstitious rituals and expensive offerings. Many extravagant absurdities, which are contrary to the Upanishadic profundities, can be abolished by law. Religious beliefs are beyond secular law reform but religious practices are subject to secularism, public order, sanitation and food adulteration. A bench consisting of Chagla and Gajendraghatkar (great judges both) have pointed out this fine distinction in AIR 1952 Bombay 40. Law Reform has a role in regulating fatal crowds, restrictions on women and dress one piously wears. Given illumination, imagination and intrepid humanization, the Commission can catalyze God's will including temple entry wherever the public freely collects.

Islam, revealed as a divine message in Arabia was nowhere in India in the ancient past or in the middle ages. Its entry into India was first through Kerala. Arabs had trade relations with the indigenous people of Malabar even before Islam came into existence in Arabia. The Muslim traders brought Islam along with their maritime trade and found facile access into Malabar where they constructed mosques and even converted a Hindu chieftain

because Hindus were tolerant, hospitable, non-violent and liberally disposed to transcendental thought from anywhere on earth. There was no aggressive resistance to their religion. Gradually Islam, with its burning faith in world brotherhood and casteless sense of egalitarian humanism, secured a firm foothold among Malayalees. Buddhists and Jains, in smaller numbers, also infiltrated into the State. So much so, Kerala became a land of religious pluralism with friendly relations among the followers of diverse faiths. In those days, God or Gods did not provide seeds of divisiveness and domination nor fanatical heirarchy and satanic barbarity. The mellifluous milieu of humanist harmony and emphasis on fraternal comity made Kerala a home of multi-religious camaraderie which was a model for the rest of the country. Things have changed, monstrous dogmatism and sectarian narrowness have introduced an obscurantist element of fissiparousness. A lunacy of castes, communities and creeds has reversed the felicity of fellowship among faiths. However, the basic structure of religious pluralism survives although politicized religions are rivals in gathering communal numbers. This disrupts secular democracy.

Commission's vision of a secular society

The Law Reforms Commission functions for a secular society with a creative future, for redeeming the solemn tryst with Swaraj Destiny. Alas, religions and sects have become communally mad and politically belligerent. The Law must redeem God from grabby, greedy godism, Jesus from authoritarian communalism, and Great Prophet Muhammed from crazy, jihadist terrorism and mulla-ukases. Temples, churches and mosques, Hindus, Christians and Muslims have a finer fellowship which the Law Reform Commission must, with missionary zeal, rehabilitate.

Kerala Humanity faces new challenges, contemporary crises, foreign cultural and economic pathologies intractable problems of poverty and unemployment, agrarian vanishments and technological invasions. Industrial backwardness is another problem. It is threatened by the escalating insanity of rabid syndrome of Money over Man. West-toxic developmental exoticism and swadeshi seppuku outrage our sylvan scenic green with a horror of ugly urbanity. The beauty of Nature is spoilt by grimy slums and sky-high concrete jungles, by five-star shopping glitters and asuric consumerism. The paradox of bathetic, aggressive, high-rise luxury apartments inhabited by competitive creamy layers of lavish life and the growing numbers of half-clad, have-not masses struggling and surviving in abject privation is the obituary of

developmental vulgarity inflationary terrorism. City robbery, cunning pick-pocketing flamboyant, flashy temptations and are the moral culpables behind lumpen bullies and sexy girls marring humility and innocence. The drug of showy godism, aggravated by the opium of religion in revelry, mafia malpractices, near-naked, promiscuous pleasure rackets and corruption ubiquitous, make social and economic sanity and equity a rarity. Justice from the judicative process is expensively untouchable and unapproachable to large sections of Kerala's lowly layers. Political justice is apt to succumb as a commercial commodity and communal casualty if parties, craving for power, discover trivial deviances, exaggerate them into popular demonstrations and hartals for purchase forget ideological basics and put to sleep the police and other law and order institutions. Law Reform has to focus on these fundamental failings of social security, sanitation, moral hygiene, and fight for values of progressive peace, secular, safety and democratic decency. Courage and principle, not cheap popularity and market-place politicking should support Law Reform will.

Economic Reform and Law Reform

Foreign money from the Gulf countries, dollars in plenty allegedly through the Church agencies and Big Business investments with U.S jobs, cheap Chinese goods aplenty and glamorous publicity with sexy media pictures create an illusion of wealth and drain of the little money of the little family. So too the sudden abundance of credit cards and easy loans to buy cars, apartments and luxury items end up in suicide for non-payment of borrowings. 'Neither a lender nor borrower be' is wasted prudence. A spend-thrift corruption and gambling stock-market gluttony has hastened widespread bankruptcy. The Central Government policy, contrary to the nationalist spirit of swadeshi, is welcoming, with colonial enthusiasm, foreign imports and investments through Multi-National Corporations and borrowing from the IMF, World Bank and its subsidiaries, keeping the people deluded by false hopes while banks are collapsing and jobs shrinking. Swaraj and swadeshi are losing their backbone through a cunningly organized dependencia syndrome suffered by the national economy. Foreign money, foreign goods, foreign automobile manufactures and other trash technology and pollutive industry and noxious processes of foreign tourist pampering glut the market, privatize development and breed alien habits and bastardize our culture. This White World and the 'White' House pressure have won over the North Block

and every State capital. The Law Reform Commission must warn the State to consult high level experts to plan revolutionary economic changes and Emergency measures through daring law reform, lest Kerala be lost. Many dangerous, meretricious influences have made Kerala finances fragile and victim of a cultural travesty. Food and dress fashions have changed and commodity scarcity has aggravated the prices and poverty in desperate depth and self-induced suicide proclivities of the common people. In sum, human rights in Kerala are under special stress and created land crisis, landlessness of the lowly and realty mafia, driving the rich to become realty and gold robbers and the poor join plunder gangs or terrorist groups. These grave issues desiderate curative legislative and executive policies involving social research and nationalist convictions. Globalization, liberalization and privatization have captivated the Centre and the federal units a la smart cities and made the right to life of the several crores of people grave and grim. Everything is expensive, including access to justice. Every one is potential freebooter; every bureaucrat is a dilatory file-pushing agency actively participating in corruption. Every suspicious character is an opportunist politician, forsaking the finer principle of integrity and efficiency. Institutionally, Kerala State is still over-politicised, communally fragmented and culturally colonial. The judicative, Executive and Legislative processes make headway steadily backwards and suffer from the sickness of Parkinson's Law and Peter Principle. Hartals and holidays and do-no-work offices have popularity. Of course, to build a socialist, secular democratic operationalism in governance is itself a mega-problem of administrative law reform since the laws, lawyers, ministers, judges and the law-makers still remain at home in Victorian vintage jurisprudence. The technology of social transformation in modern terms is an allergy to the Kerala politicos who abound.

This introductory is necessary to understand the tremendous task any Law Reforms Commission has to tackle if it is to keep Law India—Law Kerala faithful to the Constitution and the people. The legal structure is bound to be in consonance with the fundamental rights in Part III and Directive Principles in Part IV and the Fundamental Duties in Part IVA. The Law Reform Commission, as a comprehensive, progressive instrument, must abolish the growing gap between the status quo statute system and the Suprema Lex.

The magnitude of the Law Reforms Commission's grand agenda vis a vis current Kerala law and society has another historical dimension with political implications and economic transformation. India was a large domain, far more than British India, and included around 600 princely States which

had to be integrated into the Indian Republic to build a strong nation and a united people. The country's integrity, stability and fraternity commanded this dynamic unification and political integration which was achieved during the tenure of the late Sardar Vallabhai Patel, then Home Minister of India. This geo-political re-birth has a bearing on the Kerala State which had three geographical components viz., Travancore, Cochin and Malabar. India's Independence absorbed Travancore and Cochin, each of which had its own princely laws. Malabar was part of Madras province and its laws were those made by the Madras Legislature. Travancore and Cochin merged into Travancore-Cochin and made some laws of its own. Eventually, when linguistic States were formed as mandated by the State's Reorganisation Act, Kerala State emerged as a single unit comprised of Travancore-Cochin and Malabar, with minor geographical adjustments. This political transformation gave rise to the co-existence of three sets of Laws within the same State, an anomaly which was somewhat unconstitutional, anarchic and no longer practical. The operation of unification may be by steps but the process was obligatory. This explains why unification of laws and elimination of obsolete laws became a necessity on the rational principle of 'one law for one State'. The Law Reforms Commission has been called upon to address 'itself to this' important issue which is creative but complicated. The Commission has achieved some success here. Integration of people and laws is a great march and the Commission shall pioneer, as protagonist, this necessary project.

Kerala has forfeited its camaraderie of religious communities because of greed for political power and commercial gains. Christianity has resources derived from their prosperous sector and from the United States; and the papacy is a source of global prestige for it. Beyond riches, the glory of the Cross is rooted in its deep humanism, philanthropic goodness and poverty alleviation. Schools and colleges, hospitals and other divinely inspired social institutions are the basic structure of its Jesus spiritual-temporal compassion. Industries and agricultural operations, plantations and technological enterprises, where hard-working Christians have taken the lead, have promoted the prosperity of the State. Indeed, the economic and cultural advance of Kerala owes much to Christian adventure, activism and efficiency, Christian contribution, in its secular dimension, has a noble page in the developmental story of Kerala. But today, communalism, with its corrupt spirit of competitiveness, has undermined that sublime spirit, integrity and unity which the higher moral stature of the Cross used to catalyze holistically the cohesiveness and uplift of Kerala humanity. The sign of the Cross, in its secular character, was service to the people from a universal angle and the magnificent

contribution to the State's larger development by the Christian community deserves tribute. But when religion reverses Jesus, the universal spiritual revolutionary, to become an instrument to sieze state power and make wealth by inflaming communalism it becomes rabidly anti-Jesus and corrosively anti-world-brotherhood. Indeed, it contradicts the Kingdom of Heaven. The collectivity, amity and integrity which have been the pride of Kerala's religious pluralism are becoming a fracticidal casualty.

Islam has a similar but unfounded charge of fanatical blemish and terrorist image. Law Reform has a positive, corrective role to obviate misunderstandings about Muslims and promote friendly relations among religions.

> ***It was full of the spirit of kindliness, generosity and brotherhood; it was a simple and understandable religion; it was instinct with the chivalrous sentiment of the desert; and it made its appeal straight to the commonest instincts in the composition of ordinary men. Against it were pitted Judaism, which had made a racial hoard of God; Christianity talking and preaching endlessly now of trinities, doctrines, and heresies no ordinary man could make head or tail of; and Mazdaism, the cult of the Zoroastrian Magi, who had inspired the crucifixion of Mani. The bulk of the people to whom the challenge of Islam came did not trouble very much whether Muhammad was lustful or not, or whether he had done some shifty and questionable things; what appealed to them was that this God, Allah, he preached, was by the test of the conscience in their hearts a God of righteousness, and that the honest acceptance of his doctrine and method opened the door wide in a world of uncertainty, treachery, and intolerable divisions to a great and increasing brotherhood of, trustworthy men on earth, and to a paradise not of perpetual exercises in praise and worship, in which saints, priests, and anointed kings were still to have the upper places, but of equal fellowship and simple and understandable delights such as their souls craved for. Without any ambiguous symbolism, without any darkening of altars or chanting of priests, Muhammad had brought home those attractive doctrines to the hearts of mankind. (P-607)***

Islam, that great global faith, revealed by divine communication from a celestial care to the Great Prophet Muhammad, stands for world brotherhood, deep conviction in One God sans idol worship, disowns priesthood and stands for proprietary status for woman and sacrifice of wealth as a religious duty.

Compassion, not terrorism, is the Great Prophet's Mercy. Anti-casteism and generous spirit of equality have made Islam popular among the poorer sector of Kerala. Muslim aristocracy, when it tasted appetite for state power, became divisively communal and vitiated national solidarity and secularity, tempted by power politics. Heady religious pluralism and corrosive communalism tend to misuse minority status for the ends of political power. When poisonously politicized, the discordant note imperils the people-oriented, felicitous fusion which is the harmony of Kerala humanity. The dragon's teeth of group rivalries and terrorist strategies are the product of foul fanaticism and uncivilised barbarism. Both Christianity and Islam are substantial minorities, viewed as large human groups, with high humanism and unity in divinity. However, mundane, devalued materialism is a cultural distortion which is hostile to spiritual norms and makes every religion toxic with politics and power-greed. This perversion is not constitutionally valid and voids our humanist secularity. Great harm is done to the progress of the Kerala State by 'godist' grab for power and sacerdotal bigotry as fuel to inflame several groups with communal passion. This generates hatred among different creeds. Law Reform is necessary to create secular activism, to forbid misuse of minority status, especially for promoting electoral opportunities, educational commercialism and for manipulating Government offices and other money-making business. The Commission, as a secular strategist, has to perform a tough law reform to fight these grave vices and forces of fanaticism masquerading as minority protection. It is a secular sin to communalise minorities and a religious crime to drag God into politics of power and lucre.

Law reform, in its developmental dynamism, lofty value ascent and dialectical materialism, has a substantive and substantial role to play in transforming Kerala society and liberate it from the lunacy of contra-secularism.

At this point, a fundamental issue deserves to be stressed so that the iron curtain which divides sophisticated religionism from authentic secularism may be put beyond doubt. The unity of Indian humanity is currently in grave jeopardy because communalism, appareled in holy costume as religion is running amok. Religious sentiment, populist fuel, easily inflames furious feelings and violent frenzies and goes berserk unless law and morality monitors

its operations. Political leaders, using this incendiary potential, make fissiparous friction and quasi-apartheid factions; and disguise this treachery, illegitimately pressing into service 'minority' strategy. Judicial sagacity and sanity have brought out the distinction and thereby inhibited the misuse of primitive theology to perpetrate communal ideology, social and economic. When polygamy in the Hindu fold was prohibited by law, it was challenged on the ground of religion but Chief Justice Chagla and Justice Gajendragadkar of the Bombay High Court ruled it out and held that monogamy was a secular State policy and did not offend religious faith. Christianity assigned an inferior status for women under the Travancore Christian Succession Act and the Cochin Christian Succession Act. No plea of religion could save this discrimination since the Supreme Court in Mary Roy's case struck down both the statutes. They were discriminatory and wounded women's equality. Islamic Law, in fairness to the Great Prophet and the Quran, had not pampered the male with the four-wives privilege. In a learned judgment, as early as 1970, the Kerala High Court had held against indiscriminate talaq and iniquitous matrimonial pluralism. Humanism was writ large in that religion read scrupulously. Quite recently, a Division Bench of the Kerala High Court has held somewhat on similar thinking and seriously recommended statutorization of monogamy and gender justice in divorce. The Commission bears in mind this sharp but fine distinction between secularism and religionism and stands firmly by the basic structure of the Republic as socialist secular and democratic.

Muslim women have been victims more than others of the same gender of social privation as is recognized by a recent Division Bench ruling of the Kerala High Court consisting of Justice Kurian Joseph and Justice Harun-UL-Rashid in Saidali Vs. Sabeena in which the following observations are found and are pregnant with meaning in the current context:

> "***We find the Bhishmacharya of Indian judiciary V.R. Krishna Iyer J. in his celebrated decision as early as in 1970 in Shahulameedu v. Subaida Beevi, reported in 1970 K.L.T. 4 has referred to the very same situation in his inimitable style in the following terms:***
>
> ***"It follows from these passages that the Koranic injunction has to be understood in the perspective of prevalent unrestricted polygamy and in the context of the battle in which most males perished, leaving many females or orphans and that the holy prophet himself recognized the difficulty of***

treating two or more wives with equal justice and, in such a situation, directed that an individual should have only one wife. In short, the Koran enjoined monogamy upon Muslims and departure therefrom as an exception. That is why, in the true spirit of the Koran, a number of Muslim countries have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely restricted. (Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context). A keen perception of the new frontiers of Indian law hinted at in Article 44 of the Constitution is now necessary on the part of Parliament and the Judicature."

Education and Law Reform

Kerala is relatively advanced in primary and secondary education but a new development has arisen as a result of commercialization and communalization of pre-primary, primary, secondary and even higher education, technical and other. One should have expected the Constitution to prevail over lucrative privatization and other non-cultural considerations. The Right to Life, guaranteed under Article 21, includes the right to education as lending dignity to life and meaning to existence. The right to equality under Article 14 includes non-discrimination in the matter of fees and other facilities at any level of education, be the institutions privately run or State-managed. However, the reality is otherwise. Money, not merit; communal criteria, not secular values, matter as current cultural coin. Capitation fee is immoral exaction, covertly collected under implicit coercion. To rob parent for putting their children in LKG, UKG and primary classes in schools run by private agencies is educational pick-pocketing. Various guises and alibis are adopted, sophisticated arts and crafts to collect huge sums, are nocently urged, although there is now a specific constitutional mandate that such education should be free and compulsory. The parents are indigent in many cases and their children are condemned into illiteracy because they cannot afford to pay. Casteism and communalism, nepotism and favouritism are rampant. The State, whatever the Party or Coalition, blinking cowardly at this educational spoliation. In the higher courses, especially medical and technical, colossal profit-making and pillage with half-hearted judicial approach, is common. Bribery and basterdisation in the matter of appointment of teachers provokes no state action at present. The State's pusillanimity is beyond condonation. Is this socialist, secular or democratic? The State

abdicates its solemn obligation to offer free facilities for education to needy children. Private agencies, unable to manage schools, without financial support, must leave it to the State. The anti-secular delinquency of discrimination in favour of castes and religions is another common delinquency. Law Reform of a stern character against this horrendous practice is a must to make the constitutional values valid. Law reform to penalize stultification of the free and compulsory obligation in the matter of primary and secondary education is a felt necessity. The indelible stain on the Constitution, now freely cast, demands punitive legislative action. Indeed, revolutionary law reform of a comprehensive scope, in this field is a "consummation devoutly to be wished".

Law Reform and Agriculture

India lives in her villages. Agriculture is the mainstay of development. Gandhian India provides employment to its millions in farms and fields, plains, domestic and village small scale industries. Indian agriculture, which is the backbone of our common people's survival economy, is now the Cinderella of development and imports have become the passion for progress. Of course, industrialization is a necessary component of our nation's development and Kerala cannot neglect this decisive element of progress. Profit-making is more tempting and less mindful of dehumanizing development in fashionable factories and technological undertakings. The politicians, not statesman, suffer from myopic perceptions of quick-money industrialization. *"The difference between a politician and a statesman is: a politician thinks of the next election and a statesman thinks of the next generation." (James Freeman Clarke)*

Swadeshi is integral to swaraj, and Man matters more than Money, although imports and foreign investments, like on automobiles and five-star hotels, hi-tech MNC glamourous goods are pilgrim centers of the new generation conditioned by lobbies. Planned, progress with a modern vision for people's advance is still a lost cause. Lust and alcoholism are best sellers, games and gambling, lotteries and stock markets are the objects of worship. The State is callous, has no expert planning commission to take the people forward towards the true discovery of work, wealth and happiness for everyone. Such a master-plan, with purposeful expertise and yen for humanism, is yet to be visualized with futuristic perspective. Our factories are now pollutive agencies of soil, water and air, are victims of poison, caused by use of toxic chemicals in food and packaging. Law Reform to ensure pure earth, water and air is an urgency in Kerala what with its surrender to exotic.

The State of Kerala has 44 rivers, none of which is spared from environmental pollution, toxic effluents, filling up for urban buildings, sand mining and other obnoxious practices. Where is the criminal law in penal action? Law reform must spring into action here. Wet lands are disappearing. Farms, fields, herbal areas, vegetable gardens, plantations and even forests are dangerously sprayed with chemicals which cause cancer and other diseases. Radiation victimizes the community with cancer and nuclear plants are carcinogenic. There are many other maladies disguised as remedies for development, in our agriculture and industry. People are martyrs, not victors. Our pharmacopoeias of progress is a travesty of disguised dazzling syndromes. Kerala has scarcity of land space but density of human population. This incongruity obligates the State to show great concern in the acquisition and use of land so that the have-not sector may not be homeless and hungry, and tillers may not be landless and without work. Currently, traditional farmers, without resources, are purchased out of their little patches and thrown out of occupation by the rich and the mafia who corner green earth with urban objectives and sky-high concrete complexes. Agriculture is on the wane and Big-Business is buying up all land for trade and technology. Nature has lost the battle and corporate undertakings have made everything grimy with money-making greed. The woods were once lovely, green and deep but our promises we failed to keep. So much so, there is misery and starvation, disease and suicide pillage, molestation and terrorism. Humanism is gone, cupidity reigns and spiritual, moral values are gradually digging their grave. All these deleterious deviances are challenges to the happy scenario of rural Kerala, the coastal beauty and city dignity of urban Kerala. Law reform must refine social welfare. Here is a perennial pressure on the State to protect society in its pristine beauty and purity through drastic law reform. The Commission can fulfill its mission only if its concerns, commitments and futuristic perspective are revolutionary and illumined by the glorious splendour of seascape and mountain range, green fields, spices and plantations, and limitless human resources. This Kerala Panorama claims social and economic justice through the creative vision of Law Reform and supportive mission of democratic instrumentalities.

The Law Reforms Commission—Kerala is, in its patriotic perspective the architect of Kerala specific-jurisprudence, the jural dramatization of the 'Maveli Dream' of human justice and human law in conformity with the Constitution of India and International Law to the extent enforceable in India.

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PART-III

PROGRESSIVE LAW REFORM AND THE WIDER HORIZONS OF JURISPRUDENTIAL TRANSFORMATION

Holistic secularism, humanistic value-milieu, camaraderie of theological pluralism and patriotic, democratic statesmanship are the sine qua non of Kerala Panorama in its developmental dimension—Never Kilkenny Cat politics, godist adversaries, pathological communalism, ubiquitous corruption, insatiable consumerism, mafia cornering community resources, commercialization of judicial justice and arbitration processes, malignant manipulation of education, public health, free legal service. This benignant transformation is our vision, our crusading mission, our socially compassionate progressive, passion and law-making locomotion.

The Law Reform Commission—Kerala, is not a mechanical instrument of jural engineering but is a powerful, purposeful, progressive, pioneer, committed, as its basic obligation, to carry out the unification of divergent laws within the State on the same subject, deletion of obsolete legislations of medieval princely vintage, promotion of salutary, dynamic, dialectically viable statutes, harmonizing with our radical constitutional norms, especially promotion of the status and welfare of women and children, backward classes and minorities in their authentic, non-communalist semantics. Preservation of environmental and ecological purity and Nature's integrity is a paramount duty of the State as a societal sanctuary defending people's healthy survival and preventing atmospheric pollution. Compassion towards Nature begets bounty from Nature. When technology and industry, violative of Nature's intoxicated expansion vitiates the virtue of earth, air and water, it is a malefic menace to Life in all its facets. National advance is at stake if environment is endangered and biosphere blemished, although Big Business freeboots and Mafia Inc. pirates with Money as its focus. Values have changed for the worse since technology in its lucrative populism, is turning terrorist and science, in its pride of discoveries, is becoming thanatonic. Corruption, moral, material and other, has infiltrated into every section of society, official and non-official, religious and temporal. A hundred horrors are fobbed off on society as achievements of science but Big Powers and MNCs make plundering of public resources a business and national economy a submissive policy. Covert imperialism, by cunning publicity and brainwashing political intelligence, gains control over Third World Managements. Satellite status is blithely called transformation by mega-propaganda and bribery of the articulate media. Kerala is victim of this quasi-colonial syndrome because American money

and Gulf income give access to five-star life-style and instruments. Castes and communities, dubiously wearing 'minority' apparel and masquerading as sacred religion, foment felonious tendencies. Much more mischief, with Godism as the tool, incendiary in its methodology, is achieved by politicizing religion, since faith is a flame which burns like wild fire. India's unity and fraternity are vivisected by the prolixity of irrational piety, insane superstition and profusion of divine population in mundane terrain. God, the Supreme Savior, has suffered the syndrome of sacerdotal splittism. Every cause has a martyr. Religion is no exception, 'Man' is the victim; 'god' is the villain. We must save God, the Infinite, from goofy, greedy, gold-hungry gods in parochial apparel and political haberdashery. Politicised godism slays sober secularism as a moral martyr. Kerala must overcome this sinister ploy of celestial belligerency and restore the splendour of the Universal Supremo by holistic law reform and humanistic pristine secularism. Yes, we can. The cultural dream of Maveli, our regal ideal, is happy humanism and cosmic compassion, secular and socialist. Let us, as Commission, win back Maveli Jurisprudence and bury the hate-cult bigotry in the cemetery of obscurantist, ritualistic, deified barbarity.

In sports and studies, in education and research, in casteless humanity and social egalite, in cultural pluralism and communal harmony, Kerala has enjoyed an advanced place in the history of Indian life but there is widespread deterioration, degeneration and decadence, viewed from the standards of moral, ethical and fraternal values. Money has gained devastating domination over Man and finer jurisprudence has suffered decapitation, what with exploitative economies suppressing liberalism and secularism based on the commandment: everyone is his brother's keeper. So the people have to struggle to reconstruct and resurrect the magnanimous Maveli wonder of jurisprudential heritage through Law Reform and Life Reform. The Reactionaries are powerful and will resist. But we shall overcome. One of the great blunders Indian society commits today, and Kerala is no exception whatever, is the obfuscation of sensitive secularism by obdurate obscurantism and vulgarization of religion. The distinction between unalloyed religious beliefs and undefiled social praxis is brought out best in a few classic judgments of the higher courts. One of them deals with prohibition of bigamy in the Hindu community. The two rulings on this subject are AIR 1952 Bombay-84 and AIR 1952 Madras 193. Polygamy was banned by law but was challenged as unconstitutional contravention of freedom of religious faith.

Freedom of religion is fundamental and cannot be conditioned or controlled by the State. That would be fascist, not democratic, the mitre seizing power from the sceptre. Forced faith or enforced faithlessness are

both anathema to our tradition and Constitution. Nevertheless, civilized societies have recognized that while belief is free, religious practices are subject to public order, basic humanism, finer mores and stability of society sans which barbarity and torture will take the place of sage wisdom and basic culture. As early as 1879 the U.S Supreme Court had made profound observations which have found acceptance in Indian judicial jurisprudence:

> ***"In the case of 'Reynolds v. United States', (1879) 98 U.S 145 at 166-16, which also related to the validity of a Statute prohibiting polygamy, it was pointed out that:***
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> ***"Laws are made for the Government of actions and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil Government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed that it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil Government to prevent her carrying her belief into practice?***
>
> ***So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practice to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."***

Under our constitution, freedom to practice religion is not an absolute right but as Art. 25 itself states it is subject to public order, morality and health and subject to the other provisions of this part. Art. 25 (2) further empowers the legislature to enact a law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The religious practice therefore may be controlled by legislation if the State thinks that in the interests of social welfare and reform it is necessary so to do.

Monogamy has a public policy and dimension of gender justice was made into law among Hindus whose ancient traditions were claimed to be permissive of polygamy. Religious practice if it runs riot or turns terrorist cannot be tolerated by a society bed-rocked in humanism. The High Court of Bombay over-ruling the contentions based on religion sustained secularism as invulnerable irrespective of medieval religious practices. Chief Justice Chagla observed:

> ***A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, the religious practices must give way before the good of the people of the State as a whole. A very interesting and instructive case is to be found in the American Reports, viz. Davis v. Beason, (1889) 133 U.S. 637. In that case it was contended that polygamy was part of the creed of the Mormon Church and any legislation which penalizes polygamy to the extent that it affected Mormons was contrary to the First Amendment of the Constitution which provided that Congress shall not make any law respecting the establishment of religion or forbidding the free exercise thereof. This argument was rejected, and Mr. Justice Field delivering the opinion of the Court pointed out that (p.640):***
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> ***"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter."***
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> ***Marriage is undoubtedly a social institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of***

Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Art.25 (2) (b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practice and propagate religion. (AIR 1952 Bombay 84)

Justice Gajendragadkar in a separate judgment agreed with this ratio. The Madras High Court also upheld the Hindu monogamy provision and the following observations have luminous relevance:

This freedom to practice religion is not in absolute right but as Art.25 itself states it is subject to public order, morality and health and subject to the other provisions of this part. Art.25 (2) further empowers the legislature to enact a law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The religious practice therefore may be controlled by legislation if the State thinks that in the interests of social welfare and reform it is necessary to do so. (AIR 1952 Madras 193)

A great majority of nations abide by monogamy in law and secularism in life. Religion, with reactionary authority cannot block the march towards liberation of women conjugal egalite. Indeed, We, the People of India, who are the sovereign of our Republic, have now accepted in solemn terms the principle of secularism by a specific amendment to the Constitution. No one is exempt from this basic norm of life, be he Hindu, Christian or Muslim.

Islamic Law is in secular matters like marriage, divorce, inheritance and what not is fundamentally free from religious dogma and is lucidly and luminously explained in a paper presented by the Chairman of the Commission as far back as 1972 in the Indian Law Institute. This article has been annexed for the fuller understanding of the secular nature of personal law often confused with theological values as Annexure A.

Christianity, in religious faith, has many theological churches with different structures, rituals and forms of prayer. While the State cannot interfere with beliefs, it can, from a secular angle, enforce uniform principles in the matter

of decent, dignified material practices, including inheritance and succession, marriage and divorce. So far as Kerala is concerned, a substantial Christian population with diverse ecclesiastical hierarchies lives in happy proximity. There have been some perversities regarding the right to inheritance in the Travanacore-Christian Succession Act and the Cochin-Christian Succession Act. Blatant gender injustice was writ into the law in the princely days of yore. Today, the Supreme Court has struck down this discrimination and secularism, with a sense of equality, has restored the rights of Christian women. Equality in the matter of sex is a guaranteed fundamental right and salvages Christian women and those of other denominations, in status and dignity. Although dowry in practice is still discriminatingly prevalent making women commodities and liabilities, the law has yet to demolish effectively the vice of dowry among Christians and Hindus. In Mary Roy's case the Supreme Court struck down the invidious distinction in the matter of inheritance as between the sexes. The Law Reform Commission has yet to examine the application of secular justice, not merely in theory but in living practice, liberating women from thralldom of dowry system.

'Religion is the manifestation of the divinity already in Man' (Vivekananda). It is not the inscrutable face of a sphinx and is transparent omnipotence. All true theology discovers the divinity and distinguishes the secularity. Never is God sullied by Mammon.

Christian beliefs adopted by different Churches owe their fundamental nidus to Jesus Christ, the revolutionary incarnation, and the Bible, the Holy Book; Beliefs and associated ideas are sacredly doctrinal and, therefore, beyond state intervention, revision or prohibition but when it comes to material matters of property, management of buildings, organization of Sunday meetings, production of commodities as worldly objects and festive ceremonies, or gathering of people men, women and children, social and economic health hygiene and filth-free sanitation issues arise secularism steps in and the State controls the use of wealth, the disclosure of sources of donations and gifts, obligate the Church or any religious institutions to subject its ownership, accountability and invigilation of assets and the democratic direction in which such assets are to be utilized consistently with the Faith, developmental use of income and maintenance of environment, emergency sanitation, disposal of garbage and many other such matters,— such secular problems have to be in compliance with the public law, not canonical law, or other custom and tradition. All these and other temporal matters connected with the Churches and other religious institutions have to

be regulated by law and justice and supervised by appropriate state authorities. Progressive law reform has a place here and Papal infallibility or ultimate authority have to confine themselves to matters other than secular and socially relevant state prescriptions. Our country is a Republic, our sovereignty is governed by the Constitution. Any authority or duty outside of this legal system is void and non est. Secularism never disrespects divinity but reverences it. But render unto Caesar what is due to him and to God what belongs to him. And 'Caesar's wife must be above suspicion'. Everything material in the hands of religious hierarchy shall be a trust for the parishioners. The Bishop, of course, is the spiritual head. All power is a trust and obligates with fiduciary scrupulousness the parish people, who are the beneficiaries.

The insistence on secularism in civil and material aspects of social and economic life applies as much to Islam as to the other religions. If polygamy is taboo for the Hindu on the score of secular principles, public well-being and gender justice there is no reason why the Muslim brothers and sisters governed by the same Constitution and ethos should not surrender the profligacy of polygamy in favour of the civilized culture of monogamy. Indeed, Islamic jurisprudence, interpreted in the light of progressive semantics, arrives at monogamy derived from the Quoran and the great Prophet's teachings. The ruling in 1970 KLT Page 4 (Krishna Iyer, J.) (Shahulameedu v. Subaida Beevi) approvingly referred to by a Division Bench of the same High Court as late as 2008 establish that monogamy is quintessentially the conscience of marriage law in Islam.

> ***"It may be that under the Personal Law of Muslims a Muslim may have as many as four wives. But I do not think that, having more than one wife is a part of religion…So any legislative requirement to the effect that Musalman may not have more than one wife does not amount to interference with freedom of conscience or interference with the right to profess, practice and propagate religion. I (Krishna Iyer, J.), therefore, do not think that any provision of law in favour of monogamy involves violation of Art.25 of the Constitution."***
>
> ***"It is important to notice that the Supreme Court in a recent decision reported in Nanak Chand v. Chandra Kishore Agarwale [1969 (1) SCWR. 1176] has observed in negativing an argument based upon the Hindu Adoptions and Maintenance Act, 1956, that:***

'S. 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties."

"It is distressing for a Court to discriminate against Muslim women who have for ages been subjected to several social disabilities clamped down on them in the name of personal laws. It is surprising that dubious religious interpretations with values valid in a bygone age are being enforced in the current times by civil courts in our professedly secular State when those values have become mere legal superstitions, if not anathema for the community at large, out of a false sense of solicitude to a fancied section of society. The Indian Constitution directs that the State should endeavour to have a uniform civil code applicable to the entire Indian humanity and, indeed, when motivated by a high public policy, S. 488 of the Criminal Procedure Code has made such a law, it would be improper for an Indian Court to exclude any section of the community born and bred up on Indian earth from the benefits of that law, importing religious privilege of a somewhat obscurantist order. I have no doubt that it behoves the Courts in India to enforce Section 488(3) of the Code of Criminal Procedure in favour of Indian women, Hindu, Muslim or other. I (Krishna Iyer, J.) will be failing in my (Krishna Iyer, J.) duty I (Krishna Iyer, J.) if accede to the argument of the petitioner that Muslim women should be denied the advantage of para.2 of the proviso to Section 488(3)."

In short, the Koran enjoined monogamy upon Muslims and departure therefrom as an exception. That is why, in the true spirit of the Koran, a number of Muslim countries have codified the personal law herein the practice of polygamy has been either totally prohibited or severely restricted.

"Mr. Justice Hidayatullah in his Introduction to Mulla's Principles of Mahomedan Law, 16th Edn has approved of the modernization of the family law of the Muslims including the abolition of polygamy."

'One man, one wife' is global jurisprudence and many Muslim countries have statutorily implemented this principle. Similarly, in the matter of divorce, secular wisdom, justifying the dissolution of matrimony on the score of irretrievable break-down, is good law by humanist standards. Islam is not foreign to modern matrimonial justice and must accept talaq in its refined version of modern law. After all, Mohammedan Law regards marriage as a contract valid only with the consent of both sides. This is a thoroughly secular concept. In Sowramma's case 1970 KLT 477 (Yusuf Rowthan v. Sowramma) this matter has been discussed in detail and judicial observations there hold that the Prophet was ahead of his times and his views on this issue were almost the same as that of the great rationalist Bertrand Russell. A few quotations from that ruling, and the earlier one, may be of educative interest.

"Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglican judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture—law is largely the formalised and enforceable expression of a community's cultural norms—cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce."

Yusuf Ali, in his commentary on the Holy Quoran, says:

"While the sanctity of marriage is the essential basis of family life, the incompatibility of individuals and the weaknesses of human nature require certain outlets and safeguards if that sanctity is not to be made into a fetish at the expense of human life."

Here is a significant verse from the Quoran.

"And if ye fear a breach between husband and wife, send a judge out of this family, and a judge out of her family; if they are desirous of agreement, God will effect a reconciliation between them; for God is knowing and apprised of all." (Chapter IV. Verse 35).

To sum up, the Holy Prophet found a dissolute people dealing with women as mere sex-satisfying chattel and the rid Arab Society of its decadent values through his doings and he Quoranic injunctions. The sanctity of family life was recognized; so was the stubborn incompatibility between the spouses as a ground for divorce; for it is intolerable to imprison such a couple in quarrelsome wedlock. While there is no rose but has a thorn if what you hold is all thorn and no rose, better throw it away.

One of the serious apprehensions judges have voiced, if the view accepted in AIR 1950 Sind 8 were to be adopted, is that the women may be tempted to claim divorce by their own delinquency and family ties may become tenuous and snap. Such a fear is misplaced has been neatly expressed by Bertrand Russel in his 'Marriage and Morals'.

"One of the most curious things about divorce is the differene which has often existed between law and custom. The easiest divorce laws by no means always produce the greatest number of divorces... I think this distinction between law and custom is important, for while I favour of somewhat lenient law on the subject, there are to my mind, so long as the biparental family persists as the norm, strong reasons why custom should be against divorce, except in somewhat extreme cases. I (Krishna Iyer, J.) take this view because I (Krishna Iyer, J.) regard marriage not primarily as a sexual partnership, but above all as an undertaking to co-operate in the procreation and rearing of children."

The Muslim woman (like any other woman) comes back into her own when the Prophet's words are fulfilled, when roughly equal rights are enjoyed by both spouses, when the talaq technique of instant divorce is matched somewhat by the khulaa device of delayed dissolution operated under judicial supervision. The social imbalance between the sexes will thus be removed and the inarticulate major premise of equal justice realized.

On the whole, in all matters, including inheritance and succession, marriage and morals and divorce and maintenance of a divorcee, the law must defend the woman's life in decency and dignity. If there is dissent from the orthodox, the conservative and the fossil elements of society, the Law Reform Commission must rise to the occasion and be a protagonist of progress, overruling fanatical dogma and religious obscurantism.

Flavia Agnes—a lawyer with expertise on gender, human rights and minority concerns, has explained with clarity the legal position in this regard referring to decisions of the Supreme Court thus:

"The Supreme Court, in two cases, have ruled in favour of Muslim women's rights in1979 and in 1980 (Krishna Iyer, J.) which upheld the divorced Muslim woman's right to maintenance. They have been major milestones. From his position of authority over the subject, Krishna Iyer, J. lamented", "Islamic law is more sinned against than sinning".

Similarly, Chief Justice R.C. Lahoti had ruled upholding Muslim woman's right against capricious divorce. In the decision rendered in 2002, Shamim Ara v. State of U.P. 2002 (7) SCC 518, Chief Justice Lahoti has held that arbitration is an essential pre-condition to a valid talaq. According to Flavia Agnes this judgment has broken new ground in interpreting the Quranic principles in defence of women in Shamim Ara's case and invalidated all capricious and unilateral talaqs."

In the said judgment the learned Chief Justice has also quoted with approval the observations of two other learned Muslim jurists who were Judges of the Supreme Court namely Justice V. Khalid and Justice Baharul Islam apart from that of Justice V.R. Krishna Iyer the Chairman of the Commission. The following are the relevant extracts:

"V. Khalid, J., as His Lordship then was, observed in Mohd. Haneefa v. Pathummal Beevi : (1972 KLT 512 at 514. para 5)

"...I feel it my duty to alert public opinion towards a painful aspect that this case reveals. A Division Bench of this Court, the highest court for this State, has clearly indicated the extent of the unbridled power of a Muslim husband to Divorce his wife. I am extracting below what Their Lordships have said in Pathayi v. Moideen:

'The only condition necessary for the valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion, or in jest, or in anger that is considered perfectly valid. No special form is necessary for effecting divorce under Hanafi law ... The husband can effect it by conveying to the wife that he is repudiating the alliance. It need not even be address to her. It takes effect the moment it comes to her knowledge.'

Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed."

"There is yet another illuminating and weighty judicial opinion available in two decisions of the Gauhati High Court recorded by Baharul Islam. J. (later a Judge of the Supreme Court of India) sitting singly in Jiauddin Ahmed v. Anwara Begum and later speaking for the Division Bench in Rukia Khatun v. Abdul Khalique Laskar. In Jiauddin Ahmed case a plea of previous divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law. The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But

in spite of the sacredness of the character of the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution (para 6). Quoting in the judgment several Holy Quaranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters—one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected (para 13). In Rukia Khatun case the Division Bench stated that the correct law of talaq, as ordained by the Holy Quoran, is: (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law."

"In an illuminating judgment, virtually a research document, the eminent Judge and jurist V.R. Krishna Iyer, as His Lordship then was, has made extensive observations. The judgment is reported as A. Yousuf Rawther v. Sowramma. It would suffice for our purpose to extract and reproduce a few out of the several observations made by His Lordship: (AIR pp.264-65, paras 6-7)"

"6. The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute."

7. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglican judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture—law is largely the formalized and enforceable expression of a community's cultural norms—cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. It is a popular fallacy that a Muslim male enjoys, under the Quoranic law, unbridled authority to liquidate the marriage. 'The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (Namely, women) obey you, then do not seek a way against them". (Quoran IV:34). The Islamic 'law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously'. Commentators on the Quoran have rightly observed—and this tallies with the law now administered in some Muslim countries like Iraq—that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran and the Prophet. Dr. Galwash concludes that 'divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'talaq' or by 'khola'. Consistently with the secular concept of marriage and divorce, the law insists that at the time of talaq the husband must pay off the settlement debt to the wife and at the time of khola she has to surrender to the husband her dower or abandon some of her rights, as compensation."

In short the Muslim Law had recognized the role of the Rule of Law in secular matters although mullas and jejune jurists have stood in the way of luscent thinking on Muslim jurisprudence.

In this context, the Commission feels considerably strengthened in its view by the endorsement of such a progressive provision of law from a communication from Shri Justice V. Khalid, a scholar of Islamic jurisprudence and a retired Judge of the Supreme Court. He writes to say:

> ***"I've gone through the draft of the Bill. I agree with the object and need of such a Bill.***
>
> ***In addition to the two judgments mentioned in your letter, I understand that there is also a Bombay judgment approved by the Supreme Court with the same effect. In fact, I wanted the Kerala Waqf Board to circulate the above judgments among all the Mahal committees in Kerala to familiarize the public about the need of such a law.***
>
> ***Of course, we have to face the opposition from some sections of the community, but we can't help it."***

Prof. Duncan J. Derrett of the London University has emphatically negatived the chauvinistic dogmatism of reactionary elements in our religions painting their plea with a constitutional brush under Article 25:

> ***"It is a stale and discredited argument that personal laws amount to religion and Article 25 can provide a loophole whereby persons of any particular religion can escape provisions of statutes amending the laws."***

A broad spectrum perspective of secularism—A second look

The great religions of the world claim humanity as their constituencies. Theological pluralism is a fertile soil of divergent allegiances. Kerala is, of course, the home of Hindus but Christianity and Islam have a long history in this State and considerable following in the shape of devoted followers of these faiths and many churches and mosques. Communalism is a degeneration of religion, with bigoted dogmas, political motives blind gregariousness and materialistic objectives. If the nation is to remain united, if Kerala, multi-religious though, is to maintain its human solidarity in all dimensions of social

life, communal disruption using religion as catalyst must be arrested. You may go to temples, churches, mosques or other shrines according to your beliefs but in matters of public order, security, personal privacy and material and moral circumstances, the dogmas of religions shall not prejudice secular prescriptions of good conduct and decent behaviour and proper governance. You may do poojas and chant mantras according to your scriptures, recite the Holy Bible or congregate in the Church according to priestly proprieties or perform prayers five times inside the mosque or in any other hallowed place. That is your free choice but the institutions and the incumbents must obey the laws and orders of sanitation, make offerings or consume holy 'prasads' in consonance with secular prescriptions of cleanliness, sanitation and hygiene, freedom from adulteration and pollution and all other mandates of public health, public peace, purity of air, water and environs and so on. The employees, including even the priests at work, shall comply with regulations designed for their safety, amity and avoidance of noxious substances, practices and bad company.

Beyond the bounce of secularism, Law Reform has to dare and do legislation which will grapple with socialist transformation as envisioned in the Constitution. Globalizations and privatizations has changed radically the philosophy of Indian life and its profound depths. Our swaraj perspective as Constitutional objectives are the victims of foreign private enterprises too mighty in their flow; so too have Big Business and glamorous technology have captured the native markets. So much so, Women's Economic Independence has become a casualty. This shall not be. Here again the master engineering of economic reconstruction desiderate a powerful patriotic Law Reform. While this is a national challenge and beyond our Commission's jurisdiction we can and must steer our way with a sense of provincial moderation to resurrect Kerala agriculture and industry repelling the potential captivity to exotic tour de force.

Indian Penal Code (Kerala Amendment) Bill

Mortality is life's inevitability. As the end approaches, terrible illnesses inflict themselves on the body and unbearable sufferings become the lot of the victim. Lingering life may be prolonged, if artificial processes and extreme continuances by medical skill were resorted to. If such devices were withdrawn life will cease. Such termination will extinguish agony and grief, although the

last breath will also arrive together with the final moment of physical existence. Death is deliverance from dreadful disease and intolerable torment. It is a philosophical, medical and penological dilemma as to whether euthanasia is morally and legally justifiable in such situations? Excruciating pain with-no prospect of survival or Exit Distress by instant End? The Commission has no dogmatic view on the matter. Life is sacred but intense pain with no relief in sight is a torture which negatives the meaning of existence. Therefore, many great minds have opted for euthanasia. The Indian Penal Code and its author Macaulay are not the last word for the Law Reformer. The Commission has drafted a tentative bill which will hopefully receive deeper consideration, especially because some advanced countries have legally adopted the principle of euthanasia. The jurisprudence of euthanasia is a positive contribution to happiness during life and freedom from torment when no other alternative exists. Higher social philosophy which transcends limited material perspectives will illumine the noesis of euthanasia.

Multiple Solar Uses

Solar power is a perennial source of energy which will keep the earth rich in power resource especially where bright sunshine is Nature's gift. There is ignorance among people that solar power will be useful only for thermal advantages. This is not true. As versatile as electricity, less dangerous and free, solar energy can be utilized for versatile purposes, including locomotion. This power will be at our service, given research and discovery and storage methodology. The technology is already available except for those political administrators and orthodox primitives unconditioned with advance who are blind to everything new. Solar cars can be run. So too solar energy will be an innocent pollution free substitute for electricity. The Governor of Florida had announced some time ago that he would use 'solar' as high priority in his state, assigning nuclear alternative as a last item in the agenda. Why go so far. Nepal uses solar power. Open your eyes and walk into a rickshaw called "Solickshaw" which is liberated from manual exercise and exhausting physical processes but is run on solar technology. Solar power for locomotives must be given high priority by ALERT and the backwardness of the Kerala Government is the only reason why the State is not awakening to the abundance of the Sun's summons. A recent publicity note in a daily (Times of India dated 13th November 2008) is annexed hereto as Annexure B telling us

how Delhi has Rickshaws ride with solar power. More importantly, the Hon'ble Minister Kapil Sibal, when contacted by the Chairman of the Commission, was pleased to promise a note explaining the use of Solar Power for Rickshaw. The Commission strongly recommends use of solar for every need of energy. That is the best form of sun worship.

The true worship of the sun, that resplendent glory of Infinite Creation, is best performed by maximum utilization of every beam of energy emerging from that celestial Power geared to the happy transformation of all living beings in perfect harmony, through creative technology in versatile wonder, beyond holy chants and devout prayer. Hallowed humanization of Solar splendour is manifestation of universal divinity.

The Commission concludes, for the nonce with the poignant lines of Robert Frost:

The woods are lovely, dark, and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.

* * * * *

PART IV

A Reformatory odyssey of Legislative milestones

The task before the Commission in terms of the agenda proposed by the Government is Himalayan and justifies the creation of a perennial Commission which will have its hands full and its imaginative, creative operations heavy and weighty. So far as the present Commission is concerned even the wildest ambition of its members cannot visualize such an explosive, expanding extraordinary functional enormity. Even so, within its limited time and talents and resources the present Commission has executed an incredible job—a large number of Bills in their draft stage. The burden has fallen heavily on a drafting coterie, including the Chairman, Vice Chairman, Sri M.P.R.Nair, Sri Sahasrnaman and few other members with commitment who could and would sacrifice their valuable and had the expertise needed for the work. Dr. Alexander and Dr. N.R. Madhava Menon, among others though not formal members, have advised the Commission on certain special matters for which the Chairman expresses his profound gratitude to them.

The Kerala State, notwithstanding its high literacy rate, low maternity mortality rate and escalating human longevity rate, is making headway steadily backwards in the matter of employment, swadeshi agriculture and industry and other development activities. A broad- spectrum study of the human rights of the people as a whole shows that adivasis, Scheduled Castes and Scheduled Tribes and have-not humanity in general reveal more suffering and starvation and more diseases and physical-mental disablements, less employment, less educational escalation, because of aggravating commercialization of schools and colleges, aggressive communalism and galloping rise of Cancer and other fatal diseases, lesser opportunities of medical attention because of high cost of hospitalization and medicines, allopathic and ayurvedic and fewer State institutions. More desperation among the people leading to suicide, more terrorism among the youth and greater prevalence of freebooting by Big Business and philandering by girls for making quick money, disclose a steady decadence in morality and integrity, more religious fanaticism and godist pluralism with theological pluralism and grave violence, extravagant increase of alcoholism, psychotropic drugs and tobacco-related uses and diseases have multiplied mortality. Corruption has become omnipresent and omnipotent; and spirituality itself has become profit- making

business. Temples, churches and mosques have become shopping complex and dubious devotees, in unholy density of piety, have made pilgrim and priest's lucrative agencies, and management of sacred places have become pathological nidi with criminal potential.

Government and public institutions, ministers and judges are losing their respect among the public because vices and noxious habit are infiltrating into their folds. Politics has become a menace to public good and statesmanship is on long holiday from the Country. Are we relapsing into colonial culture, feudal fossilization and jungle life-style with Westoxication. On the whole Kerala, far from being an exception, is tending to be a paradigm of moral syndrome? Law Reform, with revolutionary fervour and indignant implementation and democratic ubiquity, must express itself to combat furiously this disgrace. Himalayan degeneracy must be resisted with rage if our socialist, secular democratic republic and federal units are to survive without surrender to totalitarianism, fascism and barbarity. If cultural collapse of Kerala is to be averted, a great awakening among the people as a whole and the State and politics, is a command of the time.

In this Part, the Commission is selecting some draft bills of key portent, novelty and perhaps, controversy for luminous explanation. The other draft bills are accompanied by brief notes which tell the reader the purpose and effect of those pieces.

Now we proceed to deal with certain seminal legislative adventures in their embryonic form. They are not complete in the statutory structure nor are they a work of expertise and in-depth learning. Of course, further discussion will take place when they reach the Government and undergo changes before the Legislature proceeds to consider them in greater detail. The topics are pioneer, the views are new initiatives, the spirit of reform is daring and the objective is to redeem the promise. We, the People made in the great Preamble and later progressive thought and to undo the deleterious deviances Western culture and high-tech, money-grabbing distortion of environment.

Before highlighting the novel or special features of some of the important draft Bills prepared and recommended, it may be useful to indicate briefly the nature of the task assigned to the Commission by the Government as per the terms of reference issued and the manner in which they have been carried out by the Commission.

The terms of reference mentioned 12 points on which recommendations were invited. The following five items of work has been assigned to the Commission as per the terms of reference:

4. (a) To rectify defects in the existing Laws.

(b) To repeal obsolete or unnecessary enactments.

(c) To consolidate, modify and reform the existing Laws.

(d) To simplify or modernize the Laws.

(f) To systematically develop and reform the law.

Objective in Clause (a)

Rectification of defects in the Existing laws:

Defects and deficiencies noticed in the existing laws have been rectified by proposing amendments to the existing laws. To achieve this objective, the Commission has drafted 39 Bills for amending equal number of existing Acts, Rules, Regulations and Guidelines. Highlights of some such Bills are given in this report little later after dealing with the special features of Bills recommending new legislations.

Objective in Clause (b)

Repealing of Obsolete and unnecessary Laws:

The Commission has attempted to perform the task of identifying and repealing obsolete and unnecessary enactments as indicated in clause (b) of the terms of reference. On scrutiny of the enactments in force at the time of appointment of the Commission, it was found that 810 enactments have become obsolete for various reasons and are to be repealed. Further a some of the amendment Acts also were found to be really unnecessary and liable to be repealed in view of the amendments made to the respective parent Acts by incorporating new provisions as shown in the Amendment Acts. On the basis of the above findings, **The Kerala Repealing and Savings Bill** was accordingly drafted for repealing 810 enactments which have become obsolete and unnecessary.

On 31st March 2008, the said Bill along with 4 other bills drafted by the Commission was forwarded to the Law Minister for necessary action by the Government. However, on 19-11-2008, the Chairman of the Commission received a letter from the Law Minister, informing that the Government had already promulgated an Ordinance dated 3-12-2005 repealing a total number of 697 enactments as obsolete. Referring to the decision of the Supreme Court in Venkata Reddy and others v. State of Andra Pradesh [1985 (3) S.C.C. 198] it was pointed in the letter that though the Ordinance expired and has not been so far replaced by an Act passed by the legislature, the repeal effected by the Ordinance would stand and as such it may not be necessary to proceed with the Bill recommended by the Commission so far as the repeal effected by the Ordinance was concerned. As such the Commission was requested to express its considered view in the matter. Taking note of the above circumstance, the Commission has finalized the earlier draft of the Kerala Repealing and Saving Bill by excluding the enactments already repealed by Ordinance No. 18 of 2005 and retaining the balance number of 107 enactments in the Schedule attached to the Bill. The Commission recommends the Government to accept the Kerala Repealing and Saving Bill either in the original form or in the revised form, both of which are before the Government.

Objective in Clause (c):

Consolidation, Modification and Reformation of Laws:

The next task undertaken by the Commission and completed to the extent possible is the one referred to in clause (c) namely consolidation, modification and reformation of existing laws. The object sought to be achieved by the above term of reference seems to be unification of the different enactments in force on the same subject in different parts of the State so as to avoid the inequality arising out of application of different laws in different parts of one and the same State. Of course, the terms of reference contemplated modification and modernization of existing laws also besides unification of laws. To the extent possible the Commission has attempted modification and modernization of laws also.

On a careful analysis of the existing enactments on various subjects, it was found that on 8 different subjects listed below; different enactments are in force in different parts of the State requiring unification.

1. Town Planning.
2. Fisheries.
3. Canals and Ferries.
4. Health, Hygiene and Epidemic Diseases.
5. Societies Registration.
6. Registration of Medical Practitioners.
7. Prevention of Begging.
8. Christian Marriage.

The Commission is happy to report that different enactments in force on the above 8 subjects have been unified and 8 different Bills drafted and recommended. Thus, as far as the unification or codification part of the task is concerned, the Commission has carried out the work fully. Of course, while drafting the Bill, the Commission has also effected a number of modifications and improvements to the extent possible within the limited time and other facilities available to the Commission. Modification and modernization are, of course, steps to be taken from time to time and the Commission hopes that Government would take suitable steps in that direction in future also.

The Commission may now indicate briefly the manner in which codification or unification of enactments has been carried out and the broad features of the Bills thus drafted on the 8 subjects.

1. The Town Planning Laws:

A new bill titled **The Kerala Rural and Town Planning Bill** has been drafted to unify, modify and modernize the existing two enactments namely:

(1) The Tranvancore Cochin Town Planning Act, IV of 1108 and,

(2) The Madras Town Planning Act, VII of 1920.

The above enactments are pre-constitutional and have application only in two different areas of the State. The first has application only to Travancore and Kochi regions and the other in Malabar area of the State. The provisions in the two Acts were found to be quite inadequate and outdated.

The new legislation as per the proposed Bill is a comprehensive one to ensure planned growth of land use and development in both urban and rural areas in the State. Provisions have been incorporated in the Bill making it obligatory on the part of the Government to constitute a State Town Planning Board, and appoint at State level a Director of Town planning. Each local authority is bound under the Bill to constitute a planning authority within its jurisdiction. Preparation and implementation of Town Planning Schemes on a time bound basis is the most important aspect dealt with elaborately in the Bill. Chapter X of the Bill enumerates several actions and omissions done contrary to the provisions in the Bill as offences punishable under the Bill for effective implementation of the provisions in the Bill.

2. Laws on Fisheries:

At present there are two enactments in force on the subject of Fisheries. They are,

(1) Travancore-Cochin Fisheries Act, 1950 (Act 34 of 1950) and,

(2) Indian Fisheries Act, 1897 (Central Act 4 of 1897)

The above two enactments have been unified by framing **"The Kerala Inland Fisheries and Aqua-Culture Bill"**. Apart from the fact that ancient concepts of fisheries have developed very much in recent times, the concept of aqua-culture has also developed in the State significantly. Taking note of the said developments, a new bill unifying the existing two enactments referred to above has been drafted incorporating a number of provisions found necessary to provide for the sustainable development, management, conservation, regulation, protection, exploitation and disposal of inland fish, fisheries and aqua-culture centres. Fishing is a source of livelihood for a large number of people in this State. The development and management of fisheries and other allied activities need to be regulated in public interest so that the trade in fish can be carried on smoothly and without hazards. Fish is national wealth and earns considerable foreign exchange besides providing employment

to a large number of poor people living in coastal areas of the State. Protection of the young ones or larvae of fish has to be carefully undertaken systematically. Licensing provisions have been made in the Bill for those possessing Registration Certificates as a regulatory measure. Any violation of the mandatory provisions in the Bill has been made punishable offences. The Department of Fisheries has been entrusted with the duty to manage and control inland fishery and allied activities in the Government Fishery waters. It is hoped that the Bill if accepted and made into an Act it will be a codified law sufficient to cope with the developmental needs in the field of Fisheries and Aqua-culture.

3. Canals and Fisheries:

"The Kerala Public Canals and Backwaters (Protection and Navigation) Bill" has been drafted to unify 4 different enactments now in force dealing with the subject "Canals and Ferries", namely,

(i) The Travancore Public Canals and Public Ferries Act, 1096 (Regulation V of 1096)

(ii) The Madras Canals and Public Ferries Act, 1890 (Act XI of 1980)

(iii) The Cochin Ferries and Tolls Act, 1082(Act III of 1082)

(iv) The Cochin Public Canals and Backwaters Navigation Act, 1 of 1092.

Apart from the unification of the 4 Acts, the Bill contains provisions defining the word "House Boat" a comparatively new innovation in the field of navigation. Conditions subject to which house boats can be registered, licensed and navigated without causing environmental pollution in canals and backwaters and other stringent provisions are incorporated to ensure safe navigation through the canals and backwaters to prevent tragedies like Thattekat and Alappuzha boat tragedies. Detailed provisions have been incorporated in the Bill to deal with the various aspects regarding registration, licensing, fitness and safe voyage using house boats in Chapter VII. Clause 41 of the Bill makes it mandatory to have at least two divers and swimmers in each house boat, if not more. Clause 42 of the Bill deals with safeguards to be taken to prevent environmental pollution while using the house boats. Violation of any provisions in Chapter VII makes the violator liable for a punishment of imprisonment upto two years and a fine of Rs.10,000.

4. Health, Hygiene and Epidemic Diseases:

Four different enactments on the above subjects has been unified and amended substantially and codified as a Code called **"The Kerala Public Health Code"**. The enactments unified are,

(1) The Travancore Cochin Public Health Act, 1955.

(2) The Madras Public Health Act, 1939.

(3) The Travancore Epidemic Diseases Act, 1073 and,

(4) The Cochin Epidemic Diseases Act, 1072.

The Code proposed is not only a unified enactment as already indicated but contains various provisions involving the local authorities to ensure effective control in the matter of maintaining hygienic conditions in both urban and rural areas of the State in an exemplary manner to prevent the outbreak of epidemic diseases and control them to the maximum extent possible with participation of the local people. Important matters like causing public nuisance, water supply, prevention, notification and treatment of communicable diseases, control of insects, control of H.I.V./AIDS, Food control, maintenance of markets, slaughter Houses, Meat stalls etc. are dealt with exhaustively in separate chapters in the Bill. Provisions have been incorporated in the Code for providing amenities for the public to develop and maintain physical health, to have medical re-imbursement facility, Palliative Care Units and centres for providing counseling and assistance in the matter of family control etc. Elaborate provisions have been made in the Code prescribing the standards to be maintained and the requirements to be complied with by clinical establishments following the different systems of medicines and treatment in the State. Special provisions have been incorporated into the Code providing the manner in which standard fee payable for treatment in Registered Clinical establishments is to be fixed. Provisions have also been made to maintain high standard in the services rendered by the clinical establishments registered under the Act and those provided by the State. As part of maintaining general health of the public, provisions have also been incorporated to regulate the solid waste management. Thus the code if made into an enactment would become truly a complete Code having provisions to ensure the basic needs of a developing society to lead a healthy life in Kerala.

5. Registration of Charitable Societies:

There are at present two enactments dealing with the registration and control of charitable societies of different kinds excluding Co-operative Societies. They are,

(1) The Travancore-Cochin Literary, scientific and Charitable Societies Registration Act, 1955 (Act XII of 1955) and,

(2) The societies Registration Act, 1860 (Act XXI of 1860).

The first of the enactment applies to the Travancore-Cochin area of the State and the other in the Malabar area of the State. It is to be specially noted that the 2nd enactment noted above applies only to charitable societies, or societies established for the promotion of science, literature or the fine arts, or for the diffusion of knowledge and such other charitable purposes though the title of the Act may give an impression that it applies to all kinds of societies. Accordingly, **"The Kerala Public Charitable Societies Bill"** has been drafted to unify the law regarding registration and control of administration of all societies registered under the Bill and coming within "Public Charitable Society" as defined in the Bill.

The Scheme adopted while drafting the above Bill for the purposes of registration, management and control of the affairs of the charitable societies including their dissolution in appropriate cases is thus: Under the Bill, there is a duty cast on the Government to nominate a senior officer in the service of the Government preferably in the Co-operative Department as Charity Commissioner for the purpose of exercising and performing the various powers and duties conferred on the Charity Commissioner, under the Bill. All the societies coming within the definition of charitable societies under Clause 2(c) of the Bill have to be registered with the Charity Commissioner after complying with the relevant mandatory provisions in the Bill. All societies already in existence are bound to re-register under the provisions of the Bill, if they want to continue functioning after the commencement of the Act. Management of the affairs of the society shall vest in a Governing Body constituted in accordance with the provisions of Memorandum of Association accepted by the Charity Commissioner and as amended from time to time in accordance with law. Elaborate provisions have been incorporated in the Bill

to control the management of the affairs of the society by the Governing Body and General Body of the society. As per Clause 7 of the Bill, all properties of the society have to be treated as vested in the Governing Body of the society. Clause 8 imposes certain conditions in the matter of acquisition and transfer of properties by the Societies registered under the Act. This is a very important provision of law newly recommended by the Commission to safeguard the interests of the charitable societies and the public. Whenever property worth more than Rs.50, 000 is sought to be acquired or transferred, prior permission of the Charity Commissioner is to be obtained. Keeping of Books and Accounts of the Society, preparation, auditing and filing of annual balance sheets etc. have been made compulsory by making the default in the maintenance and submission of such records and papers an offence punishable under the Bill. Charity Commissioner has been given very wide powers under Clause 19 to call for accounts and to conduct surprise inspection of books and to submit reports to the Governments, if any defects in the management of the affairs of the societies are found out. Detailed provisions have also been incorporated enabling the dissolution of societies if found necessary and the consequent distribution of assets of the society under the Bill. The Commission is of the considered view that the Bill if accepted can be basis for a unified and modified law to regulate all affairs of charitable societies in Kerala from its inception to its dissolution in appropriate cases in a fair, reasonable and strict manner unlike under the different laws existing now governing such institutions.

6. Registration of Medical Practitioners:

Two different systems are in force at present for Registration of Medical Practitioners belonging to different systems of medicine, working in different parts of the State, and connected matters.

(i) The Travancore-Cochin Medical Practitioners Act, 1953 and,

(ii) The Madras Medical Registration Act, 1914

As the titles of the Acts indicate, the first one is applicable only to the Travancore-Cochin area and the other in the Malabar area. The Commission has unified the above two enactments and drafted, **"The Kerala Medical Practitioners Bill"** which is being recommended for the acceptance of the Government.

Under the scheme of the provisions in the Bill, Government is to constitute 3 Councils at State level, one council each for Modern Medicine, Homeopathic Medicine and Indigenous Medicine. The Council of Indigenous Medicine is to have control over the practitioners of Ayurvedic Medicine, Siddha, Unani tibbi and Paramparya Vaidyas and Marma Chikitsakas. The qualifications and other terms and conditions of the members of the Council have been prescribed as per the provisions in the Bill. Detailed provisions have been made in the Bill indicating the manner in which the Council has to function while exercising the powers and performing the duties under the Bill. For the convenience of carrying out the administrative duties of the Council, they are empowered to constitute Executive Committees and other committees. Under Clause 19 of the Bill the Government is to appoint after consulting each Council a Registrar for each of the Councils. The Registrar so appointed shall be the Secretary of the Committees constituted by each Council. Clause 20 especially deals with the duties of the Registrar. The primary duty of the Registrar is to prepare separate registers for Registered Practitioners of Modern Medicine, Homeopathic Medicine, Ayurvedic Medicine, Siddha Medicine, Unani Tibbi Medicine, traditional practitioners of Ayurveda medicine known as Paramparya Vaidyans and practitioners of Modern Medicine having experience in the practice of medicine for more than 20 years and registered under the provisions of the Bill. Registrar shall keep the Registers up-to-date by deleting or adding the names of practitioners from time to time in accordance with the provisions of the Bill. The Registers so kept shall be deemed to be public documents under Section 74 of the Indian Evidence Act. Government is given the power to dissolve any Council if they fail to perform their duties after complying with the procedure prescribed in Clause 22 of the Bill.

Clause 23 is an important provision prescribing the qualifications which the practitioners should possess to become eligible for registration under the Bill. There are provisions for removal of the names from the list of practitioners

and addition of new names on various grounds provided under the bill. An appeal is provided to Government from the decision of the Council under Clauses 24, 27, 28 and 33.

Another notable innovation in the law is the incorporation of a separate part, (Part 3) containing provisions prohibiting statutorily, the practice of medicine by any person without having the qualifications prescribed under the Bill as per schedule attached and the registration under the Bill. The authorities who are entitled to confer the title prescribed under the Bill have been enumerated in the Schedule. There is also a prohibition of conferment of any of the qualification by any other authority other than those indicated in the Schedule. Violations of the mandatory provisions contained in the Bill have been made offences punishable under the Bill. Government is authorized to prosecute any person who violates any of the conditions in the Bill and practices in any system of medicine. Thus the Bill contains effective provisions to update and modernize the existing law on the subject.

7. Laws relating Christian Marriage:

At present as far as Christians in the State are concerned there are two enactments in force on the subject of marriage. One is the Indian Christian Marriage Act, 1872 and the other the Cochin Christian Civil Marriage Act, 1920. The first enactment applies to the Malabar area of the State alone while the second enactment applies to the remaining area of the State. Therefore, a felt need exists to have a single enactment on the subject applicable to the entire state. The Bill titled **"The Kerala Christian Marriage Bill"** is intended mainly to achieve the above object of unification, modification and modernization.

While drafting the Bill an attempt has been made to provide a satisfactory and effective procedure to be complied with before solemnization of marriage under the Bill so as to ensure due publicity, authenticity and sanctity of the relationship created between the parties as a result of marriage conducted and registered under the Act. Under the Bill, different authorities

are empowered to solemnize and register the marriage and issue Certificate of Registration of Marriage which under the Bill is declared as conclusive evidence of the solemnization of marriage between the parties whose names are recorded in the Certificate.

8. Prevention of Begging:

At present there are three enactments on the above subject applicable in the different parts of the State. They are:-

1. The Travancore Prevention of Begging Act, 1120 (XIII of 1120),
2. The Cochin Vagrancy Act, 1120 (Act XXI of 1120),
3. The Madras Prevention of Begging Act, 1945 (Act XIII of 1945).

The Commission has unified the different laws on the above subject by drafting **"The Kerala Prevention of seeking Alms and just Rehabilitation Bill"**.

In an attempt to prevent begging in all its forms, the word 'begging' has been defined in a very wide manner so as to include different modes of begging. As in the existing statutes the Bill also prohibits begging in any form whatsoever. The Bill further goes on to make elaborate provisions for rehabilitating the person who are involved in the practice of seeking alms whether by themselves or at the instance of others. To achieve the object of rehabilitating persons seeking alms, provisions have been incorporated in the Bill, making it a mandatory duty of the government to establish 'Work Houses' and 'Relief Centres' wherever found necessary . Any offender on punishment can be sent either to a Relief Centre or to a Work House, so that he can live there and make an earnest attempt to reform his life for his own benefit and for the benefit of the society. In the Work House he can work and earn wages. Bill also contemplates the constitution of Advisory Committees and Visiting Committees for supervising the living conditions in the Relief Centres and Work Houses besides the appointment of officers like Chief Inspector, Protection Officer etc. Provisions have also been made authorizing the Chief Inspector or other officers authorized by him, to release the inmates from the Relief Centers and Work Houses for short period or unconditionally in

appropriate cases. Special provisions have also been made empowering the Government to transfer the inmates in Relief Centres and Work Houses to Government hospitals and other institutions if such inmates suffer from mental disorders or contagious diseases. If the Bill is accepted it can form the basis of a new comprehensive legislation on the subject which would enable the Government to control the evil of seeking alms as a means of livelihood, rehabilitate the persons involved in the above evil practice and harness their potential to the benefit of the society.

Objectives in Clauses (d and f)

Bills drafted as basic documents for legislation of new enactments and amending certain existing enactments

The objectives to be achieved under Clauses (d) and (e) of the reference are simplification and modernization of laws and systematic development and reformation of law. The two objectives seem to be in a way overlapping. Systematic development and reformation of law may in many a case involve simplification and modernization of law also. The scope and implications of the objectives are really wide and possibly it is beyond the reach of any Commission to achieve the above objectives fully. The Commission, taking it as a challenging task has worked strenuously for achieving the same to the maximum extent possible. In the course of such a Himalayan effort, about 104 Bills for enacting legislations including about 39 Bills for amending an equal number of existing Acts, Rules or Regulations have been drafted and recommended. Briefly, the Commission is mentioning the salient features of some of the most important Bills from the above collection of Bills.

As already noted, about 104 Bills have been drafted by the Commission as basic documents for legislation. Subjects covered by the Bills are wide and varied. These Bills have been drafted to satisfy one or the other needs of the developing Kerala society as a whole or a particular section of the society deserving special treatment based on special laws. For convenience sake, the bills explained briefly hereunder have been catagorised into 9 different catagories as follows:—

Bills drafted :

1. To apply to different sections of the society generally classified as weaker sections of the society.

2. For modification and reformation of laws governing the ownership, control and use of land.

3. For legislatation of new laws and amendments to existing laws relating to Administration of Justice, law and order in State.

4. For maintaining social security and public order.

5. For preserving nature and environment as the most valuable asset for healthy life on earth.

6. For the purpose of statutorily prescribing the duties to be performed by all including the Government to show comparison to all living beings.

7. For Family Well-being and Regulation of Hartals.

8. For enacting new laws to regulate certain temporal matters connected with religion as opposed to spiritual matters in the best interest of the society.

9. Relating to Euthenacia, suicide and women's code—the last but the most revolutionary recommendations.

1. Bills drafted to apply to different sections of the society generally classified as weaker sections of the society. — A group of Bills have been drafted to apply especially to Children, women, widows and landless and shelterless citizens etc.

Children's Code Bill

Of the lot, Children's Code is the most important one. Attempt has been made to propose a complete and comprehensive code containing laws applicable to children including juveniles and children in conflict with law.

The Bill contains 121 clauses included in 13 Chapters. For the purpose of effectively implementing and safeguarding the rights of children throughout Kerala and to protect them from all forms of discrimination, exploitation, cruelty, abuse, including sex abuse and to provide them with necessary

amenities and facilities so as to enable them to develop and grow in a healthy, conducive and pleasant surroundings free from wants and generally to promote the welfare of children and their all round development, the Commission has incorporated several provisions in Chapter I of the Bill casting responsibility on the Government to constitute a body to be known as "the Kerala State Commission for Children" and a Fund called "Kerala State Children's Fund". The Commission to be constituted under the Bill has been given vast powers to implement the provisions of the Bill. Such functions have been specified in great detail in the various provisions in Chapter I of the Bill. To make it a compete Code, provisions have been incorporated in Chapter II to provide free and compulsory education upto Higher Secondary Grade in spite of the provisions in Kerala Education Act. The Commission has drafted 'The Kerala Free and Compulsory Education Bill' separately. Though to some extent, the provisions in the Code and the Bill may overlap, there are some distinctions between the two and as such both are being recommended. Special provisions have been incorporated in chapter III to provide adequate health services and facilities to children though the period of their growth to ensure their full physical, mental, formative cultural, moral and social development. Government is to formulate suitable schemes to provide sufficient care even to women during pregnancy. The provisions in Chapter IV are intended to protect children from being economically exploited and otherwise abused. Subjects like protection and care of children, special provisions relating to right of girl child, differently-abled child and abandoned child are provided in Chapters V, VI and VII of the Bill. To afford protection and care to children with different disabilities, Government is directed to establish various institutions like, After Care Home, Children's Home, Juvenile Home, Observation Homes, Shelter Homes, Protective Homes and Schools for differently-abled Children etc. Government is also directed to constitute a "Special Juvenile Police Unit" in the Police to control and aid the juvenile delinquents and other disabled children in times of need. Altogether 20 clauses in Chapter IX of the Bill deal exclusively with the subject of adoption of children through various agencies, again as a measure to assist the children who have no parents and other close relations to look after and show parental care and protection to destitute children. Chapter X deals with juveniles in conflict with law and connected matters. Chapter XI and XII deals with the

Children's Courts, offences and punishments created as per the provisions in the Bill. It is hoped that the Bill will be accepted and made into a code so that the future generation of children who are the hopes of tomorrow, shall have statutory right to claim and receive proper facilities to lead a healthy, educated and morally sound life and become responsible citizens.

The Kerala Free and Compulsory Education Bill

Taking the view and knowing fully well that free education now offered upto the age of 14 is not free in many respects and is not really compulsory and that there is need to have a much wider and beneficial legislation to provide free and compulsory education, the Commission has drafted **The Kerala Free and Compulsory Education Bill**. The main reason why the Commission has chosen to draft and recommend the above Bill is the realization that as per the Constitutional provisions in Art. 21 A and 51 A, it is the duty of the Government to offer to the children free and compulsory education until they attain the age of 14. If any parent fails in his duty to give his child education upto the age of 14 at least, he can be proceeded with and punished. Moreover the local authorities also have been entrusted with the duty to maintain a Register of Children upto the age of 14 and to ensure whether the children are being given compulsory education. The Commission recommends this Bill for acceptance and implementation by the Government.

The Kerala Right to a Small Farm and Shelter Bill

It is a Bill drafted with the noble intention of conferring a statutory right on the lowest of the lowly class in the society who are either landless and homeless or landless or homeless to assist them to have a minimum extent of 5 cents and a shelter with minimum convenience which can be put up spending about Rs. 50, 000/- or such other amount as the competent authority may decide under the Bill. The idea behind the legislation is to make available to all families at least a minimum extent of land and a small shelter so that the fundamental right guaranteed under Art. 21 to live with dignity can be ensured.

The Code for Custodial Correctional and Habilitative Justice to Women Bill

Taking note of the current thinking that women, generally constitute a weaker section of the society and that they need special treatment and protection while in the custody of police or other authorities or in jails, the Commission has drafted a Bill to form a strong basis for legislation of a new comprehensive Code called "The Code for Custodial Correctional and Habilitative Justice to Women Bill".

Provisions in the Dowry Prohibition Act have been made stricter. So also concession in payment of court fee has also been granted to women who belong to BPL class. The above two recommendations are made through the Bill for amending the Dowry Prohibition Act and the Kerala Court Fee and Suits Valuation Act.

The Kerala Widow's Right to Shelter and Maintenance Bill

Among women, widows form a special category of weaker section who deserves support of the society in many respects. It is important that measures to support them are given statutory recognition and benefits granted as of right and not as a pitiful grant. To achieve this objective or mission the Commission has drafted **The Kerala Widow's Right to Shelter and Maintenance Bill**. Under the Bill, the Commission has taken care to place the primary duty of providing shelter to and maintenance of widows and children, if any, on her parents. In case both classes of relations mentioned above are found to be not in a position to provide shelter and maintance to widows, such widows are given the right to apply for providing a shelter and maintenance under the Bill to the competent authority. On the death of the widow, if she has no children, the shelter given to the widow would revert back to the Government. So also on the death of widow, the maintenance granted would also cease automatically.

Kerala Senior Citizens (Maintenance, Care, Protection, Welfare and Creative Involvement) Bill

In recent years longevity of people in general and in particular in Kerala has increased considerably. Those who have attained the age of 60 years and above form a class by themselves and that class has been recognized both by the Central and State Governments as Senior Citizens for conferment of various benefits. There cannot be any doubt that Senior Citizens are a group of persons requiring special treatment. In this view, a comprehensive legislation has been drafted titled "The Kerala Senior Citizen (Maintenance, Care, Protection, Welfare and Creative Involvement) Bill".

As the title of the Bill itself indicates, the Bill contains provisions for maintenance, care, protection, welfare and creative involvement of senior citizens in all kinds of activities for public good. The Bill has been drafted mainly to give effect to the provision contained in Article 41 of the Constitution which directs the State to provide for public assistance to senior citizens, to live in dignity and justice. As a welfare State, it is the duty of the Government under the Constitution to provide care and protection to senior citizens and encourage them to involve themselves in creative work for the development of the society especially of the younger generation. Senior citizens have valuable energy, experience, knowledge and expertise acquired by them over a long period of working life which would certainly constitute a rich resource for national development and progressive prosperity, if their potential is fully and properly utilized for the benefit of the society. It is with this laudable vision that the Commission has drafted the Bill which if accepted and made an enactment will be the first of its kind in Kerala.

In the Bill, senior citizens have been grouped into four categories. The Commission has taken care to cast the responsibility of maintenance, care and protection of senior citizens primarily that of their children themselves if they are capable of discharging such responsibilities. It is only in the absence of such capable children, the State steps in to maintain and protect senior citizens. In the matter of granting them certain common concessions for travel, payment of tax, interest on deposits etc. the State performs its obligations to the senior citizens whether they are rich or poor. Provisions

have been incorporated in the Bill to make it an offence in case the children commit default in the matter of maintaining the senior citizens as provided in the Act. Such children can be prosecuted and punished. Reimbursement of medical expenses has also been provided to senior citizens in a qualified manner subject to certain conditions specified in the Bill. Government is made responsible for setting up of a new department to deal with the matters connected with senior citizens especially for devising appropriate schemes for social, educational and economic development of the State by involving senior citizens. Government is also bound to establish and maintain sufficient member of Senior Citizens' Homes. Various other monetary and other assistance to Senior Citizens have also been incorporated in the Bill.

2. Bills drafted for Modification and Reformation of laws governing the ownership, control and use of land

A bunch of new Bills and amending Bills have been drafted by the Commission on the basis that prevention of concentration of large extent of land, especially urban land in the hands of a few persons and speculative transactions with respect to such land with the sole motive of profiteering is a laudable objective to be achieved in a socialist, democratic country like India and in a State like Kerala. Similarly taking note of the fact of spiraling price of land in urban and rural areas of Kerala and the practical difficulties for a common man, not to speak of persons below poverty line, to acquire even a small piece of land just sufficient to put up a shelter. There is compelling need to ensure equitable distribution of lands to the deserving people. The Commission has drafted a new Bill to fix the maximum value of lands in Kerala. It is true that government had already taken steps to fix value of land on the basis of executive orders. The Bill if made an enactment would give statutory recognition to the value fixed under the provisions of the Bill. Further, two more Bills have been drafted to amend the provisions of Kerala Land Reforms Act. Another amending Bill has been drafted to amend the Land Acquisition Act for the purpose of avoiding the untold miseries of people who are deprived of residential houses and appurtenant land due to acquisition proceedings for the developmental activities undertaken by the Government or by Companies and Corporations both national and multinational. For the

purpose of enabling the Government to recover Government lands in the hands of trespassers or in the possession of quantum lessees or licensees and to make use of such land for public purposes beneficial to the people, especially the lowest and lowliest, Commission has drafted The Kerala Recovery and Distribution of Government Lands Bill.

With the above introductory observations, let us deal in with the special features of some of the above statutes.

The Kerala Urban Land Ceiling and Registration Bill

The provisions in the above Bill may have application only to the areas coming within Calicut, Cochin and Trivandrum cities under the category of lands described as "Urban agglomeration" and defined in Clause 2(l) of the Bill. That would mean that they will apply only to the areas within the Calicut, Trivandrum and Cochin cities and peripheral area of five kilometers or such other area notified by the Government under the provisions of the Bill. Government is to constitute a Board to recommend the urban areas where the land ceiling has to be implemented and to fix a ceiling limit within such areas. Detailed provisions have been incorporated specifying the powers and duties of the Board and the Government regarding fixation of ceiling limit, ascertaining the excess land, entering upon and taking possession of excess vacant land, allotment of land vested with the Government under the provisions of the Bill etc. Various acts and omissions and violations of the provisions of the Bill have been constituted as offences punishable under the Bill. On and after the fixation of ceiling, in the case of transfers effected by any person having excess land, the extent of such lands transferred shall also be taken into consideration while fixing his ceiling limit. For the purposes of determining the ceiling cases and appeals which may arise on the basis of the provisions in the Bill, Urban Land Tribunals and Urban Appellate Land Tribunals have to be constituted by the Government. For excess land vested in the Government, compensation is to be paid under the provisions of the Bill. Apart from the Urban Land Tribunal and Appellate Authority, a competent authority is to be constituted for receiving statement of vacant lands and preparation of draft statement to be published before finalizing the ceiling case and discharging such other functions.

The Kerala Recovery and Distribution of Government Land Bill

The scheme adopted in the Bill to assess and determine the exact extent of Government land in the possession several categories of unauthorized occupants like tenants and licensees who continue in possession on the basis of time-expired lease and license, tenants and licensees in possession paying only very nominal rent or license fees, encroachers and persons in possession of excess land vested in the Government or persons in possession of land on the basis of transfers in violation of the ceiling provisions etc. is thus: The Bill mandates that such lands shall after the date to be notified as "the appointed day" will vest in Government. Further, clause 6 of the Bill makes it obligatory on the part of every holder of Government land to file a detailed statement before the Land Tribunal concerned, declaring the particulars of the land in their possession. Any person having information that any other person is in possession of Government land can also file a statement before the Land Board and bring such fact to its notice. The Land Tribunal can also initiate suo motto proceedings. The Tribunal is empowered to prepare a draft statement and on that basis after hearing the objections of the parties concerned, to pass final orders fixing the excess land and to issue directions to surrender excess land. Appeals to the Appellate Authority and a Revision to the Government are also provided to the aggrieved parties. The most important provision in the Bill is clause 15 which obligates the Government to distribute the land to persons in accordance with the priority fixed in the clause, which is as follows:-

(a) Landless Scheduled Tribes

(b) Landless Scheduled Castes

(c) Landless people below poverty line

(d) Scheduled Tribes having land less than fifty cents

(e) Scheduled Castes having land less than fifty cents

(f) People below poverty line having land less than fifty cents

Filing of false statement, concealing correct particulars or giving incorrect particulars are declared as offences under clause 16 of the Bill. So also it is an offence to file a statement without bona fides meant only to

harass any other person. Clause 9 of the Bill confers power on the Land Tribunals to assign the land to the person in possession of the land on his application paying the market value of the land fixed by the Land Tribunal.

The Kerala Land (Fixation of Maximum Value) Bill

The method of fixing maximum value of land recommended to be adopted as per the provisions in the Bill is thus:

Each local authority has to constitute a committee as provided in clause (3) to submit a recommendation regarding the maximum value which is considered proper for the land under its jurisdiction. Such recommendation by the committees should be submitted to a Board constituted by the Government as indicated in clause (4) of the Bill. The Board after due deliberations should prepare a draft statement giving the details of the maximum value of various categories of land in the state. Such draft statement shall be published as prescribed by the Rules inviting objections from the public. On receipt of objections the Board shall consider and determine the maximum value of the land and recommend the same to the Government for its consideration and final decision. Government shall not be entitled to modify the maximum value recommended by the Board except for reasons recorded in writing. Maximum value so fixed shall be valid for a minimum period of five years and shall be liable to be modified only on the basis of the further recommendation of the Board. After fixation of maximum value of land there is a prohibition against transfer of land for any value higher than that fixed by the Government. Similarly there is a bar against registration of any document mentioning the value of land in excess of the maximum value fixed by the Government.

The Land Acquisition (Kerala Amendment) Bill

The salient features of the Amendment Bill to be highlighted are two in number.

(1) One of the provisions in the Bill makes it obligatory on the part of acquiring authority to offer a rehabilitation package in cases where as a result of acquisition a person or family is deprived of their residential house

and the appurtenant land and they request for land and a residential accommodation in substitution. In a qualified manner a right to make such claim is conferred as per the provisions in the Bill.

(2) The other right sought to be conferred on the persons from whom land is taken is to claim return of the acquired land if it has not been used for the purpose for which it was acquired or for any other public purpose within a period of 10 years from the date of taking possession of land acquired. Such right can be exercised by moving the District Collector expressing the readiness of the applicant to return the amount of compensation received with interest at such rate as fixed by the Collector.

The two amendments are being recommended mainly to redress the genuine grievances raised by persons adversely affected by acquisition of land. There has been considerable laxity in providing alternate land and shelter to the affected persons, deprived of their homestead. The Bill is recommended to remedy this unfortunate situation.

3. Bills recommending legislation of new laws and amendments to existing laws relating to Administration of Justice, Law and Order in the State

A large number of Bills have been drafted by the Commission to amend some of the existing enactments to aid and assist the administration of justice, law and order in the State in a more effective and less expressive and easily accessible manner so that irrespective of rich or poor, the benefits of administration of justice and law will react all litigants uniformity.

The Commission would briefly deal with only a few from among the above Bills to highlight the special features and the objects sought to be achieved by such Bills if enacted by to the Legislation.

The Kerala Ad hoc and Itinerant Courts Bill.

Existence of mounting arrears of pending cases in all Courts especially in the lower courts and the huge expenses incurred to seek justice from Courts situated at far off places by the litigants, especially the poor, is one of the compelling factors which prompted the Commission to draft the above

Bill. “Justice delayed is justice denied” and “Render justice at the door step of the seeker of justice” are the two principles which guided the Commission in drafting the above Bill.

The Bill contemplates constitution of Ad Hoc Courts as defined in every City, Corporation, Municipality, Block-Panchayat and other areas as decided by the Government as early as possible after the Commencement of the Act. Such courts would be in addition to the ordinary Civil and Criminal Courts and would function under the jurisdiction and control of the respective District Judge concerned. Constitution of Ad Hoc Courts can only be done in consultation with the Chief Justice of the High Court. Retired judicial officers belonging to cadres of District Judge and below upto the Cadre of Munsiff, Advocates having more than 10 years of practice or any other person having qualification prescribed by the Government after consultation with the Chief Justice can be appointed to preside over Ad Hoc Courts. Such Courts will not have powers to entertain any case on their own but shall have all powers to try cases transferred to it by regular courts. While trying cases, such courts shall have all the powers of ordinary civil or criminal courts. Such courts are also empowered to go on circuit and dispose of cases at such places and at such time as the Court may determine with notice to the parties. For the purposes of filing appeals, revision etc. such courts will be treated as courts subordinate to the District Court within whose jurisdiction the Ad Hoc Court is constituted and is expected to function.

Creative communication between Supreme Court and High Court on the one hand and The Kerala Government on the other hand—A Courier Bill

The Courier Bill is a novel idea, the first of its kind in Kerala and possibly in India too.

The Bill is being recommended taking note of the importance of having an instrumentality to ascertain and communicate the rulings of the Supreme Court, the High Court of Kerala and other High Courts which declare the law for the nation including Kerala, for appropriate and timely action by the State of Kerala. In other words, the objective is to constitute a “Judgment Competence Committee” to look into the complaints of non-compliance with

the judgments of the Courts laying down the law for implementation by the State and the country as a whole. Accordingly, under the provisions of the Bill, the Advocate General assisted by a Committee constituted under the provisions of the Bill should act as a Courier between the judiciary on the one hand and the executive and legislature on the other to convey the relevant decision of Courts and issue appropriate directions to the Government or other authorities to implement the directions contained in the judgments and submit reports from time to time. There is also a provision making it obligatory for any person who wants to file Contempt Petitions in the High Court, to prefer an application before the Committee constituted under the provisions of the Bill pointing out the default in implementing the binding directions issued by the Courts. The above provision gives an opportunity for the Committee to give appropriate directions to the Government Authorities to take appropriate action to comply with the directions of the Court so that contempt action for non compliance with the directions of Courts can be avoided as far as possible. If the Courier system proposed works out properly, multiplicity of legal proceedings and consequential expenses for the litigant and the Government can be avoided.

The Right to Justice for Victims of Criminal Injuries Bill

It is again a bill for enacting a unique enactment so far not attempted by the Parliament or any legislature in India including the State Legislature.

It is an internationally recognized basic principle of Victimology that offenders shall make fair restitution to victims or their families. In cases where such restitution is not possible for any reason, justice demands that the State should provide monetary compensation to victims who suffer serious mental or physical injuries as a result of offences committed against them. It is the above basic principle that guided the Commission in drafting the above Bill. The Bill contemplates the constitution a Criminal Victim Assistance Authority with power to entertain claims from the victims for monetary compensation from the offenders or from the Government as the case may be. Under the provisions of the Bill, State and District Legal Service Authorities are to be nominated as the State and District Victims Assistance Authorities also. Both the Authorities have been given ample powers and corresponding duties to effectuate the laudable objects of the Bill. The three other important features of the Bill deserve special mention in this context.

(a) The State Victims Assistance Authority is directed to constitute a Fund called "State Fund for Crime Victims Assistance" and to administer the same in the manner detailed in the Bill and make over funds to District Authorities necessary to satisfy the orders passed by them in claim applications filed before such authorities.

(b) District Authorities have been conferred with full powers to conduct independent investigations into the claim for and arriving at a just decision.

(c) A detailed Schedule showing the maximum monetary compensation payable for various injuries has been given to guide the authorities in the matter of determination of compensation in a fair and uniform manner.

The Kerala Access to Justice Bill

The object of the Bill is to recommend a legislation conferring statutory right of access to Courts and Tribunals in matters affecting public interest. At present, litigation seeking reliefs in relation to matters affecting public interest can be initiated and continued only in the High Courts and Supreme Court. Further at present, there is no statutory right available to a person claiming relief in matters affecting purely the interest of the public except in cases where personal interest of the litigant is involved. Therefore, in any public interest litigation, invariably the question of locus standi arises as a preliminary issue on which the Courts may take a liberal or strict view depending upon the personal view of the particular Judge hearing the matter. As a matter of fact, many worthy causes get defeated at the threshold itself on the ground of absence of locus standi. It is taking note of all the above circumstances the Commission thought it fit to recommend legislation of a statute to confer a statutory right to have access to Special Courts to be constituted under the proposed new legislation.

Under the Bill, any individual or group of individuals having concern in legitimate public issues in question can move the Special Court for appropriate reliefs. The Special feature worth mentioning is the definition of "matters affecting public interest" not so far statutorily or judicially defined, to take in a very wide range of matters having integral connection with public interest. The definition is thus.

(i) Any administrative action or inaction or legislative measure, which is contrary to the socialist objectives or contrary to any provision of the constitution of the law or inconsistent with the interest of the weaker sections or working class, agrarian or industrial.

(ii) Any environmental and ecological issues.

(iii) Any executive act or legislative measure which is likely to promote the interests of a section or a class of people but to the prejudice of the interest and welfare of the people generally or which acts against the interest of the minorities, or handicapped categories or the poorer sections of the people.

If the Bill is made an Act, it will not only help bona fide litigants to approach the Courts and Tribunals effectively with public causes but also would discourage the so called public interest litigants who are mere busy bodies.

The State—Appointment of Commissions (Regulation of Authority, Status, Powers, Functions, Accountability conditions of service and Related Matters) Bill

The above Bill is recommended for an enactment to regulate the conditions, facilities, staff strength and other just restrictions of the Commissions, other instrumentalities and agencies appointed by the Government for conducting enquiries and submitting reports. The main reason which prompted the Commission to recommend the Bill is the prolixity of Commissions and similar instrumentalities and agencies with affluent remunerations, high perquisites and expensive facilities draining the Exchequer without corresponding benefits or results. Accordingly, the following provisions have been incorporated in the Bill to be followed by the appointees while accepting and functioning as Commissions etc.

"*Persons to be appointed as Commission*.—The State Government may, as far as possible, appoint persons who are willing to give their service honorary as Chairman and members of the Commission. Only after a proper enquiry by or through an independent and responsible instrumentality, a salaried appointment shall be made. The salary, honorarium, perquisites

shall be moderate judged by living standards of the common people and never be equated with those of judges or other high functionaries in public or private enterprises.

Conveyance and Accommodation of the Commission.—(1) The State Government shall if so advised, provide, informed by a sense of austerity in public life, one low-priced car, minimum facilities compatible with a model of simplicity and free accommodation absent any luxuries.

(2) The State Government may insist that the members shall travel in condition of frugal economy and common agrarian life of the people.

Except for exceptional circumstances, the original term of the Commission fixed by the Government shall not be extended".

The Bill is inspired by Gandhian economic culture or way of life to be followed by the Government in the matter of appointment of Commissions and to remind the Commissions and other instrumentalities appointed by the Government to bear in mind the austere lifestyle of the common man while accepting such appointments.

The Kerala Public Grievances Redressal Tribunal Bill

The Bill provides for the constitution of a Tribunal to hear grievances of two classes of people. Any member of the public having any grievances against any of the public officers in the service of the State or other agencies of the State comes within the first category. The other category is that of the public officers employed in Government and other Governmental agencies having grievances relating to service matters. In the cases initiated by the second category, the Tribunal shall function as Central Administration Tribunal for Central Government servants. If the recommendation is accepted it will relieve the public from the practical difficulties in prosecuting matters before the High Court and reduces the arrears in the High Court.

The Kerala Vexatious Litigation (Prevention) Bill

Vexatious Litigation results in loss of the precious time and energy of Courts and is a menace to be got rid of. This is the firm opinion of the Commission. It is to achieve the above objective that the above Bill has been

drafted. At present, there is no Kerala statute to control or prevent Vexatious Litigations being filed in Civil and Criminal Courts including the High Court except in the area which was formerly part of the Madras State. Accordingly, provisions have been included in the Bill empowering the High Court to declare any person as a vexatious litigant after hearing him on the application of the Advocate General or any Senior Advocate nominated by the Advocate General and others mentioned in the section such as the Registrar of the High Court etc. on declaration as a vexatious litigant, such person can file cases before any Court only with the permission obtained from the High Court which has made the declaration.

Bills for Amending Existing Acts relating to Administration of Justice

Apart from several other similar Bills drafted for legislating new enactments, a few Bills for amending some of the existing enactments also have been drafted. Thus, certain amendments to Kerala Court Fess and Suits Valuation Act and Kerala Stamp Act have been proposed by drafting Amendments Bills mainly to reduce the Stamp Duty and Court Fee payable by the common people. In the case of people Below Poverty Line i.e., Persons having income below Rs. 12000 per year, prisoners and persons suffering mental illness or other grave diseases certified by a registered Medical Practitioners have been exempted from payment of Court fee as per the provisions of the Bill.

4. Bills drafted for Maintaining Social Security and Public Order

The Kerala Police Bill

A well-disciplined and well equipped Police Force is essential for the maintenance of primacy of Rule of Law. Such a Police Force must be efficient enough to maintain law and order in the State and render impartial and timely service to the people in need in accordance with the Constitutional requirements and other laws safeguarding Human Rights and other rights Civil, Political, Social, Economic and Cultural. As time passes on and changes occur in the society the role, duties and responsibilities of the Police also

need to be redefined. The Kerala Police Act now in force in the State is of the Year 1960 and as such the Commission has drafted a comprehensive law to consolidate and amend the law for regulating the Police Force in the light of the directions issued by the Supreme Court of India in Prakash Singh's case to keep pace with the requirements of the modern times. Thus provisions have been incorporated to constitute State Security Commission, Police Complaint Authority, Police Establishment Board and to provide for separation of the Department of Investigation from the Department of Law.

The Kerala Prohibition Bill

The Commission is of the considered view that the State should adopt and implement a comprehensive policy of Prohibition of all intoxicating substances as a paramount policy of the State as envisaged in Article 47 of the Constitution. It is too well-known to mention that the poorer and weaker sections of the society are the major Victims of Abkari regime. Addiction to alcohol and other intoxicating substances drains the purse of the common man and drives him to near bankruptcy. Disruption of the peaceful family life is not uncommon in the State. Women and children are the worst sufferers in the family. It is, therefore, essential that the State adopts a comprehensive policy of prohibition of all intoxicating substances in the State. An Important decision rendered by the Chairman of the Commission as a Judge of the Supreme Court way back in 1978 stressing the need for prohibition of all intoxicating substances in the interest of the society in general and families in particular is annexed to this report as Annexure C.

There are already States like Gujarat where prohibition of Alcohol and all other intoxicating substances is being implemented effectively. There is, therefore, no reason why Kerala should not implement a policy of prohibition by enacting a law as proposed by the Commission.

The provisions in the Bill prohibit manufacture, import, export, transport, possession and use of alcohol and all other kinds of intoxicating substances except in the manner permitted by the provisions in the Bill and create offices for violation of the provisions in the Bill. Penalties provided are comparatively heavy. About 16 provisions in chapter II deal with various kinds of offences and the penalties. The provisions in chapter III of the Bill deals with the exemptions and licenses grantable under the Bill. Elaborate provisions have been included in Chapter IV and V indicating the authorities who are conferred with powers to implement a policy of prohibition. A special

provision is included in Chapter VI casting the duty on the Government to take suitable steps to encourage Medicare persons to treat the addicts by giving appropriate training and necessary support refrain from using Alcohol and other drugs. For the above purpose Government is directed to establish centers for rehabilitating persons addicted to alcohol and other intoxicating substances and to bring them back to the mainstream of life as worthy citizens. Government is also directed to establish a Research Center at state level to find out more humane ways to tackle the problem of addiction to alcohol and other drugs.

This if the Kerala Police Bill and the Kerala Prohibition Bills are got enacted by the Legislature, many a family would be saved from financial disaster, while at the same time, the State will be compelled to discharge its constitutional obligation to the people of this State.

Corruption

The Corrupt Public Servants (Forfeiture of Property) Bill

It is well-known that corruption is widely prevalent in India. Time and again, acts of corruption become an issue in public domain. It violates human rights, undermines rule of law, distorts the development process and dis-empowers the Indian State. While there are laws against corruption in India, there exists a wide gap between the law in the books and the law in practice. The Commission has, therefore, drafted a Bill providing forfeiture of illegally acquired property of public servants and others.

As per Clause 5 of the Bill the Competent Authority shall be a person who has been a judge of the High Court or of the Supreme Court to enquire into, decide and forfeit the illegally acquired property of public servants, their relations, associates, name lenders etc. For discharging the very onerous duties of the competent authority under the Act, he has been given very wide powers including power to call for all informations about the illegally acquired properties inside or outside the State, power of attaching the properties even before a final decision is taken so as to disable the public servant or his relations or association from transferring the ill-gotten assets

to others. There is also a provision stating that all transfers of illegally acquired properties shall be void if such transfer is affected after the issue of notice of forfeiture. Another important provision in the Bill is Section 9 which states that "in any proceedings under this Act the burden of proving that any property specified in the notice of forfeiture is not illegally acquired property shall be on the person affected. The Competent Authority shall consider all the materials before it, and finally decide the case. Against the decision of the competent authority, the affected party shall have a right of appeal to the High Court. Appeal filed shall be heard and decided by a Division Bench of the High Court. There is a total bar for all other courts in entertaining any proceedings which is to be entertained and decided by the Competent Authority and the High Court.

Another important provision is clause 5 which constitutes the Competent Authority who shall be a retired judge of the High Court or of the Supreme Court. The Competent Authority is to enquire into, decide and forfeit the illegally acquired property of public servants, their relations, associates, name lenders etc. For discharging the very onerous duties, the competent authority under the Act has been given very wide powers including power to call for all informations about the illegally acquired properties inside or outside the State, power of attaching the properties even before a final decision is taken so as to disable the public servant or his relations or associates from transferring the ill-gotten assets to others. There is also a provision stating that all transfers of illegally acquired properties shall be void if such transfer is affected after the issue of notice of forfeiture.

5. Bills intended for preserving Nature and Environment as the most valuable asset essential for healthy life on earth

As already noted in Chapter III, preservation of environmental and ecological purity and Nature's integrity is a paramount duty of the State as a societal sanctuary defending people's healthy survival and preventing atmospheric pollution. Compassion shown towards Nature always begets bounty from nature in plenty. But when modern technological and industrial development are used by profit crazy people to serve their own selfish purpose in an uncontrolled manner ignoring the welfare of the common people; earth,

air and water get polluted and becomes a menace to life in all its facets. In this background the Commission has drafted a number of Bills to preserve and protect nature and environment as the invaluable asset of the mankind of which people in Kerala form apart. The salient features and objectives of some of them are mentioned herein below briefly.

The Kerala Environmental Courts Bill

The Bill is being recommended mainly or solely for the purpose of enacting a statute providing for the constitution of a special Court called "Environmental Court" in each of the revenue Districts so that all the offences arising under various existing enactments 10 in number enumerated in the Schedule attached to the Bill are tried and disposed of at District level itself. As early as in 1986 Chief Justice Bhagavathy had suggested this in one of his judgments reported in [1986 (2) S.C.C. 175]. Against the decisions of the Special Court, an appeal is provided to the High Court taking note of the great importance of the matters the Special Courts are likely to deal with. If the recommendation is accepted, this will be one of the pioneer legislations in the field of environmental protection.

The Kerala Alternative Energy Resources Bill

Utilize more and more the bounties of nature like Sunlight, Wind and Water for energy needs of the State is the basic motivation for recommending the above Bill. Another reason for the recommendation is the need to generate alternative energy sources that would help the State to overcome the acute scarcity of hydro-electric power generated from waterfalls and other sources like coal, oil etc. felt by the State in recent times. The provisions in the Bill make it a mandatory obligation on the part of the Government to commence production of energy from alternative energy sources like Sunlight, Wind and Water and also to encourage private individuals and companies to develop alternative energy sources for the household and industrial uses by giving financial assistance in whatever way possible. Under the Bill, the Government is bound to empower ANERT as the agency to control production of energy from alternative sources. There is a duty cast on the Government to create awareness among the consumers to rely more and more on energy produced from alternative energy sources.

The Kerala Prohibition of Plastic Articles Bill

The bill is intended to prohibit the manufacture, sale and use of non-reusable plastic materials defined as plastic materials having thickness not less than 50 microns. Violation of the provision in the Bill is made an offence punishable with imprisonment for 6 months and a fine of Rs. 5,000. Local authorities are authorized to enforce the provisions of the Bill strictly. For implementing the provisions, local authorities can appoint sufficient number of officers who are given rights to initiate prosecution for the violation of the provisions and seizure of the articles etc. A Judicial Magistrate of the First Class is designated as the authority authorized to try and dispose of the proceedings initiated under the Act. The local authority is bound to collect and burn the used plastic articles adopting modern technology without causing any pollution and causing danger to life.

The Kerala Clean Air Bill

Vehicles and industries are mainly responsible for the deterioration of air quality in the State as both generate noise and emit air pollutants, said a report published by the Kerala State Council for Science, Technology and Environment.

The impact of vehicular emission and noise is widespread whereas the industrial emission is limited to the areas around the industries. Though advanced manufacturing techniques have considerably reduced the noise and emission from automobiles and cleaner production process prevents the emission from industries to some extent, the benefits are offset by the rapid increase in number of vehicles and industries, said the State of Environment Report Kerala 2005, brought out by the Council.

The ever-increasing use of fossil fuel in transportation and industrial sectors is adversely affecting the air quality and increasing the ambient noise.

Therefore it is essential to insist on the use of alternate fuels like, Compressed Natural Gas (CNG), or electricity or such other non polluting energy sources in all motor vehicles in the State of Kerala.

This Bill is intended to achieve this object.

The Kerala Preservation and Protection of Mangroves Bill

Mangroves are trees and shrubs that grow in saline coastal habitats. The word mangroves most broadly refer to the habitat and entire plant assemblage of 'mangal' for which the terms 'mangrove swamps' and 'mangrove forest' are also used. They have many uses. They lesson the impact of storms and cyclones, Tsunamis and are sources of wood products and non-wood products. They provide aquatic products such as fish, prawns and crabs. They provide growing habitats for aquatic organisms. Today they are among the most threatened of the world's valuable habitats. Therefore it is necessary to protect and preserve them. The Bill is intended to achieve the above object.

One of the important provisions in the Bill is regarding the vesting of all mangroves in the State on the date of commencement of the Act. There is also a provision in the Bill to constitute an authority for the management of the Mangroves vested in the Government. Further there is a provision allowing Land Tax deduction if any person maintains mangroves on his land. It is an offence to cut and remove or otherwise destroy the mangroves otherwise than as provided under the Bill.

The Kerala Regulation to Control Noise Generated from Loud Speakers, Fire Works Display and other Plural Sources Bill

Noise pollution from various sources like Loud Speakers and Fire Works display is a growing threat to peaceful life of the public in spite of the Acts and Rules existing at present. As such the Commission has drafted the above Bill as the basis for a new legislation strictly controlling and conditionally banning the use of Loud Speakers and Fire Works display to supplement the provisions of Explosives Act, 1884 and Noise Pollution (Regulation and Control) Rules, 2000.

The Bill contains a provision making it mandatory for any person using Loud Speakers and Fire Work display to take out a license from the concerned Local Authority within whose jurisdiction the Loud Speaker or Fire Work display is to be used or displayed. It is also made clear that no license should be issued in violation of the provisions of the Explosives Act and Noise Pollution Control Rules.

The most important provision in the Bill is Clause 5 which makes the person using the Loud Speaker or Displaying Fire Works without license or in violation of the terms of license and causing injury to any person liable to compensate the loss caused to such persons. Violation of any provisions in the Bill has been constituted as an offence to add to the effectiveness of the recommended legislation.

The Kerala Disposal of Garbage and Waste Bill

This is a Bill recommending the enactment of a new Act containing the provisions to be implemented in addition to the existing Acts and Rules governing the matter like Municipal Solid Waste (Management and Handling) Rules and the Municipalities Act.

In the Bill, detailed provisions have been included making it a duty on the part of the local authority to collect the garbage kept by the people of the locality in their premises regularly in the manner indicated therein. The Local Authorities are also empowered to direct the owner or occupier of building to set up plants to use the garbages and other waste materials to produce useful products like biogas and vermin compost.

The attempt made by the Commission is to empower the local authorities and through them the State to prevent Kerala known as 'Gods Own Country' from being a country of stinking garbages and waste.

The Kerala Electronic Waste Management Bill

In this era of electronic equipments, the rate at which accumulation of electronic waste, shortly stated, e-waste, is very high. Old and useless electronic machines and parts become, e-waste. Unless e-waste is disposed of in a scientific manner it will cause environmental pollution and irreparable harm and health hazards to the lives of the people living in and around the heap of e-waste. At present, there is no strict law to arrest this growing menace. Therefore, the Commission is of the view that an enactment is eminently necessary to regulate the disposal of e-waste in a proper and scientific manner and hence the recommendation.

6. Bills drafted for the purpose of statutorily prescribing the duties to be performed by all including the Government to show compassion to all living beings.

Compassion for Living Creature Bill:-

Article 51 A of the Constitution mandates inter alia, that compassion should be shown to all living beings. It is to effectuate this constitutional mandate by creating statutory obligations that the above Bill has been drafted. The provisions in the Bill mainly deal with the manner in which human beings should treat animals and birds and the duties to be performed to show compassion to living creatures. The Bill thus declares that "the welfare of all living creatures is the concern of the State and the Society as an expression of reverence to life in all its forms and as a cultural recognition of the fellowship of all created beings". It proceeds to state that except in exceptional cases where avoidance of injury to human life necessitates infliction of pain on animals and birds, such infliction shall be kept to the minimum. The other provisions in the Bill impose various restrictions and conditions subject to which alone the animals and birds have to be dealt with while in their natural habitats or as household animals and birds whether reared up or living in captivity.

Apart from the above Bill for enacting a new statute, two amendment Bills have also been drafted.

(1) The Kerala Animals and Birds Sacrifices Prohibition (Amendment) Bill.

(2) The Kerala Captive Elephants (Management and Maintenance Amendment) Bill.

Both the above amendment Bills are being recommended to bring in an amendment to incorporate new provisions in the parent Acts to make them more effective. The Bills create different authorities who are bound to take action against any person who shows cruelty to animals and birds contrary to the mandatory provisions in the parent Acts. Amendments are being recommended in response to the requests made by various organizations like S.P.C.A. to make the provisions of the parent Act more effective by providing authorities with wide powers to take action for violation of the provisions in the Acts.

The Kerala Preservation of Secular Ethos and Prevention of Anti-secular Articles Bill

The above Bill one which requires very special mention in the light of the sudden steady and stunning deterioration in the unity and harmony existing in the society in the light of the increasing communalism, religious orthodoxy and anti-secular and terrorist activities on an unprecedented scale. Taking note of the Constitutional mandate contained in Article 51A (e) that it shall be the duty of every citizen of India including Kerala to promote harmony and the spirit of common brotherhood amongst all the people transcending religious, linguistic and regional or sectional diversities, the Commission thought it fit to draft a Bill containing provisions to impose a duty on the State to carry out various programmes to promote harmony and the spirit of brotherhood among the people of Kerala.

Thus Clause 3(a) of the Bill makes it a duty of the Government to take all necessary steps to preserve and strengthen the secular ethos among the people of the State by encouraging the people to imbibe the spirit of common brotherhood and to prevent the commission of or attempt to commit anti-secular activities and to promote harmony among the people. The manner in which the Government may perform the above duty is elaborately indicated in sub-clause (b) of Clause 3. Further a very wide definition has been given to the words “Anti-secular activities” to include all kinds of disruptive activities harmful to the harmony and peaceful atmosphere of the society. Commission of any anti-secular activities is an offence. So also attempt to commit any anti-secular activity. The important feature of the Bill deserving special mention is the provision contained in clause 7 of the Bill which confers a right on the victim of any offence under the Act to claim and get reasonable monetary compensation under the Bill. Of course, it is optional for the victim to claim compensation under the Bill or under any other law. The District and Sessions Court is indicated as the Court, which is competent to entertain and dispose of the claims under the Bill. The offender can be proceeded against and directed to pay the compensation, if any, ordered. The decision of the Special Court is made appealable to the High Court and the decision in appeal is declared as final.

7. For Family well-being and Regulation of Hartals

1. The Population Planning for Family well-being and Children's Development Bill.

2. A Bill for fair negation, salutary regulation and special legitimation, in public interest, of Hartals and validation of worker's right to strike.

As stated in the Preamble to the Bill (for short, referred to as 'Population planning Bill') it has been drafted to adopt Family strategy for organizing a humanist system, blending the patriotic policy of democratic fraternity, as integral to consent to obligations of maternity and family well-being and economic ability to fulfill parental responsibilities to every child born with right to dignity and health in life and thereby promoting a progressive people and nation to live in happiness and harmony. Clause (3) of the Bill declares in categoric terms that at State level, Family Planning and Birth Control shall be the basic Policy of the State. Clause 4 declares that every husband and wife shall limit their children to two for receiving the State grants to the members of such planned families. The Commission has taken special care to make it clear that it is no offence to ignore the family norm but only disentitles them to the benefits granted by the Government. Similarly the Bill does not create any disabilities on children born in violation of the family norm, whether they are the third or the fourth child. One of the special features of the Bill is the constitution of a Commission for implementation of Population Regulation Policy of the Bill. Government is bound to propagate the Policy by encouraging organizations interested in propagating the policy and discouraging persons and organizations interested in working against the Policy. Clause 10 states that no person or institution shall make use of religion, sect, caste, culture or other ulterior inducements for the bearing of more children than permitted under the Bill. Whoever violates the mandate contained in clause 10 can be proceeded against by any person before the Judicial First Class Magistrate concerned. Appointment of a Population Control Officer is also contemplated by the Bill for surveying, supervising and auditing the working of the Act and submitting reports to the Government for implementing the provisions in the matter effectively.

As regards the 2nd Bill drafted for the purpose of strictly regulating the Bundhs and Hartals, the Commission feels that unless legislation is made to regulate the conduct of Bundhs and Hartals strictly, normal life of the people is going to be disrupted substantially causing immeasurable loss to the community and the State. The Bundhs and Hartals have been so frequent in Kerala that no responsible citizen can shut his eyes to the inconvenience and hardship caused to the public, time and again. The Commission entrusted with the duty of recommending law reform is upto this task.

India has been passing through developmental decades after winning Independence and liberating itself from imperialist inhibitions holding up national progress. Kerala with its caste lunacy and religious divisiveness is unable to advance notwithstanding its educational status and socialistic ethos. Unless the entire Kerala people work hard with a developmental dimension and vision a better tomorrow may remain a dream. Unfortunately, we have too many holidays in the name of plurality of religions. This situation is aggressively aggravated by hartals and bandhs which keep the community lazy doing no work and keeping society in stagnancy. Therefore, hartals are a hindrance to human advance and deserve to be regulated and even prohibited although the right to strike by workers may still remain. It is significant to note that there has been considerable expression of opinion by leading media and public spirited men in support of regulation of hartals if not the total prohibition of hartals. It is in this background the Bill has been drafted.

In the 2nd Bill mentioned above, the word 'Hartal' has been defined so as to include "any form of forced cessation of activity or diversion of business or occupation in its widest comprehension or such cessation being at the instance of any other person or organization to create public pressure, social tension, economic intimidation or apprehension of violence to advance a cause or campaign sponsored by the organizers of the Hartal"; However, any strike by workers or organized by Trade Unions or other bodies complying with the provisions of Industrial Dispute Act, the Trade Union Act and other laws are specifically excluded from the purview of the definition. Exemption can be claimed only for strikes called for legitimate purposes. Clause 3 of the

Bill states categorically that no person shall organize or abet the conduct of, a hartal for any reason whatever without ten days notice promulgated through the media and to the fair knowledge of public bodies likely to be affected by the proposed Hartal. Even after giving notice, Hartal can be conducted only subject to the provisions in clauses 4 and 5. Clauses (4) and (5) read thus.

"(4) *No Hartal shall be conducted so as to operate.*—(a) before 6 A.M or after 6 P.M. or thwart the movement of any person, agency, business or instrumentality by use of force or threat thereof or other means by which freedom of action of another is in any manner forbidden or obstructed.

(b) Directly or indirectly deter, hamper or disable the normal functioning of any public institutions or utility services including any centre or organization, education, charitable, pro bono or otherwise giving relief to a human being or compassionate succour to any living creature.

(c) No trade, business or undertaking, no transport vehicle or facility shall be closed or stopped totally or partially out of apprehension of or actual use of violence caused or threatened by operation of any hartal or strike by the organizers or sympathizers thereof. The State shall in every reasonable manner forbid or prevent such behaviour or conduct adversely affecting the fundamental rights of members of the public.

(5) *Hartals to be prohibited by the* Government.—Hartals, when they cause stoppage of business or activity essential for the life of the community, shall be effectively prohibited by the State Government directly or through other delegated authority even though 10 days notice has been given. It is specifically provided Clauses (6) and (7) that Police shall render all assistance needed to exercise the fundamental rights of the Police to assist persons to have easy access to places like Hospital, Educational institutions, fuel centres etc. if the Police fails in their duties under Clauses 6 and 7 they are liable to a fine upto Rs. 10,000 calling for a Hartal or abetting such an act are constituted as punishable under clause 8. A special feature of the Bill is the provision contained in clause (9) for constitution of a fund for payment of comprehension to persons affected by the Hartal if it is found that Government or any officer under the Government had convinced or had abetted Hartal."

8. Bills drafted to enact new laws to regulate certain temporal matters connected with religion as opposed to spiritual matters in the best interest of the society.

According to the constitutional provisions and decisions of the Supreme Court and the High Courts including the High Court of Kerala, already referred to in Part III of the report, it is clear beyond any doubt that though the State cannot interfere with religious faith or essential religious beliefs, it can from a secular angle enforce uniform principles like inheritance. In this background, Commission has drafted a Bill to remove certain age-old customs or practice existing in regard to marriage, divorce and inheritance among Muslims and to control them according to uniform and to statutory norms laid down by the State.

Similarly, among Christians in Kerala there is no statute governing the right of adoption. A Bill for legislating an enactment allowing right of adoption to Christians in Kerala and prescribing a simple and practical procedure to be followed in the matter of adoption has been drafted with the very able assistance of Dr. Sebastian Champapilly.

Again as far as Christians are concerned, on the representation of a large number of Christian organizations, popular leaders of the community, groups of individuals etc. to enact a legislation to control the ownership and management of all forms of properties movable and immovables owned by the Church, or Diocese as the case may be, the Commission has drafted a Bill to control and regulate the ownership and management of such properties, treating them as trust properties of which the parishioners of each church are the beneficiaries. A three tier system of management by the different Committees of trustees, all elected by the parishioners directly, for an effective management of the affairs at Parish, Diocese and State level is recommended by the Commission in the Bill proposed in this behalf. Thus separation of spiritual or religious beliefs and temporal matters is sought to be effectuated and the management of the two matters are sought to be entrusted to two separate agencies, the spiritual head on the one hand and the elected representations of the parishioners on the other. On and after the

commencement of the proposed new legislation based upon the Bill, Cannon law will apply only to matters of religious beliefs or spiritual matters and will not be applicable to ownership and management of properties and all other matters affecting temporal matters of the Church. The temporal matters will be governed only by the general law of the land and managed only in accordance with the provisions in the proposed new legislation.

And in the case of Hindus, casteism is an evil or a curse which persists in its ugly form one way or other even after Constitutional and statutory prohibition introduced long back. The fact that casteism is even now practiced will be evident if it is realized that no dalit is being allowed to be a Poojari or Purohit in any Hindu Temple disability based on caste is continuing that is proof positive of the fact that even now in the society. This is to be put an end to by a new law. Law Reform Commission has taken it as its duty to put an end to the disability affected to certain castes and has drafted a new Bill to achieve the above objective.

The Bills thus drafted are the following,

(1) The Kerala Muslim Women (Relief on Irretrievable Breakdown of Marriage And Prohibition of Talakul Bidaat) Bill___

(2) The Kerala Muslim Marriage and Dissolution by Talaq and Khula (Regulation) Bill.

(3) The Kerala Right to Property (of legal heirs of predeceased child of a Muslim) Bill.

(4) The Kerala Christian Church Properties and Institutions Trust Bill.

(5) The Secular Norms for Administration of Places of Public Worship Bill.

The first three of the above Bills deal with Muslims and their temporal institutions like marriage, divorce and inheritance Bill Nos. 1 and 2 are bills intended to operate in addition to the existing Act, namely, the Dissolution of Muslim Marriage Act, 1939. The main object of the Bill No.1 is to statutorily recognize irretrievable breakdown of marriage as a ground for divorce through

a Court of competent jurisdiction. The Bill also contains provisions declaring that a Muslim husband has no right to divorce his wife on the basis of oral talaq or by triple talaq except as provided in the Bill. The unbridled power of effecting divorce by talaq is sought to be curtailed in a reasonable manner as per the provisions made in the Bill. The 2nd Bill is mainly intended to declare that among the Muslims also, Monogamy is the rule and in only in exceptionally rare circumstances mentioned in the Bill, a further marriage can be contracted by a Muslim male during the subsistence of an earlier marriage. The special circumstances, in which a further marriage can be contracted, have been enumerated in the Bill. The most important provision in the Bill is the one regarding dissolution of marriage. The Bill proceeds on the basis that both the spouses have a right to effect divorce on the grounds enumerated in the Bill with the approval of the Conciliation Committee constituted as per the Bill. The discrimination existing in the matter of divorce among Muslim husband and wife is sought to be removed by the above provision. Yet another special feature of the Bill is the provision for constitution a Conciliation Committees of 3 persons. The Chairman of the Committee shall be a retired Muslim judicial officer of the cadres mentioned in the Bill appointed by the Government after prior consultation with the Chief Justice of the High Court. The other two members shall be Muslim scholars one each chosen by the two parties to the proceedings for dissolution in a given case. The Bill also stipulates the duties and responsibilities of the husband who affects a divorce. Various other provisions also have been incorporated in the Bill to make it efficacious.

The third Bill confers a right of inheritance to the heirs of a predeceased son or daughter of a Muslim. This is a very reasonable and desirable change from the existing law of inheritance which does not grant any right to an heir of a predeceased son or daughter in the estate of their grand parents.

It is hoped that all the 3 Bills will be accepted by the public and the Government as they are Bills approved after good deal of discussions with a number of Scholars, jurists, Senior Advocates and views of leaders in the Muslim Communities obtained in writing.

As regards Christians, the Kerala Christian Church Trust Bill is altogether a new Bill enacted for the first time. It is a Bill which may have far reaching consequences as far as the properties owned or possessed by the Church and others institutions functioning under the Church are concerned. The Bill provides that on and after the commencement of the Act, all the properties of every Church, Diocese and State have to be constituted into a Trust and registered with the prescribed authority within one month from the date of commencement of the Act. Further provisions provide for the constitution of committees of trustees directly elected by the nominated members of families of the Parish at Parish, Diocese and State levels. The properties shall be managed by the respective Committees of Trustees and decisions taken by the trustees in the respective general bodies. There are provisions in the Bill which prescribe the procedures for keeping proper accounts and other records, holding of General Body meetings, auditing of accounts, approval of accounts and submission of annual report etc. The Vicar, Bishop and other spiritual heads shall be spiritual heads and preside over the meetings of the Committees of Trustees at all levels. The fundamental change sought to be effected as per the Bill is that on and after the commencement of the proposed new Act, Canonical Law will not apply to any of the matters connected with the properties owned or possessed by the Church, the Diocese or the State as the case may be. All transactions and dealings with regard to temporal matters should be in accordance with the provisions in the proposed new Act or other enactments in force in Kerala. If the Bill is accepted and made into a new legislation, it will be the first of its kind and very much appreciated by a great majority of Christians of different sects.

The Bill dealing with Hindus is mainly intended to abolish casteism prevalent even now among Hindus especially in temples and other Hindu public places of worship. Commission takes notice of the fact that inter caste inhibitions and Apartheid still persist and social backwardness keeps the lower castes away from the higher teachings contained in sacred books like Vedas and Upanishads. Abolition of casteism is tested by the presence of Hindu dalits as priests in temples like Sabarimala and Guruvayoor, of course, only after obtaining proper training in conducting poojas and other rituals according to sacred books. Therefore, in the Bill, provision has been incorporated to

direct the Government to establish sufficient number of institutions to train poojaries or purohits reserving certain percentage of seats to candidates belonging dalit Communities and to make future appoints of purohits in all Hindu temples and places of public worship from among candidates who have completed the course provided by the institutions established by the Government for the said purpose. A Committee consisting of the Presidents of all Devasom Boards is empowered to frame the curriculum of the training course. Devasom Board is given the power to make appointments of Purohits and Poojaris in all temples in future. Another important provision in the Bill is the one which declares that the public place of worship of any religion shall be thrown open to all, irrespective of their religion. The provision further makes it a duty of the Manager of the place of worship to ensure that the above mandate in strictly implemented. Failure to implement the mandate is an offence. The Commission is of the view that no person shall be denied entry into any place of public worship on account of religion, caste or sect.

Adverse opinion has been voiced on the Constitutional validity of Section 7 of "The Secular norms for Administration of places of Public Worship Bill" setting out norms for administration of places of public worship. This objection, in the Chairman's view, is flawsome. The Indian Constitution has certain non-negotiable fundamentals which are beyond the amending power of Parliament or interpretational deviances by the Judiciary or the executive view of the Cabinet. Secular polity and caste-free society belong to this absolute category of values. The Preamble, as well as Part III brings out boldly this basic structural feature of the Constitution. Every provision of the Constitution must be read in the light of the above sublime ideology. Once this bedrock principle is grasped, Article 25 must respond semantically to the caste-free axiom. A Constitution has to be interpreted in the widest noetic sense possible, not in the narrow, obscurantist way of a clause in Insurance Policy or other contractual provision. Fundamentals are fundamental and constitutional meaning is never restrictive or rigid. The religious freedom protected under Article 25 is subject to important conditions which bear a

broad signification, an expansive conceptualization and a socially sensitive philosophy of action. Since the days of Chief Justice John Marshall of the US it has been accepted in India too as sound Constitutional law that the provisions of a Constitution should receive, in its semantic paramountcy, a grant sweep. Article 25, intelligently understood and read in the spirit of secularism, has to place proper emphasis on the pregnant expression "subject to public order, morality and health". Casteism is anathema, hierarchical inequality based on caste or sect or other religious sub-division which imply inferiority is juristic allergy. The substantive part of Article 25 has, therefore, to be subjected to public order and morality. To hold that a person is of inferior caste and, therefore, disqualified to be a Purohit is to introduce, by the backdoor the Paraya-Brahmana discrimination, call it religious ritual or custom. This shall not be, whatever one's personal prejudices may be. The merit for appointment of the office of Purohit or the capacity for performance as priest depends upon character, learning of vedic philosophy, religious scholarship and high moral habits, not on caste or communal consideration. We have no paraya, in the constitutional perspective. To snuggle casteism under guise of ritual is cultural outrage. In this view, to deny even a paraya, otherwise sublime as a person, erudite, clean and moral, the position of a priest or high-priest as a Purohit or poojari in any temple or shrine is an outrage and a violation of the Constitution. Indeed, the glorious Sri Narayana Guru, when he installed Shiva and founded celebrated temples permitted Purohits and worshippers free from caste criteria and other extraneous factors. As a fact, worshippers regardless of caste and even religion, are permitted in famous Narayana Guru temples subject, of course, to affirmation of reverence to the finer Hindu faith and advaitic philosophy. Caste ban on scheduled castes as purohits is contradiction of the hallowed divinity of globally sacred Hindu institutions. Is not untouchability abolished? The whole idea of Law Reform incorporating Secular norms in the administration of places of the public worship is to establish, beyond doubt, secularism and caste-free ideologies which are integral to the basic structure of the Constitution. To exclude backward-most classes from holy priesthood in temples is barbarity violative of secularity. Valmiki,

the highest Hindu, was a low-caste hunter. Many ancient Tamil outcastes were the noblest divines. Were not Alwars and Nayanmars backward caste Hindus and are not some temples in Tamil Nadu having backward caste priests?

To make my point indisputable I rely on Article 25 (2) (b) which I quote:

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

.....

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Plain English writ into our Constitution declares emphatically that elevation of depressed castes to high holy offices inside our temples is a fulfillment of the processes proclaimed in the above sub-article. What a social welfare and reform, if it will not entitle the lowest caste to top temple positions including that of high priests and melshantis? Let us not make Article 25 a myth or boloney but give it a shine of burning reality by picking up ex-paraya and putting him on a par with the ex-Brahmin. This is Law Reform.

I have great veneration for the views of distinguished Judges like Justices C.S. Rajan and Bhaskaran Nambiar. Rituals, if they are not consistent with referred moral practices, if they contradict 'public order', have no place in temples. Animal sacrifice is not permissible even if such a ritual once prevailed. The great Ramanuja, tradition has it, declared the untouchable, unapproachable communities to be Brahmins long centuries ago and they have been Brahmins ever thereafter. Abhorrent creeds, customs and practices of long standing in sacred places suffer a constitutional sentence of death if they are obnoxious to the great values which hold a high place in the scheme of our Founding Deed.

9. Relating to Euthanasia, Suicide and Women's Code—the last but the most revolutionary recommendations

Last, but not the least, there are three more recommendations to be highlighted before concluding this part of the report. One is an amendment Bill to none other than Mcaulay's Indian Penal Code. The second is a new Bill recommending a new legislation which is in a way connected with one of the subjects included in the new amendment Bill drafted by the Commission. The Bills are the following,

(1) Indian Penal Code (Kerala Amendment) Bill,

(2) The Kerala Terminally Ill Patients (Medical Treatment and Protection of Practitioners and Patients) Bill,

(3) Women's Code for defense of divinity and dignity of womanhood.

The amendment Bill proposes two major amendments to Indian Penal Code; one declares that Euthanasia is not an offence and the other states that attempt to commit suicide is not an offence. Before dealing with the provisions in the Bill it may be relevant to deal with the consideration which prompted the Commission to draft the amendment Bills.

As far as the recommendations for Euthanasia is concerned the reason is this: "Mortality is life's inevitability". As the end approaches, terrible illnesses inflict themselves on the human body and unbearable sufferings become the lot of the victim. Lingering life may be prolonged, if artificial processes and extreme exercises by medical skill were resorted to. If such methods of prolonging life were withdrawn, life will cease. Such termination will extinguish agony and grief, although the last breath will also arrive together with the final moment of physical existence. Death is deliverance from dreadful disease and intolerable torment. It is a philosophical, medical and penological dilemma as to whether euthanasia is morally and legally justifiable in such situations. Excruciating pain with-no prospect of survival or Exit Distress by instant End? That is the question. The Commission has no dogmatic view on the matter. Life is sacred but intense pain with no relief in sight is a torture which negatives the meaning of existence. Therefore, many great minds

have opted for euthanasia. The Indian Penal Code and its author Macaulay are not the last word for the Law Reformer. The Commission has drafted a tentative Bill which will hopefully receive deeper consideration, especially because some advanced countries have legally adopted the principle of euthanasia. The jurisprudence of euthanasia is a positive contribution to happiness during life and freedom from torment when no other alternative exists. Higher social philosophy which transcends limited material perspectives will illumine the noesis of euthanasia".

[The Bill drafted for a new legislation is one permitting the terminally ill persons to put an end to their life under the supervision and advice of his close relatives and Medical Practitioners. Detailed provisions have been incorporated in the Bill to impose strict conditions and safeguards in the matter of assisting terminally ill persons without reasonable prospect of continuing life, to put and end to their unbearable and pitiable existence. This Bill again is the first of its kind in Kerala and perhaps in India too.]

As far as the second aspect regarding suicide is concerned, the Commission is of the view that it is inhuman and barbaric to punish a man who was forced to take a decision to put an end to his life for reason such as extreme poverty or utter bankruptcy which are rampant in the society at present or unbearable pain or other calamities in life. To treat him as an offender and punish and put him in jail for attempting to commit suicide is unfair and unjust. The recommendation of the Commissions is fully justifiable. The Commission has taken special care to declare that suicide attempted to be committed for any dubious purpose to put under pressure etc. will continue to be an offence if the attempt fails.

The third bill has been drafted to achieve the objective of preserving the divinity and dignity of womanhood that the Bill with the title "Women's Code for defense of dignity and dignity of womanhood" has been drafted. The provisions in the Code are mainly intended to prevent or control sexual abuses committed against young girls, boys and women inside home outside in schools, colleges, hostels, work places and in buses and other public vehicles and work places. To effectively deal with such offenses a special wing in the

Police department is directed to be constituted consisting of officials having special training in dealing with such offenders and the unfortunate and helpless victims. A special cell is being recommended to be constituted in the Police Department. Similarly there is a provision in the Bill recommending the constitution of Fast Track Courts to deal with and dispose of the cases speedily where victims of sexual violence are involved. Further provisions in the Bill direct the concerned Police authorities to establish necessary agencies to ensure protection of victims of the offences and the witnesses involved in the case from bodily harm. Another recommendation is to establish Police helpline in all cities and in rural areas wherever possible.

Just before concluding this part of the report, it is useful to extract the words of wisdom from the Chairman of the Commission which merely summarizes the objective of this code described thus in the inimitable style of the Chairman of the Commission.

INDIAN WOMANHOOD—ITS DIGNITY, DIVINITY AND DEFENCE BY LAW OF ITS DEFILEMENT

Indian humanity, in its grand story of cultural majesty, regards its sisterly half as sacred. Indian womanhood in its dignity and divinity, its indefeasible freedom from gender discrimination and molestation, is hallowed, enjoys sublime human right, transcending religion and region and transforming its status and stature and ensuring an impregnable immunity from violation, vie and vulgarity. This glory of famine felicity gains great sanctity in the vision of Indian Jurisprudence, civil and penal, regardless of age from cradle to grave, since such is the Constitutional magnanimity of gender justice. The degeneracy, which has overtaken this noble tradition, has led to a lawless situation where the weaker (?) sex is victimized in various ways although the exalted personality of girl to grandmother has a title to egalite in society, in official and public life, in marital status, inheritance and succession and in monogamous excellence. Human rights, if they show less legal reverence to the female gender, are less civilized and more barbarian. This shall not be.

The person of a sister or mother is no less a cultural value, no poorer in the protection of law, no surer in the right to justice, social, economic and political, than that or the brother or father in the family or in the community.

The penal law, in its stern insistence, shall defend the physical, psychic, moral and spiritual values of the womanhood so that she will never be regarded as a sex commodity for man's pleasure but ever give reverence as a solemn member of India's humanity. To police, justice, punish and build a glorious gender culture is the paramount duty of State and society. Conjugal dignity and sex-equal humanity of Indian Womanhood, whatever the religion or caste, shall be integral, inviolable jurisprudence, if need be, by a powerful scheme of Law Reform.

Erotic misconduct takes various forms and mercenary institutions, including hotels and hostels, are covertly made use of for promiscuous operations which ruin the finer character of the youth. Publicity through advertisements in the print and electronic media and in public streets virtually abets the urge to commit sex offences. All these activities are a menace to public morality and the happy and honourable habits of the sexes. The law cannot blink at this new barbarity and must create effective tools to curb these potential disasters. Even tourism is allegedly used as a guise for immoral, commercial deviances, professionally organized. If law reform does not produce a curative pharmacopoeia to control this growing syndrome, a collapse of clean society with good morals and excellence of public life is inevitable. That is why the Commission feels that a valiant versatile penalogical therapy should be fashioned to inhibit the spreading moral miasma. Law, in its reformatory activism must salvage Life of society to sustain a decent moral standard.

Thus altogether 65 Bills for new legislations 30 amendment Bills and 9 amendments to Rules, Regulation and guidelines have been recommended. The total number of recommendations of Bills comes to about 104 in all. All of them have been included in a list and the same is appended to this report as Annexure D.

To sum up, it is as indicated above that the Commission has functioned and made its recommendations on the terms of reference contained in clauses (a) to (d) and (f).

Recommendation made on the terms of reference in clauses (e) and (g) to (l) of para 4 of the order dated 17-11-2007

In the course of the functioning of the Commission, the Chairman constituted a Sub Committee for the purpose of considering the points covered by the terms of reference in clauses (e) and (g) to (l) and to suggest matters to be recommended by the Commission as per the final report. The Sub Committee consisted of the following members **Justice T. V. Ramakrishnan, Barrister M. P. R. Nair, Prof. N. S. Gopalakrishnan, Dr. V. D. Sebastian, Prof. K. N. Chandrasekhara Pillai.** The Committee met several times and had submitted its report containing various suggestions for the considerations of the Commission. Such suggestions were communicated to all members duly and ultimately the Commission has accepted the following suggestions of the Sub Committee.

(e) To adopt new and more effective methods for the administration of the Law

1. Create interest group to implement the provisions of the law in the legislation.

In common law countries like England, USA and India etc. Administration of Law is done by officers identified in the legislation. The citizens are supposed to know the law in as much as there is no defence of ignorance of law. It is common knowledge that ordinarily, ordinary folk do not take an active interest to know the law or for reforming the law. They carry on their work; they do not care whether they comply with the law or defy the law. When they break the law the authorities identified in the legislation step into action to bring them to the fold of law. Under some legislation the initiation of proceedings is left with the citizen. If the citizen does not initiate proceedings under this legislation they remain dead letters. Some legislations require the executive to initiate steps for their enforcement. Sometimes neither the citizen nor the official mentioned in the legislation care to initiate proceedings under certain laws. And the judiciary itself steps into action inviting criticism on the basis of judicial activism.

In such a scenario it is always better if the legislation resorts to creation of interest groups and to give them enough powers to implement the law. If one examines the provisions of the Consumer Protection Act in India, this point becomes very clear. In terms of the constitution of the tribunals

at different levels and investing powers for initiation of proceedings even with non-governmental organizations this legislation represents modern effective administration. The vitality of the proceedings taken in these tribunals and the vigorousness with which the general public resort to these tribunals for redressal of their grievances indicate its popularity among the general public. It is an indication of the strength of the consumer movement in India. This can perhaps be emulated with benefits by the Kerala Legislature while making legislation on different subjects.

2. Involvement of Academic Institution in Administration of Law.

Academic institutions in the country remain complacent by doing some theoretical research. It would be mutually beneficial both for the academic institutions and the government, if a provision is made in the law compelling the nearby academic institutions to undertake research into the implementation of various laws and make special report to the Government/Authority concerned for initiating reforms in the light of the administration of the existing laws. This legislation would be made more effective by accepting the universities to act as useful agencies for social transformation and achieve social justice by equitable administration of law.

3. Effective administration of the law would seem to depend on the following factors.

(A) Law must be an instrument of justice.

(B) Law must be strictly enforced by state with popular participation.

(C) Knowledge of law should be widely diffused in society by proper schemes of legal education.

These factors may be examined briefly.

A. Law and justice

It is easily accepted that justice is administered through law. The ideals of justice embodied in law may become out of tune with the needs and aspirations of the people. Law should be progressively reformed to minimize the above gap. Such adjustments may be possible through the judicial process. But major adjustments will be possible only through legislation.

It is desirable to have a standing machinery to study the case for law reform and call attention to the need. Even if the political will may not immediately respond to the call and translate into legislation, the findings can focus public opinion and pave the way to reform to be adopted in deference to social pressure.

In England, since the 1960s, it seems there is a standing law form committee. At the Centre also there is a Law Commission which now seems to be a continuing body. In Kerala Law Commission comes only once in a blue moon. This is not adequate. An active and continuous body is needed to study and suggest the continuous updating of law in terms of justice. So far as Kerala is concerned, a new Legislative Committee called Law Reforms Committee may be established. A new unit in the Legislature Secretariat may be created to assist the Law Reforms Committee. This Committee can also seek the help of outside persons like judges and lawyers on adhoc co-option.

B. Enforcement of Law

The legal order will get strengthened in popular minds as well as in the minds of the enforcing authorities, only if there is frequent resort to law. When nothing effective is done when a breach of law occurs, the remedies offered by law will fall into dispute and people will be tempted to deviate from the path of law and to take illegal routes to redress grievances. This aspect may be considered under criminal law, civil law, and administrative law.

Criminal law

The theory of criminal law is that every criminal act against somebody is also against society. The primary aim of criminal law is social security though it also gives some satisfaction to the victims by punishing the criminal. But because of various failures, some inherent in the system and some contrived the criminal law has almost ceased to protect society or to give satisfaction to the victims. Crimes are not promptly registered, investigated or prosecuted. A better popular participation may improve the matter. It may be recalled that involvement of the people (in informing, arresting, prosecuting and punishing) strengthened the English criminal law in the immediate post-Norman period.

The entire territory (Panchayats, Municipalities and Corporations) should be divided into a number of residents organizations which should be given the right to liaison with the police in matters of criminal law enforcement and to complain to higher authorities in cases of lethargy or failure to take action.

It is in the matter of prosecution that serious complaints are heard. It is very often the same agency i.e., the police that investigates and prosecutes. Even if these functions are performed by different agencies, by entrusting the prosecution to a Director of Prosecution, both are under executive control and political influence. If one traces the ramification of state power in the interest of better protection of peoples' rights, it would appear that the time has come for the prosecuting power to emerge as a separate power. The original unified power separated into Legislative, Executive and Judicial. Within the Executive itself there has been further separation in the interest of efficient and independent functioning. Thus the Election Commission, the Comptroller and Auditor General and the Public Service Commission, are given constitutional independence to be in charge of election, audit and public appointments.

Prosecution is also such a matter which should enjoy independence. It would have been ideal to amend the Constitution and to have a constitutional Director General of Prosecution with State Directors of Prosecution under him. The Executive governments both at the Centre and in the States which cannot 'help' themselves in the matter of prosecutions would be helped to a large extent by such a reform. Since criminal law is in the Concurrent List, in the absence of constitutional amendment, a Director General of Prosecution with authority in States can also be appointed by a Parliamentary Statute with provision to safeguard independence. Even if reform at the Centre may be slow to come, the Kerala State can pass a State Statute establishing a Director of Prosecution, with adequate independence, to keep prosecution from the deflecting influences.

At present, the victim of a crime (or his dependents) may get some compensation awarded by the criminal court. If fuller compensation is needed the civil court has to be moved in another proceedings. This seems to be a

duplication which can be avoided. When the entire evidence and the relevant facts are within the knowledge of the prosecutor, he can work out the total compensation (from the perpetration, the insurer, if any, or the government because of its failure) and submit to the court. The full compensation ordered by the court shall then be paid to the victim. In this connection it is relevant to point out that Kerala Law Reforms Commission is recommending a new Bill called "The Right to Justice For Victims of Criminal Injuries Bill" to render legal, medical and financial assistance to victims of crimes apart from compensation which the victim may get under the enactments. State Legal Aid Authority is directed to be constituted as State Crime Victims' Assistance Authority to render necessary assistance to victims under the Act.

Civil Law:-

Court fees and litigational expenses: The *ad valorem* court fees levied in civil litigation is a great discouragement to people seeking remedies within the law. Many poorer people are forced to give up their claims and to suffer injustice being unable to bear the cost. We read in history that, seeing the poor condition of India litigants, Warren Hastings had abolished court fees, but the East India Company compelled him to re-introduce it in the interests of its finances. That administration of justice is a source of income for the state is a crude idea practiced in kingly days when, as we see in English history, the kings were anxious to collect as much money from as many possible sources. Administration of justice being one of the most important essential functions of the State, the expenses incurred for that purpose should be, as in the case of defense of the country, a first charge on its revenues. The present legal aid scheme also does not appear to be adequate to free litigants from the deterrence of court fees. The best method seems to be to abolish the court fee at the beginning and to levy a reasonable amount, if it is thought inadvisable to forego the income from this source totally, at the end of litigation when the costs are allocated. The judge at this stage will have a better view of the facts of the case and of the relative illegalities of the parties before him and of the time and effort required of judicial authorities for a fairer decision as to the financial contribution to be extracted from the parties.

Advocates fee

It seems that within broad limits fixed by the state, the fees payable to the advocates should also be decided at the end of the litigation by the court. All the factors involved, complexity of the case, the time and effort put in and the diligence shown by the Advocates etc. could be taken into account by the court in fixing the fees. Such an approach is bound to improve, in due course; better client advocate relationship which will be a plus point in the administration of law.

The Roll-call system

In civil courts the best morning hours of civil judges are used for roll call. This system could be dispensed with. Roll calls could be conducted if at all necessary, by a court official (Sheristedar or so). If necessary an additional Sheristedar should be appointed. It is necessary that the valuable time of the judges should be used for more substantial work of hearing and disposing of cases.

Conflict of jurisdiction and supervision under Art.227 by the High Court

With many matters being entrusted to administrative tribunals with a corresponding exclusion of the jurisdiction of civil courts, the conflict of jurisdiction between courts and tribunals has given a serious blow to fair procedure and justice. In the French system the Tribunal of Conflicts finally decides conflicts of jurisdiction between civil courts and administrative courts. In India we have no definite system. The supervisory jurisdiction under Art.227 of the Constitution may be available but there is no easy procedure for invoking it.

When a matter in which jurisdiction has been given to a Tribunal with exclusion of civil court's jurisdiction comes before the Tribunal or the Court, it is the practice of the weaker party to plead that the jurisdiction is with the other forum. Though there seems to be a requirement that jurisdictional questions should be decided in the beginning itself, it is generally not done so. A civil court which initially accepts the case may at any later stage decide that there is no jurisdiction. Sometimes an appellate civil court may do so after a good lapse of time. Such jurisdictional questions are also taken to the High Court and the Supreme Court. There must be a provision to the effect that once a case is started in a jurisdiction, there should not be an upsetting on

jurisdictional ground later on. Whether a matter is decided in one or the other, when both are agents of the same state, will not make a serious difference to justice on merits compared to throwing it out half way or later in appeal after full hearing. So whenever a jurisdiction, either of the court or of the Tribunal coming under the High Court, is challenged, the question should be referred to the High Court for decision under Art.227. The High Court should decide it not after formal posting for hearing in open court, but in chambers after getting written memoranda of the parties. There should be no appeal from this decision on the jurisdictional question.

Limitation on oral hearing in High Court

The present practice of prolonged oral hearing with irrelevant and frivolous arguments and useless citations, should be curbed. This is actually an abuse of *audi alteram partem.* The parties should be asked to state in writing whatever they want to bring before the court and asked to indicate in the petition points on which they want oral hearing. The judge could decide in chambers how far such claims can be entertained and decide how much time will be allowed for oral hearing. Every High Court judge should be given a judicial secretary (in addition to the existing secretarial staff) to assist him in the chamber work involved in this reform. The cadre of the Munsiffs and Sub Judges in the State should be increased and each judge should be allowed to choose a Munsiff or Sub Judge as his Secretary.

The suggestions mentioned in this Section (i.e., section B) may be included in a Kerala Administration Procedure Act to be passed.

Administrative Law

As in the case of America, an Administrative Procedure Act should be passed to standardize the exercise by the Administration of legislative, judicial and discretionary powers. It would be ideal that it is a Central Act. In the absence of such a Central Act, a Kerala Administrative Procedure Act may be attempted.

Training for Administrative Officers

Most of the officials administering law may not have updated their knowledge about the legal requirements to be observed when powers are exercised and the rights of citizens are affected. In the early 1970s, based

on a suggestion given by Justice V. R. Krishna Iyer when disposing of a case in the Kerala High Court, the Kerala Government deputed about 30 officers to attend a one months course in Administrative Law under the direction of Prof. A. T. Markose in which this writer had also handled some classes. The officers who attended the course used to later on acknowledge the usefulness of the course. No such thing seems to have taken place subsequently.

The National Law School, Bangalore arranges short orientation courses in Administrative Law for IAS Officers, twice a year, at the instance of the Government of India.

The activities of almost all departments of Government are governed by statutes. It is desirable that short training courses should be arranged periodically for government officers to be conversant with the law applicable to their activities and the basic principles of Administrative Law. The facilities available in the Government Law Colleges/University Departments of Law could be used for this purpose.

C. Diffusion of Knowledge of Law and Legal Education

While ignorance of law is no excuse, precious little is done by authorities to promote knowledge of law among the people. Each Department should, in addition to gazette publication, compile handbooks of Acts and Rules applicable to its activities and sell them at a cheap rate to the people. Or the Law Department may undertake such a responsibility.

Legal Education

It is obvious that to better administration of the law it is advantageous that more and more people should have knowledge of law for intelligent participation in the legal order. So spread of the knowledge of law and institutions imparting such knowledge should be encouraged. But the Bar Councils control of legal education is a severely restrictive one. Age restrictions in the study of law, stopping evening and morning law colleges, insistence that law 3 should be taught only in exclusive law colleges, refusing to allow legal education through distance education modes, refusing to enroll full time law teachers on the Bar Council rolls and the attempt to confine the law degrees to the five year degree and to discontinue the three year degree etc.

are all aimed only to restrict entry to the practice of law but are detrimental to the spread of the knowledge of the law and some of them are unwittingly loaded against the poorer people.

Take for example the newly introduced five year degree. Only very few students having a legal background can choose law as a course after the plus two level. Only a small percentage of the five year students show the linguistic skills and mental maturity to understand problems of human nature dealt within law.

Similarly, in patent abuse of the power to prescribe standards of legal education, the Bar Council has abolished morning and evening law colleges. When such colleges were there, many persons in government and other services could study law in such colleges. Many others who had to work during day time due to financial constraints could also study law availing of the facilities in morning or evening colleges. The advantages derived from such spread of law have all been swept away by the irrational step of the Bar Council.

The Bar Councils concern about the standards of those admitted to the Bar can be adequately addressed by prescribing a standard All India Examination and a year of practical training. How knowledge, of law to enable one to sit for the All India Examination need not be Bar Councils concern.

Added to the restrictive view of the Bar Council, the Kerala States apparent policy of not sanctioning law colleges has also dampened the scope for the spread of knowledge of law. There are 84 Law Colleges in Karnataka; 35 of them in Bangalore alone. Many Kerala students who can afford to go there get legal education, but the larger number poorer ones are left behind.

4. Automation of the administration of lower judiciary

Use of modern digital technology effectively could solve some of the problems faced in the administration of justice in the Courts. The majority of the litigants, that too poor approaches only the lower judiciary for grievance redressal. Justice is denied to them because of the way in which courts are administered. Steps have already been taken in the High Courts and Supreme Court to use digital technology for court management. The following could be the areas that can fall with in digital management:

- From filing to final disposal of case
- Online filing with a hard copy to be submitted to the court on the day of posting of the case
- Online allotment of the bench
- Online recording of evidence
- Judgments to be uploaded in the website
- Online certified copies of the orders
- Registered lawyers to have access to the network with password
- Payment of court fee and other fees using credit card

5. Training for officials implementing the law

- Department that initiated the legislation to impart awareness of the provisions of the law to the officials involved in the implementation of the law
- One day programme to educate the officials
  - Provisions of the law
  - How to implement
  - Follow up etc.

6. Awareness to the Public on new laws

- Department that initiated the legislation to arrange public meetings to educate the people the importance of the law and what it is expected to deliver
- Responsibility of the political parties to educate the people by organizing awareness programme
- Creation of committees with the participation of the people at different levels to monitor the functioning of the law

7. Reporting back the problems in implementation of the law and follow up

- Creating of a special unit in the Law Department to act as a cell to receive inputs on implementation of various laws and to take appropriate steps

- Identify the problems and the changes suggested
- Mark the issue to the concerned departments for action
- Follow up the actions taken by the department to change the provisions of the law
- Ensure that the amendment reaches the Legislative Assembly

- Officials involved in implementation to report the provisions in the law that create problems and suggest solutions
- Report from the committee

(g) To provide training to the officers for legislative drafting:

1. Training Programme:

Law must possess clarity and be expressed in the simplest language. It must be understandable even to the illiterate citizen of India. If it wants to claim obedience by the people, it should not have an unrecognizable face.

It is often more important that the law should be certain, than that it should be perfect. In fact, more litigation is generated by the uncertainty and obscurity of law than by any other single factor.

Clarify must be the virtue of law, because law cannot afford to leave its consumers in confusion about what it means. If the consumers of law can make a mistake in understanding it, the enforcement agency can also do the same, and instead of enforcing the law can enforce what is not law, and thereby convert the law into unlaw and the rule of law into the rule of unlaw.

The Government shall organize a compulsory three day training programme for all officers of different departments associated with drafting of the law. The details of the training modules with reference materials is attached as **Annexure – I**

2. Committee for Drafting

In the Legislature Secretariat, there should be a Chief Legislative Draftsman, assisted by two or three additional Draftsmen. There should also be another Committee of the Legislature, the Drafting Committee. The responsibility for the final draft of any Bill to be presented to the Legislature should be with the Drafting Committee and the Draftsman. Earlier drafts could be prepared by the Department from which the Bills originate in consultation with the Draftsman.

The Legislative Draftsman can, with the help of facilities available in the Legislature Secretariat give training in drafting to select officers nominated from the various Departments. The Law Department and the Advocate General also can contribute to the training programme. When the Bills have to be drafted in the Departments, services of the persons who have received training in the drafting training programme could be utilized.

At present there is no attention paid to legislative drafting in the LL.B. curriculum. The academic training concentrates on draftings of documents for practice of law (plaint, written statements, deeds etc.). The Universities and colleges could be persuaded to add a paper on Legislative Drafting. All aspects of legislative drafting could be given attention to with a lot of practical exercises followed by an examination wherever practical skills could be tested. When legislative drafting is taught in colleges, the services of the academic staff involved in the teaching could also be utilized for actual drafting of Bills and for the training of draftsmen by the Legislature Secretariat.

(h) To provide training for the legislators in the legislative process:

(a) Suggested a compulsory for day workshop for the newly elected M.L.A's. The details of the workshop with the suggested reading materials is attached as **Annexure – II**

(b) Suggested one day workshop on new areas that come up in the Assemble to form legalization. Based on the topic experts may be invited to deliver informative lectures on the topic so that the M.L.A's are posted with different views available on the subject. This will enable them to form an informed opinion as to the various provisions of the new law.

(i) Matters to be implemented jointly by the Legislature, Parliamentary Affairs Department and Law Department Regarding Legalisation

1. Private Member Bills

The following suggestions are made to make sure that the Private Member Bills are in proper form.

(a) Once the Bill is received in the Legislative Department the same shall be referred to the Law Department for scrutiny.

(b) The Department of Law shall examine the legality, constitutionality, legislative power and the drafting. The Department shall carry out the technical errors in the draft and also give written opinion and suggestion on the legality and constitutionality. The Law Department shall make sure that while carrying out the technical corrections in drafting the policy and ideas reflected in the Bill are not changed.

(c) The Bill shall be send back to the Private Member by the Legislative Department for carrying out the suggestions and approval of the technical suggestions made by the Law Department.

(d) The Bill returned by the Private Member may be placed before the Assembly as per the rules of business.

2. Allotment of more time for the discussion of Bills:

It is recommended that at least one third of the sitting days excluding Question Hour, Submission may be exclusively set apart for legislative business.

3. Co-ordination in the Assembly when the Bill is presented:

It is recommended that when the Bill is presented in the Assembly and the discussions are going on in the House in addition to the officials of the Law Department the official who was responsible for the drafting of the Bill from the Concerned Department and Parliamentary Affairs Department shall be present.

4. Department responsible for the Administration of Justice

It is noticed that as of now different departments in the Government are involved in the administrative functions relating to administration of justice. This includes the posting of prosecutors, government pleaders, other government officials etc. Since this is resulting in lack of co-ordination of various aspects of administration it is recommended that all administrative matters related to administration of justice shall be brought under one Department, preferably Law Department.

5. Control of Legal Education:

It is brought to the notice of the Commission that the Department of Education has constituted a Committee on Legal Education System in Kerala with Prof. N.R. Madhava Menon as the Chairman (Vide G.O. (MS) No.101/08/H.Edn. dated 13/08/08). The Commission requests this committee to examine whether the control of Legal Education in Kerala is shifted from the Higher Education Department to Law Department.

6. Administrative Control of Parliamentary Affairs Department:

Since specific problems are not identified in the note send from the Law Department it is not possible to give any recommendation on this issue of bringing the Administrative control of the Parliamentary Affairs Department under Law Secretary.

(j) Steps to be taken by various Government Departments regarding legislation:

1. Creation of Core Group for preparing legislation to ensure participation of all stake holders

The preparation of the policy document and the legal provisions are generally done by the members of the bureaucracy without any transparent and active public participation. Hardly have we followed such participation in formation of the draft law. Only when the draft law is presented before the Legislative Assembly the members of the public and the stake holders get an opportunity to know and in many occasions the law is passed without proper discussion and participation of the public. This result in many controversial

provisions and in some cases difficulty in its implementation. The net result is the law being challenged and the Court deciding the case in favour of one or the other party without resorting to a balanced approach. To overcome this problem it is felt that there must be participation of different stake holders in the formulation of the legal policy and draft legal provisions before it is presented before the Legislative Assembly. The idea is to facilitate the bringing in of various views and expertise in the area into the shaping of the policy and the draft legal provisions. This it is felt would help to substantially avoid controversies and bring out reasonably balanced legal provisions taking care of the conflicting interests of various stake holders. The Central Government is now following this approach in many areas. Hence the following steps are suggested in the formation of the law by various Departments of the Government of Kerala.

a. Identification of the problems by the Department dealing with the subject that require change in the existing law or need for a new law – This could be based on the practical difficulties brought to the notice of the Department either by the functionaries or by any one interested in the subject

b. Preparation by the officials of the Department a draft legislative policy document or a position paper – This document may include brief background, problem description, existing legal provisions and the gaps, affected parties and kinds of problems they may face, suggested approach etc.

c. Creation of a “Core Group” by the Minister in charge to discuss and prepare the policy document and draft the provisions for amending the existing law or enacting a new law after proper consultation.

d. The Core Group may consist of the following:

i. Secretary of the Department (Chairman)

ii. Representatives from various Departments having stake in the subject/area in which the law is going to be enacted

iii. Representative from the Department of Law

iv. Representatives of the Industry Organizations connected with the subject

v. Representatives of the various other stake holders connected with the subject (in case there is an organization representing them the representation may be from these organizations)

vi. One or two subject experts in the area preferably academics

vii. One or two legal experts in the area – academic/advocate

viii. Representatives of non-governmental organizations working in this area

e. The Core Group shall meet as many times that may be necessary to discuss and finalize the policy document and the draft legal provisions. There is no honorarium or sitting fee for the members. The non-official members may be paid TA/DA as per Government Rules.

f. The draft document shall be circulated to the members of the Core Group and request for written suggestions—In case of conflicting views both views must find a place in the document.

g. Publication of the draft policy document as finalized by the Core Group for public comments—Publication may be through the website and news item in the paper. The document may also be send to institutions and individuals for comments.

h. Discussion of the suggestions from the public in the Core Group and inclusion of suggestions in the policy document.

i. If necessary this document may be place before the Cabinet and approved before proceeding further.

j. Creation of a "Drafting Committee" from the members of the Core Group for the purpose of drafting the legal provisions. The Committee is constituted by the Chairman of the Core Group in consultation with the members.

k. The Drafting Committee may consist of the following:

i. Chairman (preferably a member in the Core Group familiar with the subject and drafting)

ii. Representative from Department of Law

iii. One subject expert

iv. One legal expert

l. Written submission of draft provisions from the members of the Core Group—The Core Group members may submit suggest draft provision for the consideration of the Drafting Committee based on the policy document

m. The work of the Drafting Committee is technical in nature—to prepare the amendments/ new law incorporating the views expressed in the policy document and suggestions given by the members of the Core Group. The draft may contain alternative provisions in areas of conflict

n. Presentation of the Draft prepared by the Drafting Committee before the Core Group for discussion and suggestions

o. Preparation of the revised Draft by the Drafting Committee based on the discussions

p. Publication of the Draft for public comments—Publication in the website—news item in the news papers—Circulation of the document to the institutions and individuals. The Department may also organize meetings with the stakeholder in different parts of the State if the matter is of such importance. They may also hold seminars or workshop to facilitate critical inputs for the draft.

q. Discussion of the public comments and its inclusion by the Core Group

r. The Core Group shall be dissolved by the Department at this stage.

s. Finalization of the draft by the Drafting Committee

t. The draft finalized by the Drafting Committee then shall be discussed within the Department and with other department officials for its finalization. The Department may use the help of the Drafting Committee if necessary at this stage also.

u. The Drafting Committee shall be dissolved by the Department at this stage.

v. Then the Department may follow the normal procedure in the Government for its final approval by the Cabinet and placing it before the Legislative Assembly.

The duration of this exercise is subject to the urgency of the matter. The Chairman of the Core Group may in the beginning prepare a time schedule for the completion of this exercise.

2. Creation of Legal Cell in every Department

Laws made by the legislature are implemented by various government departments. Each government department should have a legal cell. When the legislation is made, it should be the duty of this cell to interact with different branches in the government and have an overview of the implementation of the new law. The enquiry could be focused on the interaction between the existing norms and new norms. Study could be focused on the interplay between the existing social norms and legal norms. The reaction of the public towards the new legislation could also be enquired into after this preliminary step. Department should initiate steps for its implementation.

The legal cell should keep track of the things and get the feedback from the implementation agencies at large. This feedback will help the legal cell to identify the problems in the implementation and the need for new legislation could be evaluated and brought forth in its Annual Report to the Government. In making its report, it should be possible for the legal cell to consult not only the various branches of the government department responsible for the implementation but also other government departments. At the time of making a report to the government, the legal cell can incorporate the views of the other government departments with reference to need for reform/fresh legislation.

The Commission has received a detailed representation from the Kerala Criminal Judicial Staff Association pointing out the absolute need of collecting feed back from the authorities implementing new legislations and informing the Government about the required steps to be taken in the matter of facilitating satisfactory implementation avoiding hardship to the staff manning the implementing authority; namely the Criminal Courts in the State. In the representation they have explained the difficulty felt by the staff working in the Criminal Judiciary while discharging the additional workload arising every now and then as a result of creating new offences by new legislations and conferring jurisdictions on the Criminal Courts in the State. They have given various particulars which justifies to a very great extent their submission that as a result of conferment of jurisdiction under section 138 of the Negotiable Instruments Act and the offences under

Domestic Violence Act to point out a few examples; the workload in the Criminal Courts have increased several times and the staff appointed in accordance with the staff pattern fixed in 1982 is finding it absolutely difficult to cope up with the increased work. As such, the Commission is of the considered view that it is highly essential for the Government to bestow serious thought over the feed back received from the implementing departments furnished through the annual report referred to above and take appropriate steps to remedy the practical difficulties faced by the implementing authorities. There will therefore be a recommendation to the Government to that effect.

3. Legislative provision for co-ordination of departments

The need for co-ordination and interaction among the various departments need not be over-emphasized. The lack of co-ordination between the department of P.W.D. and the water authorities is reflected in the destruction of roads immediately after its construction for laying water pipes etc. This could be obviated if the legislation prescribes prior consultation and planning. Example could be multiplied. Community development programmes of both the Central and the State Governments also call for co-ordination among various agencies and departments. This need for co-ordination should be given statutory recognition. It may help the government to keep pace with the latest developments in the society. It may help them to have proper regulation of the activities.

(k) Other matters to be considered in the field of legislation in the new world order.

1. International Treaty making

Today international developments have impact on domestic laws of sovereign states. In federal jurisdictions this has serious implications. This is particularly so in the Indian situation. The Indian Constitution has three lists of subjects for legislation in the 7th Schedule. There are provisions for ensuring removal of legislative conflicts between a state and the centre. In the case of implementation of international obligations it is for the Parliament to take measures including legislation. In cases where no legislation is necessary for the implementation the Central Government implements the obligation. Treaty

making power is exclusively with the Central Government. There could be in the provisions in the treaty, which may conflict with the state jurisdiction in the federal setup in India. In such a situation Central Government may go ahead with the programme ignoring interests of the states. This can result in chaos. It should therefore be the responsibility of the law department in the State Government to co-ordinate. The implications of India's entering into different treaties with various Governments or International Organizations should be addressed. It would be in the interest of the State Government itself to seek necessary help from the centre as well as from other agencies to take care of its interests by way of administrative/legislative measures. The law department should also explore the possibility of incorporation of various provsions in the laws concerned to offset the adverse impact the international legal norms may have on the sphere of activity of the state in India. In short, it should have an integrated outlook and ability to have active co-operation of the Central Government, various international agencies and the different departments of the State Governments.

Annexure – I

Modules for Training on Legislative Drafting

(3 days – 15 hours)

Introduction:

A draft Bill is a reflection of the policy of the Government to regulate the particular behavior of the members of the society. The need to bring out legal norms to regulate the activities in the society may come from different sources. Once the Government formulates the policy and decides to legislate it is the duty of the persons drafting the Bill to ensure that the language used in the Bill clearly reflects the policy of the Government. The normal practice in the Government is that the department that is responsible for the field in which legislation is needed brings out the draft. The draft is prepared within the department after consultation which then is circulated to different departments having a bearing on the subject including the law department for comments. These comments are examined by the department from where the Bill originated and the final draft is placed before the Cabinet for approval before the same is presented in the Assembly. Though there are various stages in which it is possible for the Bill to be revised during the process in the Assembly in many cases it is primarily the draft prepared and approved by the Cabinet that finally becomes the law. A law if drafted badly immediately attracts judicial scrutiny resulting in the repeal of some provisions or even the entire Act itself sometimes. This mandates that the officials dealing with drafting of legislation needs awareness about the various issues involved and expertise in drafting the Bill. It is noticed in many occasions that the poor drafting of legislation results in many impediments in the implementation of the provisions of the Act along its conflict with judicial opinions. Hence the need for proper training of officials involved in legislative drafting. It is an accepted fact that expertise in drafting is achieved through on hand experience. But there are many issues which if known to the officials to involve in drafting would help them to prepare better draft Bills. The three day training programme is designed to expose the officials the various policy and technical issues involved in drafting the Bill. It is advisable that every official posted in a section dealing with drafting of legislation in the various departments and the law department under go this course. This must be made mandatory for all the new officials posted in this section.

Programme:

Day 1

9-10

Inauguration

10.30 – 12.30

Topic: I - Policy choices in Democracy and Law Making Process

(Nature of democracy, form of Governments, political philosophy of ruling parties, inbuilt limitations on framing laws, legislative competence)

Topic: II - Importance of Policy in Framing Laws

(Spelling out the objectives of the policy, methods through which the policy is intended to be implemented – constitutionality of the policy, remedies, public participation, special agencies etc.)

2.00 – 4.00

Topic: III - Types of Legislation and its Structure

(Codification, amendments, interpretation, repeal, substantive and procedural, taxing, penal, subordinate legislation – difference in structure – examples may be used to illustrate)

Day – 2

9.00 – 11.00

Topic: IV - Importance of Rules of Interpretation in Framing Laws

(Brief introduction to various rules of interpretation followed by courts in India with the help of decided cases)

Topic: V - Choice and Use of Words in Framing Legislation

(Style, intelligibility – simplicity, precision, reflection of legislative intent through use of words – use of illustrations, provisions and explanations)

11. 30 – 1.00

Topic: VI - Use of Language in Framing Legislation

(Nature of sentence - simple and complex – importance and difficulties – British and American styles -

Topic: VII - Structural Arrangement of Statute

(Title, headings and sub-headings, marginal notes, arrangement of sections, preamble, commencement and extent of provisions)

2.00 – 4.00

Topic: VIII - New Trends in Drafting Legislation

(Simplification of language, use of local terminology, use of mother tongue, illustrate with example of land laws, new laws from England and US)

Day 3

9.00 – 11.00

Topic: IX - Role of Subordinate Legislation in the Successful Implementation of the Law

(Relationship between principle and subordinate legislation – nature and type of subordinate legislation – legislative intent and subordinate legislation -)

Topic: X - Identification of Areas that need Subordinate Legislation for Implementation of the Law

(Substantive provisions reflecting legislative intent – procedural requirements, forms, free, schedules, powers of authorities etc.)

11.30 – 1.00

Topic: XI - Administrative Instructions for Implementation of the Legislation

(Use of handbook, guidelines, manuals, policy documents, reports etc. and its legal status and consequences)

2.00 – 4.00

Concluding session – feedback, suggestions, way forward

Reading materials

Books:

1. Robert N. Cook, *Legal Drafting,* The Foundation Press, 1951.

2. E.L. Prise, *The Elements of Drafting,* The Law Book Company Ltd., Australia, 1968.

3. Robert C. Dick, Q.C., *Legal Drafting,* The Carswell Company Ltd., 1972.

4. Dr. Madabhushi Sreedhar, *Legal Language,* Asia Law House, 2nd Edn. 2004.

5. Justice R.C. Lahoti, *Preamble The Sprit and Backbone of the Constitution of India,* Eastern Book Co., Lucknow (2004).

6. G.P.Singh, *Principles of Statutory Interpretation*, Wadhwa & Co.

7. Vepa P. Sarathy, *Interpretation of Statutes*, Eastern Book Co., Lucknow.

8. Markandey Katju & S.K Kaushik, *Bindra's Interpretation of Statutes*, LexisNexis, New Delhi 9th Edn. 2002.

Cases:

1. *NEPC MICON Ltd. v. Magna Leasing*, 1999 (4) SCC 243.

2. *Smith* v. *Hughes* (1960).

3. *Heydens Case.*

4. *Royal Hatcheries (P) Ltd.* v. *State of AP.* AIR 1994 SC 666.

5. *Lee v. Knapp*, (1966) 3 All E R 961.

6. *Harbhan Sing* v. *Press Council of India,* AIR 2002 SC 1351.

7. *Forest Ranger Officer* v. *Khushboo Enterprises*, AIR 1994 SC 120.

8. *A.K. Goplan* v. *State of Madras,* AIR 1950 SC 27.

9. *Bengal Immunity Co. v. State of Bihar,* AIR 1955 SC 661.

10. *State of Rajasthan v. M/s Khandaka Jain Jewelers,* AIR 2008 SC 509.

Articles:

1. P.M. Bakshi, "The Discipline of Legislative Drafting", 24 Journal of Indian Law Institute, (1992) 1.

2. Bushan Tilak Kaul, "Industry, Industrial Dispute and Workman: Conceptual Framework and Judicial Activism", 50 Journal of Indian Law Institute (2008).

3. A.K. Ganguli, "Right to Property, Its evolution and Constitutional Development in Indian", 48 Journal of Indian Law Institute, (2006) 489.

4. Thilini, Kahandawaarachchi, "Use of Legislative History in Statutory Interpretation", 49 Journal of Indian Law Institute, (2007) 223.

Annexure - II

Workshop on Legislative Practices

(4 day programme for newly elected MLA's)

Introduction:

The Kerala Legislative Assembly is the law making body and also the house where issues connected with the people of Kerala is discussed and decisions taken. Members of the Legislative Assembly owe a great deal of responsibility. Their active involvement and participation in the proceedings of the Legislative Assembly make this democratic institution function better and deliver the desired result in a democracy. It is the law that any person who satisfies the minimum requirement as per the Constitution can contest the election and become representative of the people in the Assembly. It is important to not that no educational qualification is prescribed to become an MLA and once elected they are expected to know their role and responsibilities in the Assembly. Since it is not mandatory that these members shall be well qualified to handle complex legal issues relating to law making there may be some MLA's who needs training to develop the necessary skills. It is also to be noted that the knowledge of the rules and regulations governing the functioning of the Legislative Assembly derived from the provisions of the Constitution of India and the practices followed will definitely help one to discharge their functions. An MLA who is informed about the various activities of the Assembly and the rules and regulations governing the functioning of the Assembly can surely perform his role in the Assembly in a better way. It is

the performance experience of an MLA in the house that makes him a respected member of the house. It is his behaviour inside the house that brings respectability for the institution as well. In many cases a newly elected MLA has very little understanding about the various activities of the Assembly. This Workshop is designed to facilitate the newly elected MLA's to get equipped with the necessary information so that it would be possible for them to discharge their responsibilities in the Assembly in a better way. The four day workshop is designed to enrich them with various rules and regulations based on which the Legislative Assembly is functioning.

Programme:

Day – 1

3.30 – 5.00

Inauguration

Day -2

9.30 – 11.00

Democratic Governance under the Constitution

(Parliamentary form of Government – legislature, executive and judiciary – role and function)

11.30 – 1.00

Federal Structure under the Constitution

(Administrative and legislative relations – role of central administrative officials – control of Central Government over State)

3.00 – 5.00

Structure and Powers of Legislative Assembly

(Legislative authority – prerogative of the Governor – convening of the sessions of the Assembly – attendance of members - prorogation and adjournment – dissolution of Assembly – suspension and expulsion of members -)

Day – 3

9.30 – 11.00

Power and Functions of the Speaker of the Assembly

(Organization of the business of the house – consultation with legislative party members – disciplinary actions – powers in conducting the business of the house etc.)

Powers and Function of the Legislative Secretariat

11.30 – 1.00

Structure and Functions of the Legislative Committees

(Various committees – terms of office - membership – sitting – proceedings - evidence collection – reports etc.)

3.00 – 5.00

Proceedings of Passing Bills in the Assembly

(Introduction – readings – referring to committees – discussion-amendments – voting)

Day – 4

9.30 – 11.00

Legislative Privileges

(Freedom of speech, freedom from arrest or molestation, breach of privilege – contempt of court)

11.30 – 1.00

Anti-defection Laws

(10th Schedule of the Constitution, cases)

3.00 – 5.00

General Powers, Functions and Benefits of the MLA's

(Commitment to constituency – use of MLA's fund – salary, allowances and pension)

Reading Materials

Books:

1. Erskine May's, *Treatise on the Law, Privileges, Proceedings and usage of Parliament*, (Butter worth, London).

2. M.N. Kaul and S.L. Shakdher, *Practice and Procedure of Parliament*, (Metropolitan, New Delhi).

3. V.D. Sebastian, *Indian Federalism: The Legislative Conflicts,* Academy of Legal Publications, Trivandrum, 1980.

4. R.B. Jain (Edn.), *Legislative Process in Development,* Getanjali Publishing House, New Delhi, 1985.

5. Salil Kumar Nag, *Evolution of Parliamentary Privileges in India Till 1947,* Sterling Publishers Pvt. Ltd., New Delhi, 1978.

6. V.G. Ramachandran, *The Law of Parliamentary Privileges in India,* Eastern Book Company, New Delhi, 1978.

7. Dr. N. Jose Chander, *The Legislative Process in Kerala,* Darsan Books, Trivandrum, 1981.

Articles:

1. Hari Chand, "Powers of the Speaker", 16 Journal of Indian Law Institute, (1974) 128.

2. Joseph Minattur, "Parliaments Right and Immunities", 19 Journal of Indian Law Institute (1977) 182.

3. D.C. Jain, "Judicial Review of Parliamentary Privileges: Functional Relationship of Courts and Legislature in India", 9 Journal of Indian Law Institute (1967) 205.

4. P.M. Bakshi, "The Discipline of Legislative Drafting", 24 Journal of Indian Law Institute (1992) 1.

5. P. Iswara Bhat, "Free Legislative Choice and Anti defection Law", 1994 Academy Law Review 65.

6. Verendra Kumar, "People's Right to Know Antecedents of their elections candidates: A critique of Constitutional Strategies, 47 Journal of Indian Law Institute (2005) 1.

Cases:

1. *Jyoti Basu v. Debi Ghosal,* AIR 1982 SC 983.

2. *Union of India v. Association for Democratic Reform,* AIR 2002 SC 2112.

3. *People's Union for Civil Liberties v. Union of India,* AIR 2003 SC 2363.

4. *Kehoto Hollohan v. Zachillhu,* AIR 1993 SC 412.

5. *Power, Privileges and Immunities of State Legislatures Re,* AIR 1965 SC 745.

6. *P.V. Narasimha Rao v. State,* AIR (1997) 6 SCALE (Vol.3) 1.

(l) No other matter was further referred to the Commission other than those referred to as per order dated 17-11-2007.

Note:

One of the Consultants appointed to assist the Commission Prof. V.D. Sebastian has expressed his views on some of the points referred to the Commission with which the other members have found difficulty to agree. However, the comments of the Consultant are given below:-

"Bench System in High Court

A good amount of the time of High Court judges is absorbed in Bench sittings. One is led to doubt whether this is really necessary commensurate with the benefits that are supposed to be derived from the practice.

As has been rightly held by our Supreme Court in Maneka Gandhi's case, in the last analysis, law is reason. Reason is a faculty residing in individual minds. In the democratic theory and practice of a politically organized society, the co-ordinated reason of the people finds expression in the majoritarian view of the legislature. The reasons of the law is fixed in this way by counting heads not because there is any addition of the reason of the voting members, but in the absence of an acceptable alternative, the reason of the leader (which would have been adjusted to get the voting support) is adopted by the others. It is not based on a belief that reason is on the side of the bigger batallion. In the judicial process, there is no need to get number support for the law. Chosen for competence and trained in openness, fairness and impartiality, the reason of the individual judge can safely be accepted as that of the law to dispose of the case before the court. What gives validity to the reason of the judge is not the number support but a number supported sovereign authorization. There is no need to adopt the norms of wholesale business at the retail level. To do so is a mere superfluity.

It seems that the procedure of sitting *in banc* started in the English judicial practice following the Norman Conquest. When an itinerant judge from the *Curia Regis* visiting a county found before him a point of law seemingly already decided by another judge in another *iter* used to reserve the case to be decided at the headquarters in consultation with the judge who had already

decided the point. Though the decision of the judge would be equally valid as a decision of the King in *Curia Regis*, the sitting *in banc* procedure was adopted to avoid conflict. Had there been statute laws and law reports there would have been no need for a bench sitting. It is not known why the system continued even after the original necessity was no longer there. The Bench system might have taken deeper roots in due course because of the inbuilt conservation of the judicial process and the fear of judges to depart from precedents.

At present, there is statute law, law reports and able counsels on either side to give clarification and to assist the judges. In this context to invite more than one judge to decide the issue is like adding a fifth wheel to a four wheeled car. The resolution of a conflict in a Division Bench requires reference to another judge, conflicts between Division Benches, constitution of bigger Benches, and so on, involving much judicial time and energy. Sometimes it is claimed that the dissenting opinions are valuable pointers for the development of law. But it is too expensive a procedure to draw attention to the need for reform. Other agencies like socially active groups, news papers, academics can highlight on the need for reform, at much less cost, and draw the attention of the Law Reforms Committee and the Legislature for effective action.

So the suggestion is that the Bench system should be abolished in the High Courts. [In the Supreme Court because of the constitutional requirement of a Five Judge constitution Bench, it may continue to that limited extent subject to a rule that a later constitution bench can overrule an earlier one and there is no need to seek bigger Benches]. Every question presented to the High Court should be decided only by a single judge. If considered necessary, the judges in the High Court could be divided into two groups—seniors and juniors—based on length of service as a High Court judge, and decision of a junior judge can be subjected to an appeal to a senior judge. All conflicts of law could be settled by the Chief Justice or by another senior judge nominated by him in chamber. In India there are more High Court judges than members of Parliament. If the Bench system is abolished, it seems there will be no arrears in High Courts.

Posting cases to Courts in the High Court:

The present practice is to post cases to courts and then the judges to be posted to particular courts. A case should be posted to a particular judge and he should be responsible for its disposal. This has two advantages. First, there is at present no easy indication of the work done by the judge. While time-limits and disposal schedules cannot be prescribed, an awareness in the mind of the judge of his personal responsibility of disposing of the cases posted to him may yield better results. Secondly, the present unwholesome practice among some advocates of waiting for change of judges in courts and the consequent delays could be avoided. If this system is adopted there will be no case pending in the High Court for more than a limited period, for no judge would like to be identified as keeping cases for long periods.

It is also desirable that arrangements be made for teaching law in mother tongue, Malayalam. In the case of a section of students, knowledge of English is so poor that they are unable to understand the instruction given in English. Either batches teaching law through Malayalam may be introduced or the students allowed to write at least the examination in Malayalam.

This writer hopes that the suggestions given above would, if implemented, bring about better administration of law."

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PART V

THE END OF THE BEGINNING

'This is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning'

(Winston Churchill)

'PRISONER, tell me, who was it that bound you?'

'It was my master.' said the prisoner.

'I thought I could outdo everybody in the world in wealth and power, and I amassed in my own treasure-house the money due to my king. When sleep overcame me I lay upon the bed that was for my lord, and on waking up I found I was a prisoner in my own treasure-house.'

'Prisoner, tell me, who was it that wrought this unbreakable chain?'

'It was I,' said the prisoner, 'who forged this chain very carefully. I thought my invincible power would hold the world captive leaving me in a freedom undisturbed. Thus night and day I worked at the chain with huge fires and cruel hard strokes. When at last the work was done and the links were complete and unbreakable, I found that it held me in its grip.

(Gitanjali p-18)

Money Power creates Prison Culture. Law Reform is the means and Human Liberation the end. The rich suffer the syndrome of insatiable pleasure in a prison of unbreakable iron. The poor, in slave status, seek to break free and gain liberty through the power of State law geared to Social Justice.

The present Law Reforms Commission is limited in time and its objectives and initiatives are confined to a specified agenda and provincial jurisdiction. The eminent but busy members, chosen by the State Government in its political wisdom, have limited facilities and faculties in luminous people-oriented jurisprudence, necessarily restricting the Commission's socialist, secular perspective, operation and output matching the new challenges of our nascent century. It is Kerala-specific in its sapient scope and constitutionally

value-lucent as a federal unit and, at the same time, it is socialistic, secular and democratic because the Constitution, in its Preambular guidelines, has underscored these paramount prescriptions as basic to Law India. However, notwithstanding the supremacy of the Fundamental Law, the nineties of the last century have made a grave departure, violative of the basic structure, largely influenced by western culture and Big Business pressure, where agriculture is de facto jettisoned and money-motivated industrial—technological ambition has overtaken India's emphasis on agriculture, stress on swadeshi, abolition of poverty, generation of employment and the social justice entitlement of swaraj as every Indian's human right never to be imperiled by the exploitative, pollutive, Proprietariat-manipulated terrorism of a privileged class who consist of the indigenous mafia, foreign Corporate Business and corrupt freebooters who make a perverse priority reversing the constitutional humanism and Gandhian-Nehruvian parameters which are our tryst with destiny. Money enslaving Man became the rule of life and global quasi-imperialism gained colonial infiltration. Indian humans, the real resources of the nation, are the billion and odd unsure of tomorrow, not the billionaires and millionaires who bluntly or vicariously rob community wealth, disowning their trusteeship as 'keepers of their brothers'. Law, in its holistic dimensions of justice, equity and good conscience, will generate a salutary transformation using the sovereignty of the nation. The richer classes, will then find the meaning of democracy in their trinity of instrumentalities. They will realize that no longer can they be masters of the country's entire wealth. They will be prisoners of distributive justice. The Gitanjali has poignantly projected this sage vision which justifies a militantly enforced distributive humanism whereby expropriators shall be expropriated and the Gandhian ethos of Small is Beautiful is sanctified into human reality.

Even as the world and international relations undergo fundamental changes, moral and material, nations in their internal values and provincial policies, undergo temporal mutations and ideological approach.

Immutability of laws is absurd since Law must keep pace with Life. To hold that jurisprudence is out of bounds for alteration is unsound. When Globalization and Privatization operated Big Powers have greedily grabbed the economics of nations, laws of feudal vintage and colonial complexion lose their relevance and look ludicrous if mummified. Law reformers and juristic activists have to strengthen, by stern enforcement, the fundamental

values of finer, humanist culture. Only then can sovereignty, swaraj and swadeshi make justice, social, economic and political, a federal reality and living truth. If Law Reform lags and lazes, a new meltdown will see the poor disappear.

The horizon of law expands with discoveries of science and technology which, in turn, gives rise to amazing processes of mechanization, original means of larger production and fairer distribution. This large-scale incarnation summons the Law Reforms Commission to undertake radical changes relevant to meet the dynamic challenges lest the wealthy crazily corner the new boons. Our legal system is too primitive, too static, too pachydermic for this progressive mission of legislative locomotion and administrative action.

Nature's gracious plenty has showered celestial bounties on Kerala which, if utilized with creative intelligence, scientific planning and social commitment will developmentally enhance the happiness of the common people. The sun has blessed the State with abundant energy, social uses ad other public health benefits, but the State has failed to investigate and exploit the plural Solar utilities. The ANERT, a public sector research organ, is inert and the State is choked by polemical politics with parties at loggerheads. The Sun is a wonder, a star whose glorious advantages deserve Kerala's developmental research. A long coastal line with beautiful beaches, rare sands and finer facilities for coastal shipping is another natural gift, somewhat neglected until now. The two monsoon seasons natural bounties, are usually a plentiful source of water which can be used for irrigation, social cleanliness, tanks and wells and several other social privileges. A few utilitarian hydro-projects, especially, if undertaken in association with Karnataka and Tamil Nadu, carefully investigated and executed, (a unique master-plan of Kerala State's water resources already exists as early as 1958) will augment our natural wealth. Unfortunately, no new reservoir, no fresh, large lift irrigation scheme, no small electricity project in the hills from waterfalls, seems to have yet attracted the State's planning talent and development creativity. More than all, inland navigation, the cheapest form of transport, is a great but untapped Kerala resource. What a wonder if Trivandrum to Kasaragod were linked with inland navigational canals! There are many rivers and backwaters in between, which are fertile sources of inland transport. However, these remain to be explored and executed. Negative politics hardly helps.

Some of these plans were in the Planning vision and execution (a la Kuttiadi project) of the State Government during the 1957-59 span of Administration. Idukki, of course, is an achievement. This excellent prospect is still a somnolescent process. These creative ideas require imaginative engineering, operational skills and people's involvement. Pressure, through legislative mandates, is part of Law Reform which can awaken an apathetic Administration. What is mere potential wealth must be transformed into a developmental asset. The urgent desideratum of Law Reform is Earth Justice, Earth Law! Yes, we can. Our Commission must catalyse these blessings of Nature and avoid the tragedies of neglect of rivers which lead to floods and tidal terrors.

Tourism has been claimed by leaders of public life and social activists as a paradisiac prospect which will add to the enchantment and enrichment of Kerala. True, the Western Ghats are a marvel of scenic beauty with waterfalls, plantations, wild animals and glamorous greenery. The Arabian Sea which runs from end to end of the State provides glorious sunrise and golden sunset too picturesque for poetry. But to sell tourism to Big Business and to commercialize vulgarly its dimensions, leading to prostitution, abuse of street children and other venial violations require careful regulation by law. Nature and tourist culture cannot be a product of social abuse and Law Reform has to function with sedulous sensitivity so that a great boon does not degenerate into a greedy bane. This subject has hardly received Executive concern or legislative prescriptions. The police and district administration have a vigilant role to play in socially and morally preserving and protecting tourism as a gift of new fraternity, rather than an avaricious opportunity for spoiling the green glory of Kerala panorama. The rule of law is the ally, servant and master of the rule of life.

The Law Reforms Commission—Kerala, is only beginning to operate this revolutionary mission. Technology and ideology travel fast but democracy and legislation-in-action are slow in locomotion. So much so, capitalist corporations like America Incorporated and captains of acquisition rob the enormous riches through unconscionable business leaving the vast have-not humanity out of the bracket of beneficiaries. How long will the poor agree to become poorer, unable to impart education for their children and employment

for themselves? Shelterless and starving, they suicide in despair or turn terrorist against those who plunder public resources, even Nature, and live luxurious lives and lavish in Westoxication and five-star pleasure. The sun ceases to be universal property. The earth is no longer available for the indigents' habitation, having been usurped by concrete jungles, grand palaces sky-high for the rich occupants. Industrial pollution spread by giant corporations pick-pockets the consumer and poisons food and drink. The air is no longer fresh for the people to breathe nor indeed is water in the river unpolluted for common people to drink what with factories spoiling the lovely flow; and public transport as a system which ensures freedom of movement for the smaller people has no hope of development. Shining cars, lightning trains, other speed monsters everywhere glut and block traffic. The earth no longer belongs to humbler humanity but is pillaged by the proprietariat. A shocking contrast between the haves and have-nots sets ablaze an incendiary movement of violence and greed. Such a disastrous prospect can be obviated only by powerful, daring, innovative, imaginative initiatives on the part of the democratic State with a social philosophy militantly pro-people and radically compassionate, if society's survival in equity, egality and justice is to redeem the noble tryst with the solemn Preamble to the sacred Constitution. The present Commission, functionally speaking is hardly a beginning. It seeks to set the tone, spark the plugs, catalyse the process; No more. A vistarama of revolutionary law, a class equalization with vibrant socialist commitment to the huge hapless sector is the urgent desideratum if despair and terrorism are to spare humanity in tranquility. The little done, the undone vast is the comment the Commission makes about the Constitutional journey so far. The present situation of pathos and bathos is a grave peril unless we change through a mighty paradigm shift. Today, power is with the illiterate or overbearing politician sans vision and drugged by election intoxication, may manipulate religious and regional chauvinism through communalism and parochialism, make gods belligerent to battle against one another and spur dark-minded, dogmatic bigots in numbers as narcotic casualties of trauma and tension. We need far-sighted statesmen who think of the next generation and progress of the nation, use resources for universal betterment. Such super-patriots regard advaita of the Vedas, thou art thy brother's keeper, in

true Jesus faith. The hallowed earth as world brotherhood in peace as a human haven is Islam's teaching, the spiritual compassion and self-less sacrifice of the Buddha and Chaitanya and the Marxian motto of non-exploitation are the paradigm-shift Law and Life must strive to attain. This glorious goal even when applied to the advance of a small State like Kerala demands a weltanschauung of humanism, a social philosophy of world order. Such an illumination alone can make Law Reform a spiritually and temporally purposeful operation. This shall be the finer, final end of Law Reforms Commissions in succession in compassionate operation. We commend this goal to the State so that it may truly be a socialist secular democratic unit of the Brave New Bharat, a pioneer, a paradigm.

An Elucidation

Freedom of religion is a constitutional fundamental. Equally imperative is secularism which is a basic feature of our constitutional order. But in a country of religious pluralism and hyper-political communalism the divine dimension of religion is apt to be confused with obscurantist versions of theology leading to vulgarity, violence and rivalries among sections of people with different faiths. So the Commission has taken care to refine the distinction between religion in its higher dimension and secularism in its finer facets, confined to the material aspects of social life. In this perspective, some Law Reform has been proposed. So far as Hindus are concerned, some aspects of legal rights have been subjected to Law Reform vis a vis secular matters. Likewise, preserving the decency and dignity of the secular aspects of Jesus Christ's great teachings valuable law reforms have been proposed. Islam has a laudable secular tradition often misinterpreted by mullas and propagated fanatically. Dogmatic obscurantists have bargained for popularity through bigotry. The Commission has recommended a few Law Reforms, distilled, refined and brought the Islamic law into harmony with civilized values. The Quaran and the Great Prophet are more sinned against than sinning. On the whole, the Commission takes a broad spectrum view that secularism in its pristine glory and grand dignity applies to Indian society, whichever the religion. Kerala has a secular culture and the vulture of communalism cannot martyr secularism to own votes or political power. No creed of the Constitution shall be a casualty to placate obdurate communalists.

We live in a new century with grave challenges and great perils. Globalization, liberalization and privatization have been used as a mahamantra or occult-incantation by Big Powers for exploitation of weaker nations. The world has gone berserk and people in their billions have become victims and enslaved under unprincipled authoritarian politicians by brainwashing intellectuals, by disrupting ancient value systems and distorting the spiritual-temporal confluence of mankind. The earth itself has lost its innocence and astral asset. We need a resurrection cultural and other. Max Muller told the world: *"If we were to look over the whole world to find out the country most richly endowed with all the wealth, power, and beauty that nature can bestow—in some parts a very paradise on earth – I should point to India".* Insatiable and excessive ways of life have made India particularly Kerala a garbage State, a testimony of the poetic truth 'wealth accumulates and men decay'. There is a universal decadence recession which inflicts untold calamity on humanity. We, in Kerala must win back our Maveli vision of socialist secular democracy. The Rule of Law must run close to the Rule of Life. Surely, billionaires will be a barrior to the claims of the billions. Nevertheless with determination and people's total co-operation **we shall overcome.**

The Commission is perhaps unpleasant in some of its extravagant view points but the world will change, so too India and Kerala State, only if radical truth is asserted time and again for the common people to awake, arise and battle through law for the Constitutional values of our Paramount Parchment. "Craft must have clothes, but truth loves to go naked" (Thomas Fuller).

The Finale

The Law Reform Commission is grateful to the State Government for giving it a fair opportunity to attempt a superb task, at once a lofty inspiration, an essay in jurisprudence and an experiment in value wonder. Our goal has been to help Kerala humanity achieve a better measure of justice, social, economic and political. The period for our performance has been infinitely small, and our labours honorary, viewed in the light of the

Everest of legal revolution ahead. Even so, something attempted, something done, wins for us patriotic satisfaction and humanist fulfillment. The end we set for ourselves is an agenda of excellence but our humble abilities were no match. If we have served to advance the Cause a wee-bit our mission is well-begun. Our magnificient motto, with which we conclude, is brief but exciting:

> ***My fellow Indians: ask not what your country can do for you—ask what you can do for your country. (John Fitzgerald Kennedy)***

* * * * * *

FINIS

The Law Reform Commission, Kerala, which undertook with the zeal of a patriotic mission, the task of transforming the legal system, discovered the Himalayan dimensions of the majestic project of Reform when viewed in the light of the magnificent Terms of Reference. Realizing the immensity of the work, the Commission chose to inscribe its study to a limited canvas but indicated the vast potential, limitless amplitude and perennial process of Law Reform in a constantly changing global culture. It is imprudent and fatuous to essay in a brief span a giant agenda. Such an ambitious goal would be sensible only for a permanent Commission, not for us. We are under no illusion that our Commission has extraordinary capacity to attempt an almost impossible task. We are not celestial in faculty, manpower and jurisdiction. We are small, know we operate as a State Commission and functionally submit to a few months duration. One is reminded of E.M. Forster's famous words, *"it is the vice of a vulgar mind to be thrilled by bigness, to think that a thousand square miles are a thousand times more wonderful than one square mile, and that a million square miles are almost the same as heaven".*

Avoiding this egregious blunder of infinite power but aware of the patriotic wonder of proposing salutary changes geared to social justice and constitutional perspective necessary in the dynamic days of rapid and radiant value transitions, we adopted a pragmatic attitude towards Law Reform. It is beyond us to claim deep dialectal insights of sociology or understanding of diagnosis of the social pathologies or, for that matter of scholarly solutions from a legislative pharmacopoeia. What we have achieved through our humble, humanist endeavour is reflected in the nearly hundred socialist innovative draft Bills accompanying this Report. We are conscious of 'the little done and the undone vast'. But we have made clear the direction in which Law Reform must move. This Commission has no pretentions of performing the grand objectives set for it by the State's terms of reference. Even so, Operation

Law Reform realistically assessed in the present situation of Law India leaves much to be desired from the angle of the have-not Indian humanity. Indeed, our present proprietariat, jejune jurisprudence, reminds one of the anonymous poem,

"The law locks up both man and woman

Who steals the goose from off the common,

But lets the greater felon loose

Who steals the common from the goose."

We have a Socialist Republic and so change is a must. The command of our Constitution and the demand of the tryst with destiny we made on the Declaration of Independence desiderate revolutionary legislative activism. Yes, we can, we must. Why? Change we need. Our moment is Now. Surely, hostile forces stand in the way of the fulfillment of Indian humanity's aspirations but we shall overcome. Our Report just begins the inauguration of a Blueprint for Change.

The total number of Bills, including amendment bills, new Rules, Regulations, guidelines or amendments to exisiting Rules, Regulations and guidelines framed and being recommended are included in Volumes II and III of this Report. All the Bills and other recommendations have been circulated to all members by sending their copies by e-mail except to the Chairman, Vice Chairman, Sri T. P. Kelu Nambiar, Barrister M. P. R. Nair and Sri P. B. Sahasranaman who were all actually involved in the drafting of the Bills and other recommendations. It is to be noted that except one member who has expressed his difficulty to agree with the Hartal Regulation Bill, nobody else has raised any objections to any of the recommendations. Hard copies of all the Bills and other recommendations have been forwarded on different dates to the Hon'ble Chief Minister for the consideration of the Government.

The conclusion of the Report closes our function in a formal sense but as Chairman of the Commission—and the Commission wholly agrees with the sentiment expressed—I record with gratitude the Commission's

appreciation of the personnel who have made it possible to complete the work undertaken by the Commission. Among the members, the Vice Chairman Sri Justice T. V. Ramakrishnan has rendered Herculean service and our Report has become possible only because of his industrious contribution. The Chairman also feelingly expresses the wish that one member Sri T. P. Kelu Nambiar, Senior Advocate and outstanding jurist has lent constant moral, ideological, cultural and luminous counsel whenever the Chairman or the Vice Chairman sought his critical and correctional opinion on controversial issues which came up for the proposal of draft legislative Bills at the formative stage of several discussions. The Commission is deeply appreciative of Sri Kelu Nambiar's compassionate help despite his age and ill health which the Chairman valued considerably in the course of his labours. Barrister M. P. R. Nair and Sahasranaman too have devoted considerable time and attention to various aspects of the Commission work in substantial measure. Their contribution deserves profound appreciation. Dr. Gopalakrishnan with academic proficiency has served the Commission as a member with special reference to certain legislative Bills which require academic scholarship. Dr. N. R. Madhava Menon despite his extraordinary crowd of work and busy schedule has rendered help whenever required. Dr. P. J. Alexander whose academic talent and practical experience have made his unique in certain ways and he has helped substantially in the preparation of the Kerala Police Act. Sri Gopal Subramaniam, Additional Solicitor General of India, Sri C. P. Sudhakara Prasad, Advocate General of Kerala, Dr. V. D. Sebastian, Prof. M. K. Prasad, Dr. Leelakrishnan, Dr. Chandrasekhara Pillay, Dr. Sebastian Chembapilli, Dr. Sunny, Dr. Ramesh, President, I.M.A. Kerala Chapter and others have also supported the Commission one way or the other. Above all, Justice K. T. Thomas, Justice V. Bhaskaran Nambiar and Justice Kurian Joseph, Justice C. N. Ramachandran Nair, Justice Thottathil B. Radhakrishnan, Justice Harun-Ul-Rashid, Justice M. M. Pareed Pillay, Justice P. K. Shamsuddin, Senior Advocate M. K. Damodaran, Advocates Kabeer, Mohammed, Vaidyanathan, Johnson,Vakkom Vijayan, K. L. Varghese and V. Rajasekharan Pillai and many others have morally and pragmatically made the Commission obliged to them by concrete assistance. So is the case with Mr. P. J. Francis, Retired I. G. of Registration who has been responsible for drafting three amendment Bills.

Last, but certainly not the least, the Commission also places on record our deep sense of appreciation to the staff members of the Commission Mr. P. Parameswaran Moothath, Executive Officer, Mr. George James and Antony two relieved officers of the Law Department deputed by the Government to assist the Commission, Mrs. Chandrika Aravindan, Stenographer-cum-Computer Operator and Mr. Sivakumar, A.S., Computer Operator and Mr. Anil Abraham for rendering sincere and dedicated service to the Commission.

Justice V. R. Krishna Iyer,
Chairman,
Law Reforms Commission, Kerala

Justice T. V. Ramakrishnan,
Vice Chairman,
Law Reforms Commission, Kerala

MEMBERS

Justice C. S. Rajan

Sri T. P. Kelu Nambiar

Sri Varkala Radhakrishnan

Dr. Sebastian Paul

Barrister M. P. R. Nair

Sri P. B. Sahasranaman

Prof. N. S. Gopalakrishnan

Dr. N. K. Jayakumar

MEMBER SECRETARY

Sri P. S. Gopinathan

Annexure A
Reform of the Muslim Matrimonial Law

*Justice V. R. Krishna Iyer**

In presenting this paper, I have trepidation for two reasons. I am a Judge whose buisness traditionally is to interpret the law, not to amend it, and I have been reproved by an eminent English jurist[1] for one of my judgments on Muslim Law delivered in an activist mood. Secondly, I am conscious of my proverty on the subject and tremble to rush in where sages of the law fear to tread. Even so, I write with humility and admit errors while pleading good faith.

The goal of a common civil code has been spelt out by the Constitution and the people as well as the institutions of national life, including the judiciary, are committed to this secular mission. Two decades are too long for redeeming the pledge, and solicitude for the last fanatic's consent may well be construed as political pussilanimity, even by the protestant youth in the Muslim community. Since Independence, the Hindu Chapter has been codified, not the Muslim Law. Therefore, let us begin.

Law reform is social engineering and not mere parliamentary bills and ballyhoo. The area of reform, the resistance pockets, the political overtones, the inner urges of the progressive wings of the community and its power equation vis a vis the unthawing crust of orthodoxy, the strategy and tactics which will secure success—these are pragmatic considerations for the law-making statesman. The sanctity of minority rights and their real amplitude, the secularising forces of the modern age, the strong winds of family law reform in the Muslim World, the inter-action of ways of life in our 'one world', the dissent of youth everywhere and the growth of a neosuffragette upsurge among muslim women in South Asia also are relevant factors. The catalytic effect of socialist transformation on personal laws based on religion, pitted against the totalitarian hold of Hinduism and Islam on their respective folds, are forces in the legal dynamics of reform which must be taken into account. The psycho—social complex of a minority to keep its family laws 'untouchable' by a majority-dominated legislature cannot also be ignored. But move we must towards 'one citizenship, one law', living down the deep wedge driven by the imperial policy of apartheidising personal laws.

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* Member, Law Commission of India, New Delhi. Paper read at the Indian Law Institute Seminar on Islamic Personal Law in India.

(1) J.D.M. Derret. A Hindu Judge's Animadversions on Muslim Polygamy (1970) 72 Bom. L.

The life of the law is not logic but experience and even in law-making, realism, not heroism, is our motto. For, a great revolutionary, in a different context, cautioned 'one step forward, two steps back'. So our strategy must be correct and careful as we are dealing with a human mass, not an intellectual elite, and a sensitive area where 'religion in danger' is an explosive buyt facile we–apon the no-changers may use. We must, under current conditions, go stage by stage, community by community, militantly but not rashly. I venture to think that the tremendous secular impact of Bangla Desh is fresh; the new awareness among Muslim youth and the gentle upsurge among Muslim woman are gathering into a storm. The solidarity of the nation under the present leadership, and the comparative political confidence of the minorities by participation in State Governments and social assurance, through judicial pronouncements, of cultural and religious freedoms, have created a favourable climate, almost a take off stage for legislative essays in secularising the personal laws of the community in general. India is awake right now and projects which were the despair of yesterday are proving hopeful items on the national agenda today. There is a tide in the affairs of men and let us take it at the flood. I speak this as an activist Judge, a Member of the Law Commission (but not for the Law Commission) and as a citizen of the Republic. I blush to state that more than half a century ago Goa, a Portugese colony, applied a common family law for all its citizens, regardless of religion, and we are still struggling with the problem.

The constititutional purpose of Article 44 calles for state action—not only legislation. Ideological preparation, choice of subjects and stages for codification, creation of public and parliamentary opinion are part of the strategies and this seminar itself is a part of the know-how of reform. Straight away, it must be agreed that we are distances away from a common code for all religions right now. Let us tackle the job the modernising the Islamic law, preserving its genius and great principles but approximating the law to the general system and eventually enriching the latter in many respects. No interference with the culture of a minority or the religion of a denomination arises because matters of evil concern do not affect the core of the Prophet's religious teaching but fall under the great guide line given by Jesus: 'Render unto Ceasar what is due to him'. Moreover, providing for social welfare and reform are permissible sectors for state action. All endeavours for personal law reform are part of the Operation Secularisation.

The task of evolving a progressive Islmic jurisprudence as a step towards a common family code will not be more difficult now than when Parliament faced Hindu obsurantism. For, the times have changes, the Islam enjoys the unique advantage of not being checked by a priestly hierarchy. Secondly, in large areas of family law, even now sizeable groups of Muslims like the Cutchi Memons, the Moplas of Malabar and Khojas of Bombay are governed by non—Islamic law. Moreover, the original texts of the Quoran and the sayings and doings of the Prophet are refreshingly modern and rational, understood in their proper setting (not literally, obtusely, clinging fanatically to the ancient ethos of Arabia, geographically and historically distant from the modern mores of India today).

Syed Ameer Ali in his Spirit of Islam sapienty wrote half a century ago: "The Islam of Muhammad contains nothing which in itself bars progress". He said: "The Prophet inculcated the use of reason; his followers have made its exercise a sin.....He impressed on them to go in quest of knowledge to the land of the heathens. They do not take it even when offered to them in their own homes. Speaking of law itself we have this authentic and holy word of the Prophet." When Ma'az was being sent as a Judge to Yemen, the Prophet asked him:

'According to what shalt thou Judge?'

Ma'az replied: 'According to the scriptures of God's book.'

'And if thou findest nought therein?'

'According to the traditions of the Messenger of God.'

'And if thou findest nought therin?'

'Then I shall interpret with my reason' Ma'az replied.

Thereupon, the Prophet said 'Praise be to God who has favoured the messenger of His Messenger, with what His Messenger is willing to approve.'

One may therefore reasonably agree with Badr-ud-din Tyabji: 'The dogma of past centuries, laboriously and conscientiously elaborated, even by the most eminent divines and theologians of those days, can no longer, serve our purpose. We have to forge our own code by our own study and understanding of the Quoran in the light of our own needs.[3] This is a hopeful gospel for judges since the play of reason and justice is expressly permitted by the Prophet.

([3]) Badr.—Ud din Tyabji: *The Self in Secularism p. 122.*

I must pay a tribute to the Muslim Women's Movement in India, not oceanic but enough to prick our social conscience, and the progressive muslim associations which have organised publicity for reform of personal law, keeping faith with and owing allegiance to the true tenets of Islam.

Even here, I must mention that the modalities of reform include judicial legislation, naturally interstitial and limited, but still considerable where there is a will compaigns and movements by muslim organs and reformers, administrative action in many ways, and, of course, legislative projects which keep the Islamic identity and flavour.

For the purpose of this Seminar, I have confined myself to that branch of the law that relates to the most intimate human relationship of matrimony, its formation, conditions and dissolution. Even here I may only throw some different suggestions for reform to help us forward to the destination set out in Article 44 of the Constitution.

All the three great constitutional instrumentalities, and, above all, organised but wellinformed public opinion, particulary muslim opinion, have their part to play. Even the Judicature, I say with respect.

Silent but substantial reforms through judicial activism is an unexploited field in India largely because they are not militantly committed to the secular mission of the constitution—not that anyone is to be blamed but that it is our respected tradition and orientation. May be, that is right. The British Indian and post-independence judiciary have hardly made the judicial power a dynamic instrument of law reform in this area. The statism, typical of the generality, is best brought out in the following observation of a Madras Judge:

> ***"We have.....to administer without in any way circumventing or deviating from the original texts, the law, as promulgated by the Islamic law-givers to suit the present day conditions; and in doing so, it has to be remembered that Courts are not at liberty to refuse to administer any portion of those tenents even though in certain respects they may not found quite modern".[4] (quoted by Dr. Derret)***

Uninhibited judicial adventure in open areas of Muhammadan Law can be fruitful. In self-defence, I touch upon a few of my judicial essays to discover the modern feel of Islamic law and give it a new direction. The

([4]) Derret. Law, religion and the Modern World p. 531.

instance relate to the subject of this paper–marital law. Polygamy, it is facilely assumed by non-muslims, is special privilege of the muslim make and so that system is below civilized norms. This is a misstatement as I have tried to prove in one case[4a]. A claim for maintenance by the first wife from her husband was met in court by the latter, who had another wife living with him, by the plea that the petitioner was disentitled because her refusal to stay with him did not attract S. 488 (3), Criminal P. C., his religion having licenced four wives at a time.

In that ruling (1970 K.L.T. 4) I observed:

> ***"The starting point of all this argument that the Muslim Law actively permits multi-marriages is itself open to serious doubt, as I will presently show. Moreover, it is distressing for a Court to discriminate against Muslim women who have for ages been subjected to several social disabilities clamped down on them in the name of personal laws. It is surprising that dubious religious interpretations with values valid in a bygone age are being enforced in the current times by civil courts in our professedly secular State when those values have become mere legal superstitions, if not anathema for the community at large, out of a false sense of soliditude to a fancied section of society. The Indian Constitution directs that the State should endeavour to have uniform civil code applicable to be entire Indian humanity and, indeed, when motivated by a High public policy, S. 488 of the Criminal Procedure Code has made such a law, it would be improper for an Indian Court to exclude any section of the community born and bred up on Indian earth from the benefits of the law, importing religious privilege of a somewhat obscurantist order."***

"The conviction is gradually forcing itself on all sides, in all Muslim communities, that polygamy is as much opposed to Islamic laws as it is to the general progress of civilised society and true culture. In consequence of this conviction a large and growing section of Islamists regard the practice of polygamy as positively unlawful."

"A Yusuf Ali in his commentary on the Holy Quoran has pointed out with reference to the original text, in its proper context, that the prophet first strictly limited the unrestricted number of wives of the 'Times of Ignorance'

([4a]) Shahlameedu v. Sabaida Beevi (1970 KLT. 4).

to a maximum of four, 'provided you could treat them with perfect equality in material things as well as in affection and immaterial things. As this condition is most difficult to fulfil, the recommendation was understood to be towards the practice of monogamy."

'If my view were sound a provision for monogamy in contemporary India would fulfil rather than fail the Prophet. The courts could have concretised the broad injunctions of the Prophet and produced the juristic effect of monogamy, to be relaxed in special, extreme cases—a conclusion which agrees with even Bernard Shaw's views on the subject and is more rational than the inflexible 'one man, one wife' formula which, in unnatural situations breeds otherwise. With most Muslim countries having swung towards monogamy in tune with notions prevalent over the whole world and the population ratio argument being unavailable, judicial legislation could have gone a long way unobtrusively to help the cause. Dr. Derret[5] makes an involved solution—a long route to reach monogamy—which makes a new tort and inhibits indirectly a second marriage. His error is in reading the Prophet as conferring a polygamous franchise, coupled with mawkish solicitude for Indian Muslim 'religiosity'. Many Indian Muslims need to be saved from their friends. In fairness to Islam and with an eye on reforms we must repudiate the anti-contextual perversion of western scholars that prohibition of extravagant polygamy implies permission of limited polygamy. Any dynamic Indian judge, jurist or legislator could have reasonably spelt out monogamy from the original text read in modern Indian circumstances. Living law has to be interpreted in a living way. The words of the HolynQuoran say that if a man cannot treat his two wives with perfect equality, he is enjoined to marry only one wife. It is obvious that in modern Indian conditions, however financially, psychically, sexually potent a husband may be, it is beyond him to show equal justice in every respect to a plurality of wives. The Quranic *sine quanon* being impossible now, a court, a legislator and a truly religious Muslim would be right in insisting on monogamy. For equality, according to some commentators, covers clothes, jewellery, houses, love, affection and sentiment etc. This gamut of perfect equality is as good as a prescription of one wife only in normal conditions as the Tunnisian Code.

The impression that a muslim marriage is a more contract and not therefore sufficiently solemn or sacred is another fallacy of the Hindu and Western student. For that matter, the modern world, socialist and other, is veering to the secular from the sacred, to civil marriages from religious

([5]) J. D. M. Derrett: *Law, Religion and the Modern World.*

sacraments, and Islam showed the way? Some Hindu marriages (Marumakkathayam, for example) are finished in a few minutes and are thingly tinged with holy ceremonials. When a common code on marriage law is drawn up the concept of solemn contract creating marital status is sure to be highlighted. Nor is a muslim marrige merely a sale of goods but serious and of deep import sans the elaborate rituals and priestcraft of some other religions. In the matter of divorce again, 'Muslims can come to terms with the contemporary world only if they go straight back to the Quoran, and renew their faith and belief by seeking direct inspiration and guidance from it'. (Tyabji: The Self in Secularism). The cheap jibe about freak 'talaqs' and the helpness bondage of women to wedlock cannot be blamed on Quoranic injunctions. On the contrary, having regard to the circumstances of pre-Islamic Arabia reeking with sex promiscuity and social injustice, wives unlimited and divorce at pleasure for men and unbreakable chains for women, this great Messenger of God and revolutionary, had planted restrains on the male and granted cautious rights to the female, and innovated a rational and fair system, astonishingly radical and modern and more protective than Manu's verdict on women. In two recent rulings of the Kerala High Court,[6] one of which was generously referred to by Mr. Danial Latifi, a leading jurist, as a most significiant pronouncement, I have developed this thesis. The Prophet viewed marriage as a permanent union and divorce only as a last resort. Let me quote, at some length, from myself in *Yusuf Rowthan* v. *Sowaramma*: (1970 K.L.T. 477):

"7. There has been considerable argument at the bar—and precedents have been filed up by each side—as to the meaning to be given to the expression 'failed to provide for her maintenance' and about the grounds recognised as valid for dissolution under Muslim Law. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglican judicial exposition of the Islamic Law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture—Law is largerly the formalised and enforceable expression of a community's cultural norms—cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can

(6) *Shahulameedy* v. *Subaida Beevi* (1970 KLT. 4) and *Yusuf Rowthan* v. *Sowaramma* (1970 KLT. 477)

buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce and this is a relevant enquiry to apply S. 2 (ix) and to construe correctly S. 2 (ii) of the Act."

> ***'Marriage under Islam is but a civil contract, and not a sacrament, in the sense that those who are once joined in wed-lock can never be separated. It may be controlled and under certain circumstances, dissolved 'by the will of the parties' concerned. Public declaration is no doubt necessary, but it is not condition of the validity of the marriage. Nor is any religious ceremony deemed absolutely essential' (The Religion of Islam by Ahmad A. Galwash p. 124)***

"It is impossible to miss the touch of modernity about this provision; for, the features emphasised are precisely what we find in the civil marriage laws of advanced countries and also in the Special Marriage Act, Act 43 of 1954. Religious ceremonies occur even in Muslim weddings although they are not absolutely essential. For that matter, many non-Muslim marriages, (e.g. Marumakkathayees) also do not insist, for their validity, on religious ceremonies and registered marriages are innocent of priesty rituals. It is a popular fallacy that a Muslim male enjoys, under the Quoranic law, unbridled authority to liquidate the marriage. 'The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, 'if they (namely, women) obey you, then do not seek a way against them' " Quoran IV: 34). The Islamic 'law gives to the man primarily the faculty of dissolving the marrige, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eyes of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously'. As the learned author, Ahmad Galwash, notices, the pagan Arab, before the time of the Prophet, was absolutely free to repudiate his wife whenever it suited his whim, but when the Prophet came, He declared divorce to be 'the most disliked of lowful things in the sight of God'. He was indeed never tired of expressing his abhorrence of divorce. Once he said: 'God created not anything on the face of the earth which He loveth more than the act of manumission (of slaves) nor did He create anything on the face of the earth which He detesteth more than the act of divorce'. Commentators on the Quoran have rightly

observed—and this tallies with the law now administered in some Muslim countries like Iraq—that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce. Dr. Galwash deduces:

> ***" 'Marriage being regarded as a civil contract and as such not indissoluble, the Islamic law naturally recognises the right in both the parties, to dissolve the contract under certain given circumstances. Divorce, then, is a natural corollary to the conception of marriage as a contract.....***
>
> ***'It is clear, then, that Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties, to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes."***

We have to examine whether the Islamic law allows the wife to claim divorce when she finds the yoke difficult to endure 'for such is marriage without love.....a hardship more cruel than any divorce whatever'. The learned author referred to above states, 'Before the advent of Islam, neither the Jews nor the Arabs recognised the right of divorce for women: and it was the Holy Quoran that, for the first time in the history of Arabia, gave this great privilege to women.' After quoting from the Quoran and the Prophet, Dr. Galwash concludes that 'divorce' is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Kholaa'. When the proposal of divorce proceeds from the husband, it is called 'Talaq', and when it takes effect at the instance of the wife it is called 'Kholaa'. Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the 'husband must pay off the settlement debt to the wife' and at the time of Kholaa she has to surrender to the husband her dower or abandon some of her rights, as compensation.

8. Maulana Muhammad Ali in his book 'The Holy Quoran' has this to say:

> ***"Divorce is one of the institutions of Islam regarding which much misconcention prevails, so much so that even the Islamic law as administered in the courts, is not free from these misconceptions...The Islamic law has many points of advantage as compared with both the Jewish and Christian laws as formulated in Deut. and Matt. The chief feature of improvement is that the wife can claim a divorce according to the Islamic law, neither Moses nor Christ (nor Manu, may I add) conferring that right on the woman....." (Page 96)***

The Prophet, however, warned:

"Of all things which have been permitted divorce is the most hated by Allah (A D 13:3)."

Dealing with divorce, the Holy Quoran says: "And women have rights similar to those against them in a just manner...."

This statement, Muslim doctors of law assert, was 'a revolutionalising one' for the Arabs of those days and almost equated women with men!

9. The decisions of court and the books on Islamic law frequently refer to the words and deeds of the Prophet in support of this truly forward step. He said "if a woman be prejudiced by a marriage, let it be broken off". The first 'kholaa' case in Islam is quoted by Bukari in the following words: The wife of Thabit-ibn-Quais came to the Prophet and said 'O Messenger of God, I am not angry with Thabit for his temper or religion; but I am afraid that something may happen to me contrary to Islam, on which account I wish to be separated from him'. The Prophet said: "Will you give back to Thabit the garden which he gave to you as your settlement?" She said, 'Yes'. Then the Prophet said to Tabit: 'Take your garden and divorce her at once'. (Bukhary is the greatest commentary of Mohammadan orthodox traditions). 'This tradition clearly tells us that Thabit was blameless, and that the proposal for separation emanated from the wife who feared she would not be able to observe the bounds set by God namely not to perform her functions as a wife. The Prophet here permitted the women to release herself by returning to the husband the ante-nuptial settlement, as compensation for the release granted to her.' Asma, one of the wives of the

Holy Prophet, asked for divorce before he went to her, and the Prophet released her as she had desired. Yusuf Ali, in his commentary on the Holy Quoran, says:

> ***'While the sanctity of marriage is the essential basis of family life, the incompatibility of individuals and the weaknesses of human nature require certain outlets and safeguards if that sanctity is not to be made into a fetish at the expense of human life.'***

Here is a significant verse from the Quoran.

> ***'And if ye fear a breach between husband and wife, send a judge out of his family, and a judge out of her family: if they are desirous of agreement, God will effect a reconciliation between them; for God is knowing and apprised of all' (Chapter IV, Verse 35)***

Maulana Muhammad Ali has explained this verse thus:

> ***"This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should divorce cases be made too public. The judge is required to appoint two arbiters, one belonging to the wife's family and the other to the husband's. These two arbiters will find out the facts, but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed, but the final decision for divorce rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."***

In Mulla's Principles of Mahomedan Law (16th Edn.) there is an interesting reference to a Pakistani decision

> ***"In an important recent judgment the Pakistan Supreme Court in Khurshid Bibi v. Mohd. Amin. PLD. 1967 S. C. 97, has endrosed the Lahore High Court's view in Mst. Baalqis Fatima v. Najmul Ikram [(1959) 2 (W. P.) p. 321. (1959) Lah. 566], that under Muslim Law the wife is entitled to Khulla, as of right, If she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union."***

"To sum up, the Holy Prophet found a dissolute people dealing with women as mere sex-satisfying chattel and he rid Arab society of its decadent values through his doings and the Quoranic injunctions. The sanctity of family life was recognised; so was the stubborn incompatibility between the spouses as a ground for divorce; for it is intolerable to imprison such a couple in quarrelsome wedlock. While there is no rose but has a thorn if what you hold is all thorn and no rose, better throw it away. The ground is not conjugal guilt but actual repulsion."

"17. I may also point out with satuifaction that this secular and pragmatic approach of the Muslim law of divorce happily harmonises with contemporary concepts in advanced countries. For instance, in the Family Code of the German Democratic Republic, recently enacted, the provisions on the dissolution of marriage have been explained in an official legal publication thus:

> ***"Their most characteristic feature is the doing away with the guilt-principle of the erstwhile German Civil Family Law. According to that principle a partner of a petition for divorce had to prove that the other partner had in a culpable manner violated marital duties. According to the principle which now prevails in the German Democratic Re-public the only valid yard-stick for the dissolution of a marriage are its objective conditions. If a marriage—as formulated in the draft has lost its significance for the married partners, for the children and thereby for society, if it has become merely an empty shell, it must be dissolved, independently whether one of the married partners or which of the two bears the blame for its disintegration. In view of the most personal and variegated relations within married life and the fact that conflicts which lead to divorce, have frequently been simmering for years, and might have their deepest roots in an ill-considered marriage, it may be, as a result, hardly possible to declare either of the spouses guilty for the disintegration of the marital partnership. (Law and Legislation in the G.D.R. 2/65, p.32)."***

One of the serious apprehensions judges have voiced, if the view accepted in A.I.R. 1950 Sind 8 were to be adopted, is that the women may be tempted to claim divorce by their own delinquency and family ties may become tenuous and snap. Such a fear is misplaced has been neatly expressed by Bertrand Russel in his 'Marriage and Morals'.

> ***'One of the most curious things about divorce is the difference which has often existed between law and custom. The easiest divorce laws by no means always produce the greatest number of divorces...I think this distinction between law and custom is important, for while I favour a somewhat lenient law on the subject, there are to my mind, so long as the biparental family persists as the norm, strong reasons why custom should be against divorce, except in some what extreme cases. I take this view because I regard marriage not primarily as a sexual partnership, but above all as an undertaking to co-operate in the procreation and rearing of children.'***

The Law of the Marumakkathayees provides a large licence for divorce by actual experience allays the alarm. The law has to provide for possibilities; social opinion regulates the probatilities. For all these reasons, I hold that a Muslim woman, under S.2 (ii) of the Act, can sue for dissolution on the score that she has not as a fact been maintained even if there is good cause for it— the voice of the law, echoing public policy is often that of the realist, not of the moralist.

"18. The view I have accepted has one other great advantage in that the Muslim woman (like any other woman) comes back into her own when the Prophet's words are fulfilled, when roughly equal rights are enjoyed by both spouses, when the talaq techique of instant divorce is matched somewhat by the khulaa device of delayed dissolution operated under judicial supervision. The social imbalance between the sexes will thus be removed and the inarticulate major premise of equal justice realised."

In a later case (1971 KLT. 663), I had to deal with a young woman who, allegedly under instigation from an orthodox father, asked for divorce from a heterodox husband. Incompatibility, to a repellant degree, was upheld by me as an available ground for a muslim woman. The only system of

marital law in India which accepts the ultra-modern, but responsibly realistic ground of 'breakdown' as against 'fault' is Islam and I feel that its spin-off benefits to the emerging Indian family code will be unexpectedly large. A welcome bonus to secularism! My views on the topic are set out in the relevant excerpts from that judgment. I quote:

> ***"12. But-but that is not the end of the battle for divorce in this case. Daily, trivial differences get dissolved in the course of time and may be treated as the teething troubles of early matrimonial adjustment. While the stream of life, lived in married mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds breaks up the flow of the stream? In such a situation, we have a breakdown of the marriage itself and the only course left open is for law to recognise what is a fact and accord a divorce. Such a fact situation has been set up in the pleadings of the female spouse, says counsel for the appellant, although we do not find an investigation into that case in the judgments of the courts below.***
>
> ***13. Modern legal systems are veering round to the view that while no party can be permitted to benefit by his own wrong conduct and obtain divorce, pleading a breakdown of marriage, public interest demands that formal ending of marriages which remain marriages in name only is but right. Sir John Salmond laid down this principle in a few New Zealand decisions:***
>
> ***'In general it is not in the interest of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact."***

"When an intolerable situation has been reached, the partners living separate and apart for a substantial time, an inference may be drawn that the marriage has broken down in fact and so should be ended by law. This trend in the field of matrimonial law is manifesting itself in the Commonwealth countries these days. (See A.C. Holden—Divorce in the Commonwealth, A Comparative Study—The International and Comparative Law Quarterly, Vol. 20, Part I. 4th series, p. 58.) This principles is of Quoranic vintage as I have explained in Yusuf Rowthan's case (1970 KLT. 477)."

"We have also the tradition personal to the Holy Prophet himself. Asma, one of the wives of the Prophet, asked for divorce before he went to her and the Prophet released her as she had desired. Yusuf Ali, in his Commentary on the Holy Quoran, says:

> ***.....'While the sanctity of marriage is the essential basis of family life, the incompatibility of individuals and the weaknesses of human nature require certain outlets and safeguards if that sanctity is not to be made into a fetish at the expense of human life'."***

Here is a significant verse from the Quoran:

> ***'And if we fear a breach between husband and wife, send a judge out of his family, and a judge out of her family; if they are desirous of agreement, God will effect a reconciliation between them: for God is knowing and apprised of all'. (Chapter IV, Verse 35).***

14. The sanctity of marriage is preserved not merely by the morality that permeates it, but by the reality that holds the family together; one without the other spells a breakdown; and so, a ground for divorce may well be made out if there is a total irreconcilabilty between the spouses. The Muslim law, independently of Act 8 of 1939, accepts this ground for dissolution of marriage, as I have held in Yusuf Rawthan's case; and the statute itself in S. 2 (ix) preserves 'any other ground which is recognised as valid for the dissolution of marriages under Muslim law'. It, therefore, follows that we have to see whether any ground of breakdown has been set up and, if so, whether it has been made out. Nor is this an Indian innovation in Muslim Law for, Prof. J. N. D. Anderson has stated recently commenting on modern trends in Islam that:

> ***"Very considerable relief has been given, almost everywhere, to ill-used wives.....In Tunisia, Pakistan and Iran things have gone further than this. The Tunisian Code allows a wife to insist on divorce, whatever her reason may be, provided she is prepared to pay such financial compensation as the court may decree. In Pakistan judge made law has opened the door to a wife demanding a divorce, where she alleges that her marriage has become intolerable, on condition that she***

pays back her dower and returns any gifts which she may have received in respect of the marriage. And in Iran she can apply for a divorce, after first obtaining a certificate of impossibility of reconciliation, "on a wide variety of grounds (in which virtual equality between husband and wife has been achieved)."

15. The Islamic ethos accepts irreconcilable breach as a ground for dissolution."

I venture to think that the divine stamp of the Prophet, who regarded divorce as 'most hated by Allah' though permitted, is available for courts and legislatures to bridle the male's right and impose restraints, judicially examined, for the exercise thereof. The cue from the Middle East countries, which are the homeland of Islam, may well be taken by us too and a process of re-interpretation of the law in tune with the inner fibre of the Prophet's teaching begun.

To sum up, Islamic matrimonial jurisprudence, if the story were fully and frankly told, is more sinned against than sinning and the sister systems of India have much to learn and copy from it in some respects. But the orientation of our courts, the awareness of our parliamentarians and the willingness of muslims and non-muslims to take an unprejudiced and radical look at the law and the lore, leave much to desird. The battle is ideological (I use the word without political overtones) and this Seminar, in the current Indian context, may mark a milestone—or may not. It depends. The rule of law, let us remember, must run close to the rule of life. Civil status and interests, and material concerns of society are for the State; and elimination of injustice to women, rationalisation of inheritance rights, regualtion of married relationship are constitutionally permissible area for State action. If gift tax and land reforms, if age of marriage and appearance in public offices are not erosions of religion—and they are not—public morals enforced through monogamy and inhibition of painfully arbitrary masculine divorces are also unobjectionable. The dogmas of the archaic and quiet past are no longer adequate to the stormy egalitarian present. Now, social justice is the keynote of national life for Hindus, Muslims and others, in family law as in other jural

areas. A new symbiosis of the secualr and the sacred is the target. The task force consists of progressive group of each community, rationalist intellectuals and nationalist politicians. The training ground is the system of meets, workshops and discussions and publications. The challenge to Indian Islamic jurisprudence is given by Syed Ameer Ali (Spirit of Islam p. 454):

> ***"For five centuries Islam asisted in the free intellectual development of humanity, but a reactionary movement then set in, and all at once whole stream of human thought was altered. The cultivators of science and philosophy were pronounced to be beyond the pale of Islam. Is it impossible for the Sunni Church to take a lesson from the Church of Rome? Is it impossible for her to expand similarly—to become many-sided? There is nothing in Mohammed's teachings which prevents this. Islamic Protestantism, in one of its phases,—Mu'tazilaism,—has already paved the way. Why should not the great Sunny Church shake off the old trammels and rise to a new life?"***

* * * * * *

* Wadhwa

Annexure B

Subject: Solar Rickshaws in Delhi-Times of India 13th Nov., 2008

NEW DELHI: It's been touted as a solution to urban India's traffic woes, chronic pollution and fossil fuel dependence, as well as an escape from backbreaking human toil.

A state-of-the-art, solar powered version of the humble cyclerickshaw promises to deliver on all this and more.

The "soleckshaw", unveiled this month in New Delhi, is a motorised cyclerickshaw that can be pedalled normally or run on a 36-volt solar battery.

Developed by the state-run Centre for Scientific and Industrial Research (CSIR), prototypes are receiving a baptism of fire by being road-tested in Old Delhi's Chandni Chowk area.

One of the city's oldest and busiest markets, dating back to the Moghul era, Chandni Chowk comprises a byzantine maze of narrow, winding streets, choked with buses, cars, scooters, cyclists and brave pedestrians.

"The most important achievement will be improving the lot of rickshaw drivers", said Pradip Kumar Sarmah, head of the non-profit Centre for Rural Development.

"It will dignify the job and reduce the labour of pedalling. From rickshaw pullers, they will become rickshaw drivers", Sarmah said.

India has an estimated eight million cyclerickshaws.

The makeover includes FM radios and powerpoints for charging mobile phones during rides.

Gone are the flimsy metal and wooden frames that give the regular Delhi rickshaws a tacky, sometimes dubious look.

The "soleckshaw", which has a top speed of 15 kilometres (9.3 miles) per hour, has a sturdier frame and sprung, foam seats for up to three people.

The fully-charged solar battery will power the rickshaw for 50 to 70 kilometres (30 to 42 miles). Used batteries can be deposited at a centralised solar-powered charging station and replaced for a nominal fee.

If the tests go well, the "soleckshaw" will be a key transport link between sporting venues at the 2010 Commonwealth Games in New Delhi.

"Rickshaws were always environment friendly. Now this gives a totally new image that would be more acceptable to the middle-classes", said Anumita Roychoudhary of the Delhi-based Centre for Science and Environment.

"Richshaws have to be seen as a part of the solution for modern traffic woes and pollution. They have never been the problem. The problem is the proliferation of automobiles using fossil fuels", she said.

Initial public reaction to the "soleckshaw" has been generally favourable, and the rickshaw pullers have few doubts about its benefits.

"Pedalling the rickshaw was very difficult for me", said Bappa Chatterjee, 25, who migrated to the capital from West Bengal and is one of the 500,000 pullers in Delhi.

"I used to suffer chest pains and shortage of breath going up inclines. This is so much easier."

"Earlier, when people hailed us it was like, 'Hey you rickshaw puller!' Police used to harass us, slapping fines even abusing us for what they called wrong parking. Now people look at me with respect", Chatterjee said.

Mohammed Matin Ansari, another migrant from eastern Bihar State, said the new model offered parity with car, bus and scooter drivers.

"Now we are as good as them", he said.

Indian authorities have big dreams for the "soleckshaw".

India's Science and Technology Minister Kapil Sibal who hailed the invention for its "zero carbon foot print" said it should be used beyond the confines of Delhi.

"Soleckshaws would be ideal for small families visiting the Taj Mahal", he said.

At present battery-operated buses ferry people to the iconic monument in Agra–but their limited numbers cannot cope with the heavy tourist rush.

CSIR Director Sinha said he hoped an advanced version of the "soleckshaw" with a car-like body would become a viable alternative to the "small car" favoured by Indian middle class families.

"Greenhouse gas emissions are showing an increasing trend year on year and 60 per cent of this comes from the global transport sector."

"In the age of global warming, the soleckshaw, with improvements, can be successfully developed as competition for all the petrol and diesel run small."

* * * * * *

Annexure C
(1978) 3 Supreme Court Cases 558

(BEFORE V. R. KRISHNA IYER, D. A. DESAI AND O. CHINNAPPA REDDY, JJ.)

Writ Petition Nos. 4021-4022, 4024-4025, 4027-4032, 4037, 4040-4041, 4045-4047, 4049-4075, 4078-4092, 4094-4099, 4103-4111, 4120-4126, 4129-4140, 4142-4143, 4155-4157,4184, 4187, 4188-4190, 4192, 4202, 4203, 4205, 4206, 4212, 4214, 4217, 4223, 4231, 4234-4235, 4245, 4250, 4252, 4300, 4308 of 1978 and 4226 of 1978

P. N. KOUSHAL and others . . Petitioners

Versus

UNION OF INDIA and others . . Respondents

Writ Petition Nos. 966-971, 3643-3650, 3884-3896, 3900-3921,3965, 3975-3990, 4001-4020, 4034, 4100, 4127-4128, 4186, 4193, 4208, 4271 of 1978 and 3968-3971, 4191, 4221 and 4272-4275 of 1978

LAXMI NARAIN and others . . Petitioners

Versus

DISTRICT EXCISE OFFICER, FATEHPUR and others } Respondents

Writ Petition Nos. 4154, 4209, 4242, 4243, 4247, 4248, 4253, 4254, 4310 and 4314 of 1978

SHAM LAL and others . . Petitioners

Versus

UNION OF INDIA and others . . Respondents

Writ Petition Nos. 4021-4022 etc. decided on August 16, 1978

The Judgment of the Court was delivered by

KRISHNA IYER, J.

Writ Petition Nos. 4021-4022 etc. from Punjab

***What are we about*?**

A raging rain of writ petitions by hundreds of merchants of intoxicants hit by a recently amended rule declaring a break of two 'dry' days in every 'wet' week for licensed liquor shops and other institutions of

inebriation in the private sector, puts in issue the constitutionality of Section 59 (*f*) (*v*) and Rule 37 of the Punjab Excise Act and Liquor Licence (Second Amendment) Rules, (hereinafter, for short, the Act and the Rules). The tragic irony of the legal plea is that Articles 14 and 19 of the very Constitution, which, in Article 47, makes it a fundamental obligation of the State to bring about prohibition of intoxicating drinks, is pressed into service to thwart the State's half-hearted prohibitionist gesture. Of Course, it is on the cards that the end may be good but the means may be bad, constitutionally speaking. And there is a mystique about legalese beyond the layman's ken!

2. To set the record straight, we must state, right here, that no frontal attack is made on the power of the State to regulate any trade (even a trade where the turn-over turns on tempting the customer to take reeling rolling trips into the realm of the jocose, belliocose, lachrymose and comatose). Resort was made to a flanking strategy of anathematising the statutory regulatory power in Section 59 *(f)* (*v*) and its offspring, the amended rule interdicting sales of tipsy ecstasy on Tuesdays and Fridays, as too naked, unguided and arcane and, resultantly, too arbitrary and unreasonable to comport with Articles 14 and 19.

3. Our response at the first blush was this. Were such a plea valid, what a large communication gap existis between lawyer's law and judicial justice on the one hand and life's reality and sobriety on the other, unless there be something occultly unconstitutional in the impugned section and rule below the visibility zone of men of ordinary comprehension. We here recall the principle declared before the American Bar Association by a distinguished Federal Judge—William Howard Taft—in 1895:

> If the law is but the essence of commonsense, the protests of many average men may evidence a defect in a legal conclusion though based on the nicest legal reasoning and profoundest learning.

The facts

4. The Punjab Excise Act, 1914, contemplates grant of licences, inter alia, for trading in (Indian) foreign and country liquor. There are various conditions attached to the licences which are of a regulatory and fiscal character. The petitioners are licence-holders and have, on deposit of heavy licence fee, been permitted by the State to vend liquor. The conditions of the licences include restrictions of various types, including obligation not to

sell on certain days and during certain hours. Under the former Rule 37 Tuesday up to 2 p.m. was prohibited for sale; so also the seventh day of the month. The licences were granted subject to rules framed under the Act and Section 59 is one of the provisions empowering rule-making. Rule 37 was amended by a notification whereby, in the place of Tuesdays up to 2 p.m. plus the 7th day of every month, Tuesdays and Fridays in every week were substituted, as days when liquor vending was prohibited. Under the modified rules a consequential reduction of the licence fee from Rs. 12,000 to Rs. 10,000 was also made, probably to compensate for the marginal loss caused by the two-day closure. Aggrieved by this amendment the petitioners moved this Court challenging its vires as well as the constitutionality of Section 59 (*f*) (*v*) which is the source of power to make Rule 37. If the section fails the rule must fall, since the stream cannot rise higher than the source. Various contentions based on Articles 19 (*g*) and (6) and Article 14 were urged and stay of operation of the new rule was granted by this Court.

5. We will presently examine the tenability of the argument and the alleged vice of the provisions; and in doing so we adopt, as counsel desired, a policy of non-alignment on the morality of drinking since law and morals interact and yet are autonomous; but, equally clearly, we inform ourselves of the plural 'pathology' implict in untrammelled trading in alcohol. He who would be a sound lawyer, Andrea Alciati, that 16 the century Italian humanist, jurist, long ago stressed, should not limit himself to the letter of the text or the narrow study of law but should devote himself also to history, sociology, philology, politics, economics, noetics and other allied sciences, if he is to be a jurist priest in the service of justice or legal engineer of social justice[(1)]. This is our perspective because, while the forensic problem is constitutional, the Constitution itself is a human document. The integral *yoga* of law and life once underlined, the stage is set to unfold the relevant facts and focus on the precise contentions. Several counsel have made separate submissions but the basic note is the same with minor variations in emphasis.

Why drastically regulate the drink trade?—the social rationale on Brandies brief

6. Anywhere on our hyman planet the sober imperative of moderating the consumption of inebriating methane substances and manacling liquor business towards that end, will meet with axiomatic

(1) *Encyclopaedia of the Social Sciences,* Vol.II, P. 618

acceptance. Medical, criminological and sociological testimony on a cosmic scale bears out the tragic miscellany of traumatic consequences of shattered health and broken homes, of crime escalation with alcohol as the hidden villain or aggressively promotional anti-hero, of psychic break-downs, insane cravings and efficiency impairment, of pathetic descent to doom *sans* sense *sans* shame, *sans* everything, and host of other disasters individual, familial, genetic and societal[2].

7. We need not have dilated further on the deleterious impost of unchecked alcohol intake on consumers and communities but Shri Mahajan advocated regulation as valid with the cute rider that even water intake, if immoderate, may affect health and so regulation of liquor trade may not be valid, if more drastic than for other edibles. The sequitur he argued for was that the two-day ban on liquor licensees was unreasonable under Article 19 (1) (*g*) read with Article 19 (6). He also branded the power to restrict the days and hours of sale of liquor without specification of guidelines as arbitrary and scouted the submission of the Additional Solicitor General that the noxious nature of alcohol and the notorious fall-out from gentle bibbing at the beginning on to deadly addiction at the end was inherent guideline to salvage the provision from constitutional causalty. Innocently to equate alcohol with aqua is an exercise in introxication and straining judicial credibility to absurdity. We proceed to explain why alcohol business is dangerous and its very injurious character and mischief potential legitimate active policing of the trade by any welfare State, even absent Article 47.

8. The alcoholics will chime in with A.E. Houseman: "And malt does more than Milton can to justify God's ways to man....." But the wisdom of the ages oozes through Thomas Bacon who wrote: "For when the wine is in, the wit is out."

9. Dr. Walter C. Reckless, a criminologist of international repute who had worked in India for years has in "*The Crime Problem*" rightly stressed:[4]

> *Of all the problems in human society, there is probably none which is as closely related to criminal behaviour as is drunkenness.* It is hard to say whether this close relationship is a chemical one, a psychological one, or a situational one. Several different levels of relationship between ingestion of alcohol and behaviour apparently exist. A recent statement by the National Council on Crime and Delinquency quite succinctly describes the

(2) *Ibid*, pp. 619-27 (3) Loutis Untermeyer, *Makers of Modern World,* P. 275
(4) IWalter C. Reckless: *The Crime Problem (*Fifth Edition), pp. 115, 116 and 117

> effect of alcohol on behaviour: Alcohol acts as a depressant; it inhibits self-control before it curtails the ability to act; and an individual's personality and related social and cultural factors assert themselves during drunken behaviour..... Although its dangers are not commonly understood or accepted by the public, ethyl alcohol can have perhaps the most serious consequences of any mind-and-body-altering drug. It causes addiction in chronic alcoholics, who suffer consequences just as serious, if not more serious than opiate addicts. *It is by far the most dangerous and the most widely used of any drug.* (emphasis added)

The President's Commission on Law Enforcement and Administration of Justice made the following pertinent observations:

> The figures show that crimes of physical violence are associated with intoxicated persons..... Thus the closest relationship between intoxication and criminal behaviour (except for public intoxication) has been extablished for criminal categories involving assaultive behaviour. This relationship is especially high for lower class Negroes and Whites. More than likely, aggression in these groups is weakly controlled and the drinking of alcoholic beverages serves as a triggering mechanism for the external release of aggression. There are certain types of key situations located in lower class life in which alcohol is a major factor in triggering assaultive behaviour. A frequent locale is the lower class tavern which is an important social institution for the class group. Assaultive episodes are triggered during the drinking situation by quarrels that center around defaming personal honor, threats to masculinity, and questions about one's birth legitimacy. Personal quarrels between husband and wife, especially after the husband's drinking, frequently result in assaultive episodes, in the lower-lower class family.

10. The steady flow of drunkenness cases through the hands of the police, into our lower courts, and into our jails and workhouses has been labelled the "revolving" door, because a very large part of this flow of cases consists of chronic drinkers who go through the door and out, time after time. On one occassion when the author was visiting a Saturday morning session of a misdemeanor court, there was a case of an old "bum" who had been in the local workhouse 285 times previously.

11. An Indian author, Dr. Sethna dealing with society and the criminal, has this to say:[5]

> Many crimes are caused under the influence of alcohol or drugs. The use of alcohol, in course of time, causes a great and irresistible craving for it. To retain the so-called 'satisfaction', derived from the use of alcohol or drugs, the drunkard or the drug-addict has got to go on increasing the quantities from time to time; such a state of affairs may lead him even to commit thefts or frauds to get the money for purchasing the liquor of drug, or to get the same otherwise. If he gets drunk so heavily that he cannot understand the consequences of his acts he is quite likely to do some harmful act—even an act of homicide. Very often, crimes of violence have been committed in a state of intoxication. Dr. Healy is of the opinion that complete elimination fo alcohol and harmful drug habits would cause a reduction in crime by at least 20 per cent; not only that, but there would also be cumulative effect on the generations to come, by diminishing poverty, improving home conditions and habits of living and environment, and perhaps even an improvement in heredity itself.
>
> * * * * * *
>
> Abstinence campaigns carried out efficiently and in the proper manner show how crime drops. Dr. Healy cites Baer, who says that Father Matthew's abstinence campaigns in Ireland, during 1837-1842, reduced the use of spirits 50 per cent, and the crimes dropped from 64,520 to 47,027. According to Evangeline Booth, the Commander of Salvation Army, "In New York before prohibition, the Salvation Army would collect from 1,200 to 1,300 drunkards in a single night and seek to reclaim them. Prohibition *immediately* reduced the gathering to 400, and the proportion of actual drunkards from 95 per cent to less than 20 per cent." And "a decrease of two-thirds in the number of derelicts, coupled with a decrease in the number if drunkards almost to the vanishing point, certainly lightened crime and charity bills. It gave many of the ersthwhile drunkards new hope and a new start." So says E.E. Covert, in an interesting article on Prohibition.

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(5) M. J. Sethna: *Society and the Criminal,* 3rd Edn. 1971, P. 164

12. The ubiquity of alcohol in the United States has led to nation-wide sample studies and they make startling disclosures from a criminological angle. For instance, in Washington, D.C. 76.5 per cent of all arrests in 1965 were for drunkenness, disorderly conduct and vagrancy, while 76.7 per cent of the total arrests in Atlanta were for these reasons(6).

13. Of the 8 million arrests in 1970 almost one-third of these were alcohol-related. Alcohol is said to affect the lives of 9 millon persons and to cost 10 billion dollars in lost work time and additional 5 billion dollars in health and welfare costs(7).

14. Richard D. Knudten stated "Although more than 35 per cent of all annual arrests in the United States are for drunkenness, additional persons committing more serious crimes while intoxicated are included within the other crime categories like drunken driving, assault, rape and murder(8)".

15. President Brezhnev bewailed the social maladies of increasing alcoholism. Nikita Krushchev was unsparing: "Drunks should be 'kicked out of the party' not moved from one responsible post to another(9)".

16. Abraham Lincoln, with conviction and felicity said that the use of alcohol beverages had many defenders but no defence and intoned:

> Whereas the use of intoxicating liquor as a beverage is productive of pauperism, degradation and crime, and believing it is our duty to discourage that which produces more evil than good, we, therefore, pledge ourselves to abstain from the use of intoxicating liquor as a beverage(10).

17. In his famous Washington's birthday address said:

> Whether or not the world would be vastly benefited by a total and final banishment from it of all intoxicating drinks seems to me not now an open question. Three-fourths of mankind confess the affirmative with their lips, and I believe all the rest acknowledge it in their hearts(11).

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(6) Don C. Gibbons: *Society, Crime and Criminal Careers,* pp. 427—428
(7) *Current Perspectives on Criminal Behaviour,* edited by Abraham S. Blumberg, p.23
(8) Richard D. Knudten: *Crime in a Complex Society,* p. 138
(9) *Report of the Study Team on Prohibition,* Vol. I, p. 344
(10) *Ibid,* p.345 (11) *Ibid,* p.345

18. Jack Hobbs, the great cricketer, held: "The greatest enemy to success on the cricket field is the drinking habit". And Don Bradman than whom few batsmen better wielded the willow, encored and said: "Leave drink alone. Abstinence is the thing—That is what made me[12]".

19. Sir Andrew Clark, in Lachrymal language spun the lesson from hospital beds:

> As I looked at the hospital wards today and saw that seven out of ten owed their diseases to alcohol, I could but lament that the teaching about this question was not more direct, more decisive, more home-thrusting than ever it had been[13].

20. George Bernard Shaw, a provocative teetotaller, used tart words of trite wisdom:

> If a natural choice between drunkenness and sobriety were possible, I would leave the people free to choose. But then I see an enormous capitalistic organisation pushing drink under people's noses of every corner and pocketing the price while leaving me and others to pay the colossal damages, then I am prepared to smash that organisation and make it as easy for a poor man to stay sober, if he wants to, as it is for his dog.
>
> Alcohol robs you of that last inch of efficiency that makes the difference between first-rate and second-rate.
>
> I don't drink beer-first, because I don't like it; and second, because my profession is one that obliges me to keep in critical training, and beer is fatal both to training and to criticism.
>
> Only teetotallers can produce the best and sanest of which they are capable.
>
> Drinking is the chloroform that enables the poor to endure the painful operation of living.
>
> It is in the last degree disgraceful that a man cannot provide his own genuine courage and high spirits without drink.
>
> I should be utterly ashamed if my soul had shrivelled up to such an extent that I had to go out and drink a whisky[14].

([12]) *Ibid*, p.347 ([13]) *Ibid*, p.347 ([14]) *Ibid*, p.346

21. The constitutional test of reasonableness, built into Article 19 and of arbitrariness implicit in Article 14, has a relativist touch. We have to view the impact of alcohol and temperance on a given society; and for us, the degree of constitutional restriction and the strategy of meaningful enforcement will naturally depend on the Third World setting, the ethos of our people, the economic compulsions of today and of human tomorrow. Societal realities shape social justice. While the universal evil in alcohol has been indicated the particularly pernicious consequence of the drink evil in India may be useful to remember while scanning the rationale of an Indian temperance measure. Nearly four decades ago, Gandhiji, articulating the inarticulate millions' well-being, wrote:

> The most that tea and coffee can do is to cause a little extra expense, but one of the most greatly felt evils of the British Rule is the importation of alcohol.....that enemy of mankind, that curse of civilisation—in some form or another. The measure of the evil wrought by this borrowed habit will be properly guaged by the reader when he is told that the enemy has spread throughout the length and breadth of India, inspite of the religious prohibition for even the touch of a bottle containing alcohol pollutes the Mohammedan, according to his religion, and the religion of the Hindu strictly prohibits the use of alcohol in any form whatever, and yet alas! the Government, it seems, instead of stopping, is aiding and abetting the spread of alcohol. The poor there, as everywhere, are the greatest suffers. It is they who spend what little they earn in buying alcohol instead of buying good food and other necessaries. It is that wretched poor man who has to starve his family, who has to break the sacred trust of looking after his children, if any, in order to drink himself into misery and premature death. Here be it said to the credit of Mr. Caine, the ex-Member for Barrow, that, he undaunted, is still carrying on his admirable crusade against the spread of the evil, but what can the enrgy of one man, however powerful, do against the inaction of an apathetic and dormant Government[15].

([15]) *The collected Works of Mahtma Gandhi,* Vol. I, pp.29-30

22. Parenthetically speaking, many of these thoughts may well be regarded by Gandhians as an indictment of Governmental policy even today.

23. The thrust of drink control has to be studied in a Third World Country, developing its human resources and the heaven it offers to the poor, especially their dependents. Gandhiji again:

> For me the drink question is one of dealing with a growing social evil against which the State is bound to provide whilst it has got the opportunity. The aim is patent. We want to *wean the labouring population and the Harijans from the curse.* It is a gigantic problem, and the best resources of all social workers especially women, will be taxed to the utmost before the drink habit goes. The prohibition I have adumbrated is but the beginning (undoubtedly indispensable) of the reform. We cannot reach the drinker so long as he has the drink shop near his door to tempt him[16].

24-31. Says Dr. Sethna in his book already referred to:

> And in India, with the introduction of prohibition we find a good decline in crime. There are, however, some persons who cannot do without liquor. Such persons go even to the extent of making illicit liquor and do not mind drinking harmful rums and spirits. The result is starvation of children at home, assaults and quarrels between husband and wife, between father and child, desertion, and other evils resulting from the abuse of alcohol.
>
> * * * * * *
>
> The introduction of prohibition in India actually caused a considerable fall in the number of crimes caused by intoxication. *Before prohibition, one often had to witness the miserable spectacle of poor and ignorant persons—millhands, labourers, and even the unemployed with starving families at home—frequenting pithas* (*liquor and adulterated toddy shops*) *drinking burning and harmful spirits, and adulterated toddy,* which really had no vitamin B value; *these persons spent the little they*

([16]) *Ibid,* Vol. 66, p.47

earned after a hard day's toil, or what little that had remained with them, or what they had obtained by some theft, trick, fraud or borrowing; they spent away all that, and then, at home, left wife and children starving and without proper clothes, education, and other elementary necessaries of life[17]. (emphasis added)

The Labour Welfare Department of the State Governments and of the Municipalities are rendering valuable service, through their Labour Welfare Officers who work at the centres assigned to them, impressing upon the people how the use of alcohol is ruinous and instructing them also how to live hygienically; there are lectures on the evils of drug and drink habits.

Partial prohibition of hot country liquors was introduced by the Congress Ministries in Bombay, Bihar, Madras (in Salem, Chittor, Cuddaph and North Arcot Districts) when they first came into power. In C.P. and Berar, prohibition covered approximately one-fourth of the area and population of the State. In Assam, prohibition is directed mainly against opium. In Deccan Hyderabad, on January 3, 1943, a *Firman* was issued by his Exalted Highness the Nizam, supporting the temperance movement. Jammu and Kashmir came also on the move towards prohibition. Since 1949 State Governments determined the policy of introduction of total prohibition.

On April 10, 1948, the Central Advisory Council for Railways, under the Chairmanship of the Hon'ble Dr. John Matthai, agreed to the proposal to ban the serving of liquor in refreshment rooms at railway stations and dining cars.

In Madras, prohibition was inaugurated on October 2, 1948, by the Premier, the Hon'ble Mr. O. P. Ramaswami Reddiar who pronounced it a red letter day.

In 1949, West Punjab took steps for the establishment of prohibition. In 1949, nearly half the area of the Central Provinces and Berar got dry, and it was proposed to enforce prohibition throughout the State.

([17]) M. J. Sethna: *Society and the Criminal,* 3rd Edition, 1971, pp. 166 and 168-169, quoting *Social Reform Annual, 1943,* pp. 20-23

In Bombay the Prohibition Bill was passed and became Act in 1949, and Bombay got dry by April 1950.

The number of offences under the Abkari Act is notoriously high. It shows the craving of some persons for liquor in spite of all good efforts of legal prohibition. The remedy lies in making prohibition successful *through education* (even at the school stage), suggestion, re-education.

32. The Tek Chand Committee[18] surveyed the civilizations from Babylon through China, Greece, Rome and India, X-rayed the religions of the world and the *dharmasastras* and concluded from this conspectus that alcoholism was public enemy. Between innocent first sour sip and nocent never-stop alcoholism only time is the thin partition and, inevitability the sure nexus, refined arguments to the contrary notwithstanding.

33. In India some genteel socialities have argued for the diplomatic pay-off from drinks and Nehru has negatived it:

> Not only does the health of a nation suffer from this (alcoholism), but there is a tendency to increase conflicts both in the national and the international sphere.
>
> I must say that I do not agree with the statement that is sometimes made—even by our ambassadors—that drinks attract people to parties and if there are no drinks served people will not come. I have quite frankly told them that if people are only attracted by drinks, you had better keep away such people from our missions..... I do not believe in this kind of diplomacy which depends on drinking....and, if we have to indulge in that kind of diplomacy, others have had more training in it and are likely to win.[19]

34. Of course, the struggle for *Swaraj* went beyond political liberation and demanded social transformation. Redemption from drink evil was woven into this militant movement and Gandhiji was the expression of this mission:

([18]) *Report of the Study Team on Prohibition,* Vol. I, p.345 ([19]) *Ibid,* p.345

> I hold drink to be more damnable than thieving and perhaps even prostitution. Is it not often the parent to both? I ask you to join the country in sweeping out of existence the drink revenue and abolishing the liquor shops.
>
> Let me, therefore, re-declare my faith in undiluted prohibition before I land myself in deeper water. If I was appointed dictator for one hour for all India, the first thing I would do would be to close without compensation all the liquor shops, destroy all the toddy palms such as I know them in Gujarat, compel factory owners to produce humane conditions for their workmen and open refreshment and recreation rooms where these workmen would get innocent drinks and equally innocent amusements. I would close down the factories if the owners pleaded for want of funds[20].

35. It has been a plank in the national programme since 1920. It is coming, therefore, in due fulfilment of the national will definitely expressed nearly twenty years ago[21].

Sociological journey to interpretive destination

36. This long excursion may justly be brought to a close by an oft repeated but constitutionally relevant quotation from Field, J. Irresistibly attractive for fine-spun feeling and requisite expression:

> There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, if it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilised and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent

([20]) *Ibid,* p.344 ([21]) *Collected Works of Mahatma Gandhi,* Vol. 69, p.83

> spirits obtained at those retail liquor saloons than to any other source. The sale of such liquors in this way has therefore, been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a licence be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the Governing authority. That authority may vest in such officers as it may deem proper and power of passing upon applications for permission to carry it on and to issue licences for that purpose. It is a matter of legislative will only[22].

37. The panorama of views, insights and analyses we have tediously projected serves the socio-legal essay on adjudicating the reasonableness and arbitrariness of the impugned shut down order on Tuesdays and Fridays. Whatever our personal views and reservations on the philosophy, the politics, the economics and the pragmatics of prohibition, we are called upon to pass on the vires of the ameded order. "We, the people of India", have enacted Article 47 and "we, the Justices of India" cannot "lure it back to cancel half a life" or "wash out a word of it", especially when progressive implementation of the policy of prohibition is, by Articles 38 and 47 made fundamental to the country's governance. The Constitution is the property of the people and the court's know-how is to apply the

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([22]) *Crowely* v. *Christensen,* 34 L Ed. 620, 623

Constitution, not to assess, it. In the process of interpretation, Part IV of the Constitution must enter the soul of Part III and the laws, as held by the Court in *State of Kerala* v. *N. M. Thomas*[23] and earlier. The dynamics of statutory construction, in a country like ours, where the pre-Independence Legislative package has to be adapted to the vital spirit of the Constitution, may demand that new wine be poured into old bottles, language permitting. We propound no novel proposition and recall the opinion of Chief Justice Winslow of Wisconsin upholding as constitutional a Workmen's Compensation Act of which he said:

> When an eighteenth century Constitution forms the character of liberty of a twentieth century Government, must its general provisions be construed and interpreted by an eighteenth century mind surrounded by eighteenth century conditions and ideals? Clearly not. This were a command of half the race in its progress, to stretch the State upon a veritable bed of Procrustes. Where there is no express command or prohibition, but only general language of policy to be considered, the conditions prevailing at the time of its adoption must have their due weight but the changed social, economic and governmental conditions of the time, as well as the problems which the changes have produced, must also logically enter into the consideration and become influential factors in the settlement of problems of construction and interpretation[24].

38. In short, while the imperial masters were concerned about the revenues they could make from the liquor trade they were not indifferent to the social control of this business which, if left unbridled, was fraught with danger to health, morals, public order and the flow of life without stress or distress. Indeed, even collection of revenue was interwined with orderly milieu; and these twin objects are reflected in the scheme and provisions of the Act. Indeed, the history of excise legislation in this country has received judicial attention earlier and the whole position has been neatly summarised

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([23]) (1976) 1 SCR 906; (1976) 2 SCC 310 ([24]) *Borgnis* v. *The Falk Co.,* 147 Wisconsin Reports, p. 327 at 348 et seq. (1911). That this doctrine is to be deemed to apply only to "due process" and "police power" determinations, *see* especially concurring opinions of Marshall, J. and Barness, J.

by Chandrachud, J., (as he then was) if we may say so with great respect, and a scissor-and-paste operation is enough for our purpose[25]: (SCC pp. 749-50, 752: Paras 25-30 and 37)

> Liquor licensing has a long history. Prior to the passing of the Indian Constitution, the licensees mostly restricted their challenge to the demand of the Government as being in excess of the condition of the licence or on the ground that the rules in pursuance of which such conditions were framed were themselves beyond the rule-making power of the authority concerned..... The provisions of the Punjab Excise Act, 1914, like the provisions of similar Acts in force in other States, reflect the nature and the width of the power which the State Governments are empowered to exercise in the matter of liquor licensing. We will notice first the relevant provisions of the Act under consideration.
>
> Section 5 of the Act empowers the State Government to regulate the maximum or minimum quantity of any intoxicant which may be sold by retail or wholesale. Section 8 (*a*) vests general superintendence and administration of all matters relating to excise in the Financial Commissioner, subject to the control of the State Government. Section 16 provides that no intoxicant shall be imported, exported or transported except after payment of the necessary duty or execution of a bond for such payment and in compliance with such conditions as the State Government may impose. Section 17 confers upon the State Government the power to prohibit the import or export of any intoxicant into or from Punjab or any part thereof and to prohibit the transport of any intoxicant. By Section 20 (1) no intoxicant can be manufactured or collected, no hemp plant can be cultivated, no *tari* producing tree can be tapped, no *tari* can be drawn from any tree and no person can possess any material or apparatus for manufacturing an intoxicant other than *tari* except under the authority and subject to the terms and conditions of a licence granted by the Collector. By sub-section (2) of Section 20 no distillery or brewery can be constructed or worked except under

([25]) *Har Shankar* v. *Dy. Excise and Taxation Commr.,* (1975) 1 SCR 254 at 266-67: (1975) 1 SCC 737, 749-50, 752

the authority and subject to the terms and conditions of a licence granted by the Financial Commissioner. Section 24 provides that no person shall have in his possession any intoxicant in excess of such quantity as the State Government declares to be the limit of retail sale, except under the authority and in accordance with the terms and conditions of a licence or permit. Sub-section (4) of Section 24 empowers the State Government to prohibit the possession of any intoxicant or restrict its possession by imposing such conditions as it may prescribe. Section 26 prohibits the sale of liquor except under the authority and subject to the terms and conditions of a licence granted in that behalf.

Section 27 of the Act empowers the State Government to "lease" on such conditions and for such period as it may deem fit the right of manufacturing or of supplying or selling by wholesale or retail, any country liquor or intoxicating drug within any specified local area. On such lease being granted the Collector, under sub-section (2), has to grant to the lessee a licence in the form of his lease.

Section 34 (1) of the Act provides that every licence, permit or pass under the Act shall be granted—(*a*) on payment of such fees, if any, (*b*) subject to such restrictions and on such conditions, (*c*) in such form and containing such particulars, and (*d*) for such period as the Financial Commissioner may direct. By Section 35 (2), before any licence is granted for the retail sale of liquor for consumption on any premises the Collector has to ascertain local public opinion in regard to the licensing of such premises. Section 36 confers power on the authority granting any licence to cancel or suspend it if, inter alia, any duty of fee payable thereon has not been duly paid.

Section 56 of the Act empowers the State Government to exempt any intoxicant from the provisions of the Act. By Section 58 the State Government may make rules for the purpose of carrying out the provisions of this Act. Section 59 empowers the Financial Commissioner by clause (*a*) to regulate the manufacture, supply, storage or sale of any intoxicant....

* * * * * *

The Prohibition and Excise Laws in force in other States contain provisions substantially similar to those contained in the Punjab Excise Act. Several Acts passed by State Legislatures contain provisions rendering it unlawful to manufacture export, import, transport or sell intoxicating liquor except in accordance with a licence, permit or pass granted in that behalf. The Bombay Abkari Act, 1878; the Bombay Prohibition Act, 1949, the Bengal Excise Acts of 1878 and 1909; the Madras Abkari Act, 1886; the Laws and Rules contained in the Excise Manual United Province; the Eastern Bengal and Assam Excise Act, 1910; the Bihar and Orissa Excise Act, 1915; the Cochin Abkari Act as amended by the Kerala Abkari Laws Act, 1964; the Madhya Pradesh Excise Act, 1915, are instances of State legislation by which extensive powers are conferred on the State Government in the matter of liquor licensing.

39. In this background, let us read Section 59 (*f*) (*v*) and Rule 37 before and after the impugned amendment:

59(*f*)(*v*).—The fixing of the days and hours during which any licensed premises may or may not be kept open, and the closure of such premises on special occasions;

Rule 37(9) *Conditions dealing with licensed hours.—E*very licensee for the sale of liquor shall keep his shop closed on the seventh day of every month, on all Tuesdays up to 2 p.m. on Republic Day (26th January), on Independence Day (15th August), on Mahatma Gandhi's Birthday (2nd October) and on such days not exceeding three in a year as may be declared by the Government in this behalf. He shall observe the following woking hours, hereinafter called the licensed hours, and shall not, without the sanction of the Excise Commissioner, Punjab or other competent authority, keep his shop open outside these hours. The licensed hours shall be as follows:

* * * * * *

After amendment

37(9). *Conditions dealing with licensed hours.—E*very licensee for the sale of liquor shall keep his shop closed on every Tuesday and Friday, on Repbublic Day (26th January), on Independence Day (15th August), on Mahatma Gandhi's Birthday (2nd October) and on such days not exceeding three in a year as may be declared by the Government in this behalf. He shall observe the following woking hours, hereinafter called the licensed hours, and shall not, without the sanction of the Excise Commissioner, Punjab or other competent authority, keep his shop open outside these hours. The licensed hours shall be as follows:

* * * * * *

Note.—The condition regarding closure of liquor shops on every Tuesday and Friday shall not be applicable in the case of licenses of tourist bungalows and resorts being run by the Tourism Department of the State Government.

40. Before formulating the contentions pressed before us by Shri A. K. Sen, Shri Mahajan and Shri Sharma, we may mention that Shri Seth, one of the Advocates who argued innovatively, did contend that the Act was beyond the legislative competence of the State and if that tall contention met with our approval there was nothing more to be done. To substantiate this daring submission the learned Counsel referred us to the entries in the Seventh Schedule to the Constitution. All that we need say is that the argument is too abstruse for us to deal with intelligibly. To mention the plea is necessary but to chase it further is supererogatory.

The main contention

41. The primary submission proceeded on the assumption that a citizen had a fundamental right to carry on trade or business in intoxicants. The learned Additional Solicitor General urged that no such fundamental right could be claimed, having regard to noxious substances and consequences involved and further contended that notwithstanding the

observations of Subba Rao, C.J. in *Krishna Kumar Narula* v. *State of Jammu and Kashmir*[26], the preponderant view of this Court, precedent and subsequent to the 'amber' observations in the aforesaid decision, has been that no fundamental right can be claimed by a citizen in seriously obnoxious trades, offensive businesses or outraging occupations like trade in dangerous commodities, trafficking in human flesh, horrifying exploitation or ruinous gambling. Even so, since the question of the fundamentality of such right is before this Court in other batches of writ petitions which are not before us, we have chosen to proceed on the footing, *arguendo,* that there is a fundamental right in liquor trade for the petitioners. Not that we agree nor that Shree Sorabjee concedes that there is such a right but that, for the sake of narrowing the scope of the colossal number of writ petitions now before us, this question may well be skirted. The Bench and the Bar have, therefore, focussed attention on the vires of the provision from the standpoint of valid power of regulation of the liquor trade *vis-a-vis* unreasonableness, arbitrariness and vacuum of any indicium for just exercise. Essentially, the point pressed was that Section 59 (*f*) (*v*) vested an unguided, uncanalised, vague and vagarious power in the Financial Commissioner to fix any days or number of days and any hours or number of hours as his fancy or humour suggested. There were no guidelines, no indicators, no controlling points whereby the widely-worded power of the Excise Commissioner (on whom Government has vested the power pursuant to Section 9) should be geared to a definite goal embanked by some clear-cut policy and made accountable to some relevant principle. Such a plenary power carried the pernicious potential for tyrannical exercise in its womb and would be still born, judged by our constitutional values. If the power is capable of fantastic playfulness or fanciful misuse, it is unreasonable, being absolute, tested by the canons of the rule of law. And if, *arguendo,* it is so unreasonably wide as to imperil the enjoyment of a fundamental right it is violative of Article 19 (1) (*g*) and is not saved by Article 19 (6). Another facet of the same submission is that if the provision is an arbitrary armour, the power-wielder can act nepotistically, pick and choose discriminatorily or gambol goodily. Where a law permits discrimination, huff and humour, the guarantee of equality becomes phoney, flimsy or illusory. Article 14 is outraged by such a provision and is liable to be quashed for that reason.

([26]) (1967) 3 SCR 50: AIR 1967 SC 1368

An Important undertaking by the State

42. We must here record an undertaking by the Punjab Government and eliminate a possible confusion. The amended rule partially prohibits liquor sales in the sense that on Tuesdays and Fridays no hotel, restaurant or other institution covered by it shall trade in liquor. But this prohibition is made non-applicable to like institutions run by the Government or its agencies. We, *prima facie,* felt that this was discriminatory on its face. Further, Article 47 charges the State with promotion of prohibition as a fundamental policy and it is indefensible for Government to enforce prohibitionist restraints on others and itself practise the opposite and betray the constitutional mandate. It suggests dubious dealing by State Power. Such hollow homage to Article 47 and the Father of the Nation gives diminishing credibility mileage in a democratic polity. The learned Additional Solicitor General, without going into the correctness of propriety of our initial view—probably he wanted to controvert or clarify—readily agreed that the Tuesday—Friday ban would be equally observed by the State organs also. The undertaking recorded, as part of the proceedings of the Court, runs thus:

> The Additional Solicitor General appearing for the State of Punjab states that the Punjab State undertakes to proceed on the footing that the 'Note' is not in force and that they do not propose to rely on the 'Note' and will, in regard to tourist bungalows and resorts run by the Tourism Department of the State Government, observe the same regulatory provision as is contained in the substantive part of Rule 37, sub-rule 9. We accept this statement and treat it as an undertaking by the State. Formal steps for deleting the 'Note' will be taken in due course.

43. Although a Note can be law, here the State concedes that it may not be treated as such. Even otherwise, the Note is plainly severable and the rule independently viable. Shri A. K. Sen who had raised this point at the beginning allowed it to fade out when the State's undertaking was brought to his notice. The vice of discrimination, blotted out of the law by this process may not be sufficient, if the traditional approach were to be made to striking down; but if restructuring is done and the formal process delayed there is no reason to quash when the correction is done. Courts try to save, not to scuttle, when allegiance to the Constitution is shown.

44. In short, Tuesdays and Fridays, so long as this rule remains (as modified in the light of the undertaking) shall be a holiday for the liquor trade in the private or public sector throughout the State. We need hardly state that if Government goes back on this altered law the consequences may be plural and unpleasant. Of course, we do not expect, in the least, that any such apprehension will actualise.

45. One confusion that we want to clear up is that even if Section 59 and Rule 37 were upheld *in toto* that does not preclude any affected party from challenging a particular executive act pursuant thereto on the ground that such an act is arbitrary, *mala fide* or unrelated to the purposes and the guidelines available in the statute. If, for instance, the Financial Commissioner or the Excise Commissioner, as the case may be, declares that all liquor shops shall be opened on his birthday or shall remain closed on his friend's death anniversary, whatever our pronouncement on the vires of the impugned provisions, the executive order will be sentenced to death. The law may be good, the act may be corrupt and then it cannot be saved.

46. The only question seriously canvassed before us is as to whether the power under Section 59 (*f*) (*v*) is unguided and the rule framed thereunder is bad as arbitrary. We will forthwith examine the soundness of that proposition.

47. An irrelevant controversy consumed some court time viz., that the two-day shut-down rule meant that a substantial portion of the year for which the licence was granted for full consideration would thus be sliced off without compensation. This step was iniquitous and inflicted loss and was therefore 'unreasonable'—therefore void. The Additional Solicitor General refuted this charge on facts and challenged its relevance in law. We must not forget that we are exmining the vires of a law, not adjudging a breach of contract and if on account of a legislation a party sustains damages or claims a refund that does not bear upon the vires of the provision but belongs to another province.

48. Moreover, the grievance of the petitioners is mere 'boloney' because even their licence fee has been reduced under the amended rule to compensate, as it were, for the extra closure of a day or so. We do not

delve into the details nor pronounce on it as it is not pertinent to constitutionality. But a disquieting feature of the rule in the background of the purpose of the measure, fails to be noticed. Perhaps the most significant social welfare aspect of the closure is the prevention of the ruination of the poor worker by drinking down the little earnings he gets on the wage day. Credit sales are banned and cash sales spurt on wage days. Any Government, with workers' weal and their families' survival at heart, will use its 'police power' under Article 19 (6) read with Section 59 (*f*) (*v*) of the Act to forbid alcohol sales on pay days. Wisely to save the dependent women and children of wage-earners the former unamended rule had forbidden sales on the seventh day of every month (when, it is well-known, the monthly pay packet passes into the employees' pocket). To permit the tavern or liquor bar to transact business that tempting day is to abet the dealer who picks the pocket of the vulnerables and betray the Gandhian behest. And yet, while bringing in the Tuesday-Friday forbiddance of sales, the ban on sales on the seventh of every month was entirely deleted—an oblique bonus to the liquor lobby, if we look at it sternly, an unwitting indiscretion, if we view it indulgently. The victims are the weeping wives and crying children of the workers. All power is a trust and its exercise by governments must be subject to social audit and judas exposure. 'For whom do the constitutional bells toll', this Court asked in an earlier judgment relating to Scheduled Castes[27]. We hope Punjab will rectify the error and hearten the poor in the spirit of Article 47 and not take away by the left hand what the right hand gives. We indicated these thoughts in the course of the hearing so that no one was taken by surprise. Be that as it may, the petitioner can derive no aid and comfort from our criticisms which are meant to alert the parliamentary auditors of subordinate legislation in our welfare State.

The Scheme and the subject-matter supply the guidelines

49. We come to the crux of the matter. Is Section 59 (*f*) (*v*) bad for want of guidelines? Is it over-broad or too bald? Does it lend itself to naked unreasonable exercise? We were taken through a few rulings where power without embankments was held bad. They related to ordinary items like coal or restrictions where guidelines were blank. Here, we are in a

([27]) *State of Kerala* v. *N. M. Thomas,* (1976) 1 SCR 906: (1976) 2 SCC 310

different street altogether. The trade is instinct with injury to individual and community and has serious side-effects recognised everywhere in every age. Not to control alcohol business is to abdicate the right to rule for the good of the people. Not to canalise the age and sex of consumers and servers, the hours of sale and cash-and carry basis the punctuation and pause in days to produce partially the 'dry' habit—is to fail functionally as a welfare State. The whole scheme of the statute proclaims its purpose of control in time and space and otherwise. Section 58 vests in Government the power for more serious restrictions and laying down of principles. Details and lesser constraints have been left to the rule-making power of the Financial Commissioner. The complex of provisions is purpose-oriented, considerably re-inforced by Article 47. Old statutes get invigorated by the Paramount Parchment. Interpretation of the text of pre-constitution enactments can legitimately be infused with the concerns and commitments of the Constitution, as an imperative exercise. Thus, it is impossible to maintain that no guidelines are found in the Act.

50. We wholly agree with the learned Additional Solicitor General that the search for guidelines is not a verbal excursion. The very subject-matter of the statute—intoxicants—eloquently impresses the Act with a clear purpose, a social orientation and a statutory strategy. If bread and brandy are different the point we make argues itself. The goal is promotion of temperance and, flowing there out, of sobriety, public order, individual health, crime control, medical bills, family welfare, curbing of violence and tension, restoration of the addict's mental, moral and physical personality and interdict on impoverishment, in various degrees, compounded. We have extensively quoted supportive literature; and regulation of alcohol *per se* furnishes a definite guideline. If the Section or the Rule intended to combat an evil is misused for a perverse, ulterior or extraneous object that action, not the law, will be struck down. In this view, discrimination or arbitrariness is also excluded.

51. A final bid to stigmatize the provision [Section 59 (*f*) (*v*)] was made by raising a consternation. The power to fix the days and hours is so broad that the authority may fix six out of seven days or 23 out of 24 hours as 'dry' days or closed hours and thus cripple the purpose of the licence. This is an ersatz apprehension, a caricature of the provision and an

assumption of power run amok. An Abkari Law, as here unfolded by the scheme (Chapters and Sections further amplified by the rules framed thereunder during the last 64 years) is not a Prohibition Act with a mission of total prohibition. The obvious object is to balance temperance with tax, to condition and curtail consumption without liquidating the liquor business, to experiment with phased and progressive projects of prohibition without total ban on the alcohol trade or individual intake. The temperance movement leaves the door half-closed, not wide ajar; the prohibition crusade banishes wholly the drinking of intoxicants. So it follows that the limited temperance guideline writ large in the Act will monitor the use of the power. Operation Temperance, leading later to the former, may be a strategy within the scope of the Abkari Act.

52. Both may be valid but we do not go into it. Suffice it to say that even restrictions under Article 19 may, depending on situations, be pushed to the point of prohibition consistently with reasonableness. The chimerical fear that 'fix the days' means even 'ban the whole week', is either pathological or artificial, not certainly real under the Act. We are not to be understood to say that a complete ban is without the bounds of the law—it turns on a given statutory scheme.

53. While the police power as developed in the American jurisprudence and constitutional law, may not be applicable in terms to the Indian Constitutional Law, there is much that is common between that doctrine and the reasonableness doctrine under Article 19 of the Indian Constitution. Notes an American Law Journal:

> The police power has often been described as the "least limitable" of the governmental powers. An attempt to define its reach or trace its outer limits is fruitless for each case turns upon its own facts..... The police power must be used to promote the health, safety, or general welfare of the public, and the exercise of the power must be "reasonable". An exercise of the police power going beyond these basic limits is not constitutionally permissible.

Noxious Use Theory.—This theory upholds as valid any regulation of the use of property, even to the point of total destruction of value, so long as the use prohibited is harmful to others[28].

54. In a Law Review published from the United States 'police power' with reference to intoxicant liquors has been dealt with and is instructive:

> Government control over intoxicating liquors has long been recognized as a necessary function to protect society from the evils attending it. Protection of society and not the providing of a benefit of the licence-holder is the chief end of such loss and regulations. There is no inherint right in a citizen to sell intoxicating liquors as retail. It is a business attended with danger to the community and it is recognised everywhere as a subject of regulation.

As to the legislative power to regulate liquor, the United States Supreme Court has stated:

> If the public safety or the public morals require the discontinuance of the manufacture or traffic (of intoxicating liquors) the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer.
>
> The States have consistently held that the regulation of intoxicants is a valid exercise of its police power. The police power stands upon the basic principle that some rights must be and are surrendered or modified in entering into the social and political state as indispensable to the good government and due regulation and well-being of society.
>
> In evaluating the constitutionality of a regulation within the police power, validity depends on whether the regulation is designed to accomplish a purpose within the scope of that power[29].

([28]) South Western Law Journal—Annual Survey of Taxes Law, Vol. 30 No. 1, Survey 1976, pp. 725-26 ([29]) Idaho Law Review, Vol. 7, 1970, p.131

55. It is evident that there is close similarity in judicial thinking on the subject. This has been made further clear from several observations of this Court in its judgments and we may make a reference to a recent case, *Himmatlal*,[30] and a few observations therein: (SCC pp. 680-81, paras 21 and 22)

> In the United States of America, operators of gambling sought the protection of the commerce clause. But the Court upheld the power of the Congress to regulate and control the same. Likewise, the Pure Food Act which prohibited the importation of adulterated food was upheld. The prohibition of transportation of women for immoral purposes from one State to another or to a foreign land was held valid. Gambling itself was held in great disfavour by the Supreme Court which roundly stated that 'there is no constitutional right to gamble'.
>
> Das, C. J. after making a survey of judicial thought, here and abroad. opined that freedom was unfree when society was exposed to grave risk or held in ransom by the operation of the impugned activities. The contrary argument that all economic activities were entitled to freedom as 'trade' subject to reasonable restrictions which the Legislature might impose, was dealt with by the learned Chief Justice in a sharp and forceful presentation:
>
> On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on a business of hiring out goondas to commit assault or even murder, of house-breaking of selling obscene pictures, of trafficking in women and so on until the law curbs or stops such activities. This appears to us to be completely unrealistic and incongruous. We have no doubt that there are certain activities which can under no circumstances be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the

(30) Fatehchand Himmatlal v. State of Maharashtra, (1977) 2 SCR 828 at 839-840:(1977) 2 SCC 670, p. 680-81

true meaning of those words. Learned Counsel has to concede that there can be no 'trade' or 'business' in crime but submits that this principle should not be extended.....

We have no hesitation, in our hearts and our heads, to hold that every systematic, profit-oriented activity, however sinister, suppressive or socially diabolic, cannot, ipso facto, exalt itself into a trade. Incorporation of Directive Principles of State Policy casting the high duty upon the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice—social, economic and political—shall inform all the institutions of the national life, is not idle print but command to action. We can never forget, except at our peril, that the Constitution obligates the State to ensure an adequate means of livelihood to its citizens and to see that the health and strength of workers, men and women, are not abused, that exploitation, moral and material, shall be extradited. In short, State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business or commerce, can be de-recognised as trade or business. At this point, the legal culture and the public morals of a nation may merge, economic justice and taboo of traumatic trade may meet and jurisprudence may frown upon dark and deadly dealings. The Constitutional refusal to consecrate exploitation as 'trade' in a Socialist Republic like ours argues itself.

A precedential approach to the ultra vires argument

56. The single substantive contention has incarnated as triple constitutional infirmities. Counsel argued that the power to make rules fixing the days and hours for closing or keeping open liquor shops was wholly unguided. Three invalidatory vices flowed from this single flaw, viz. (i) excessive delegation of legislative power, (ii) unreasonable restriction on the fundamental right to trade in intoxicants under Article 19 (1)(*g*) and (iii) arbitrary power to pick and choose, inherently violative of Article 14.

57. Assuming the legality of the triune lethal blows, the basic charge of uncanalised and naked power must be established. We have already held that the statutory scheme is not merely fiscal but also designed to regulate and reduce alcoholic habit. And, while commodities and situations dictate whether power, in given statutory provisions, is too plenary to be other than arbitrary or is instinct with inherent limitations, alcohol is so manifestly deleterious that the nature of the guidelines is written in invisible ink.

58. A brief reference to a few rulings cited by counsel may not be inept.

59. It is true that although the enactment under consideration is more than five decades old, its validity can now be assailed on the score of unconstitutionality:

> When India became a sovereign Democratic Republic on 26th January, 1950, the validity of all laws had to be tested on the touchstone of the new Constitution and all laws made before the coming into force of the Constitution have to stand the test for their validity on the provisions of Part III of the Constitution[31].

This is why the principle of excessive delegation, that is to say, the making over by the legislature of the essential principles of legislation to another body, becomes relevant in the present debate. Under our constitutional scheme the legislature must retain in its own hands the essential legislative functions. Exactly what constitutes the essential legislative functions is difficult to define:

> The legislature must retain in its own hands the essential legislative function. Exactly what constituted "essential legislative function", was difficult to define in general terms, but this much was clear that the essential legislative function must at least consist of the determination of the legislative policy and its formulation as a binding rule of conduct. Thus where the law passed by the legislature declares the legislative policy and lays down the standard which is enacted into a rule of law, it can leave

([31]) Suraj Mall Mohta v. A. V. Visvanatha Sastri, (1955) 1 SCR 448 at 457: AIR 1954 SC 545

> the task of subordinate legislation which by its very nature is ancillary to the statute to subordinate bodies, i.e. the making of rules, regulations or bye-laws. The subordinate authority must do so within the frame-work of the law which makes the delegation, and such subordinate legislation has to be consistent with the law under which it is made and cannot go beyond the limits of the policy and standard laid down in the law. Provided the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case[32].

60. In *Vasanthlal Maganbhai Sajanwal* v. *State of Bombay*[33] the same point was made:

> A statute challenged on the ground of excessive delegation must therefore be subject to two tests, (i) whether it delegates essential legislative function or power and (ii) whether the legislature has enunciated its policy and principle for the guidance of the delegate.

61. Likewise, if the State can choose any day or hour for exclusion as it fancies and there are no rules to fix this discretion, plainly the provision [Section 59 (f)(v)] must offend against Article 14 of the Constitution (See *Saghir Ahmed's case*)[34].

62. Another aspect of unguided power to affect the citizen's fundamental rights lies in the province of Article 19 since imposition of unreasonable restrictions on the right to carry on business is violative of Article 19 (1)(*g*). Patanjali Sastri, C. J., in *V. G. Row's case*[35] observed:

> The test of reasonableness wherever prescribed should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent or urgency of the evil sought to be remedied thereby, the disproportion of imposition, the prevailing conditions at the time should enter into the judicial verdict.

([32]) Municipal Coporation of Delhi v. Birla Cotton Spinning and Weaving Mills, (1968) 3 SCR 251 at 261: AIR 1968 SC 1232 ([33]) (1961) 1 SCR 341: AIR 1961 SC 4: AIR 1954 SC 728
([34]) AIR 1954 SC 728 ([35]) (1952) 2 SCR 597: AIR 1952 SC 126

63. This Court, in *R. M. Seshadri*[36], dealt with unreasonable restrictions on showing of films by theatre owners and struck down the provisions. Similarly, in *Harichand*[37] an unreasonable restriction on the right to trade was struck, down because the regulation concerned provided no principles nor contained any policy and this Court observed:

> A provision which leaves an unbridled power to an authority cannot in any sense be characterised as reasonable. Section 3 of the Regulation is one such provision and is therefore liable to be struck down as violative of Article 19(1)(*g*).

Other decisions in the same strain were cited. Indeed an annual shower of decisions on this point issues from this Court. But the essential point made in all these cases is that unchannelled and arbitrary discretion is patently violative of the requirements of reasonableness in Article 19 and of equality under Article 14, a proposition with which no one can now quarrel. It is in the application of these principles that disputes arise as Patanjali Sastri, C. J. clarified early in the day in *V. G. Row's case* (cited supra). Reasonableness and arbitrariness are not abstractions and must be tested on the touchstone of principled pragmatism and living realism.

64. It is in this context that the observations of this Court in *Nashirwar*[38] become decisive. While considering the soundness of the propositions advanced by the advocates for the petitioners the Additional Solicitor General rightly shielded the statutory provisions in question by drawing our attention to the crucial factor that the subject-matter of the legislation was a deleterious substance requiring restrictions in the direction of moderation in consumption, regulation regarding the days and hours of sale and appropriateness in the matter of the location of the places of sale. If it is coal or mica or cinema, the test of reasonableness will be stern. When the public purpose is clear and the policing need is manifes from the nature of the business itself the guidelines are easy to find. Shri Mahajan's reliance on the *Coal Control*[39] case of Shri A. K. Sen's reliance on the *Gold Control*[40] case is inept. Coal and gold are as

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([36]) (1955) 1 SCR 686: AIR 1954 SC 747, ([37]) Lala Hari Chand Sarda v. Mizo District Council, (1967) 1 SCR 1012 at 1021:AIR 1967 SC 829 ([38]) Nashirwar v. State of M. P. (1975) 2 SCR 861: (1975) 1 SCC 29 ([39]) *Dwaraka Prasad* v. *State of U. P.*,AIR 1954 SC 224 ([40]) *Harakchand Ratanchan Bantia* v. *Union of India,* (1969) 2 SCC 166: AIR 1970 SC 1453

apart from whisky and toddy as cabbages are from kings. Don't we feel the difference between bread and brandy in the field of trade control? Life speaks through Law.

65. Counsel after counsel has pressed that there is no guideline for the exercise of the power of rule-making and the Additional Solicitor General has turned to the history, sociology and criminology relating to liquor. In support of his contention, Shri Soli Sorabjee for the State has drawn our attention to the following passages in Nashirwar (supra) which are quoted in extenso because of the persistence of counsel on the other side in pressing their point about unbounded power: (SCC pp. 37-39, paras 26-28 and 34-35)

> In our country the history of excise shows that the regulations issued between 1790-1800 prohibited manufacture or sale of liquors without a licence from a Collector. In 1808 a regulation was introduced in the Madras Presidency wihich provided that the exclusive privilege of manufacturing and selling arrack should be framed in each district. In 1820 the law was amended to authorise the treatment of toddy and other fermented liquors in the same way as spirits by allowing Collectors to retain the manufacture and sale under direct managment if deemed preferable to farming. In 1884 a Committee was appointed to investigate the excise system. The recommendations of the Committee were adopted. Under the new system the monopoly of manufacture was let separately from that of sale. The former was granted on condition of payment of a fixed duty per gallon. The right of sale was given on payment of a fee per shop or a number of shops, or on payment of a fee determined by auction. In the Bombay Presidency the monopoly of the retail sale of spirits and the right to purchase spirits was farmed. In 1857 the Government declared its future policy to be the letting by auction of each shop, with its still, separately. In 1870-71 a change was made. The rule at that time was that the Collector would fix the number and locality of the different shops and determine their letting value according to the advantages possessed by each. It was not intended that they should, as a rule, be put up to public competition; but competition might be resorted to by the Collector and taken into account in

determining the sum at which each would be leased. This rule remained in force for many years. The practice of putting the shops up to auction was, thereafter followed. The history of excise administration in our country before Independence shows that there was originally the farming system and thereafter the central distillery system for manufacture. The retail sale was by auction of the right and privilege of sale. The Government of India appointed an Excise Committee in 1905. The measures recommended by the Committee were the advances of taxation, the concentration of distillation, the extended adoption of the contract distillery system. The Committee suggested among other things the replacement of the then existing excise law by fresh legislation on the lines of the Madras Abkari Act. (See Dr. Pramatha Nath Banerjee: *History of Indian Taxation, p. 470 seq.).*

Reference may be made to the Taxation Enquiry Commissioner Report 1953-54, Vol. 3. At page 130 following there is a discussion of State excises. Among the major sources of revenue which are available to the State Government there is a duty on alcoholic liquors for human consumption. At page 132 of the Report it is stated that in addition to the excise duties, licence fees are charged for manufacture or sale of liquor or for tapping toddy trees etc. Similarly, several fees like permit fees, vend fees, outstill duties are also levied. Manufacture or sale of liquor is forbidden except under licences which are generally granted by auction to the highest bidders. The manufacture of country spirit is done in Government distilleries or under the direct supervision of the excise staff. All supplies are drawn from Government warehouses which ensures that the liquor is not more than of the prescribed strength. The licensed sellers have to sell the country spirit between fixed hours and at fixed selling rates. As in the case of country-spirit, the right of tapping and selling toddy is also auctioned. In addition to the licence, in some States the licensee has to pay a tree tax to Government.

Traditionally tobacco, opium and intoxicating liquors have been the subject-matter of State monopoly. (See Section IV of the Madras Regulation XXV of 1802 relating to permanent settlement of land revenue.) Section IV states that the Government having

reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads *inter alia* of the abkary, or tax on the sale of spirituous liquors and intoxicating drugs, of the excise on articles of consumption, of all taxes personal and professional, as well as those derived from markets, fairs, or bazars, of lakhiraj lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit rents, the permanent assessment of the land-tax shall be made exclusively of the said articles now recited.

* * * * * *

The excise revenue arising out of manufacture and sale of intoxicating liquors is one of the sources of State Exchequer. One of the principal sources of State revenue is coustoms and excise. In England sale of intoxicating liquors althrough perfectly lawful at common law is subject to certain statutory restrictions. These restrictions are primarily of two kinds: those designed for the orderly conduct of the retail trade and those designed to obtain revenue from the trade whether wholesale or retail.

Trade in liquor has histroically stood on a different footing from other trades. Restrictions which are not permissible with other trades are lawful and reasonable so far as the trade in liquor is concerned. That is why even prohibition of the trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of the liquor. The State possesses the right of complete control over all aspects of intoxicants, viz., manufacture, collection, sale and consumption. The State has the exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. That is the view of this Court in *Bharucha's case* (supra) and *Jaiswal's case* (supra). The nature of the trade is such that the State confers the right to vend liquor by farming out either in auction or on private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government. (pp. 869-871).

The guidelines

66. Now that we have held that the provision [Section 59 (*f*) (*v*)] is valid on a consideration of the criteria controlling the wide words used therein there is a minor matter remaining to be disposed of. The extract from the section, as will be noticed, contains a clause which runs: "and the closure of such premises on special occasions". Thus, rules may be made by the Financial Commissioner for fixing the closure of licensed premises on 'special occasions'. Shri Mahajan insisted that 'special occasions' may mean anything and may cover any occasion dictated by humour, political pressure or other ulterior considerations. It is thus a blanket power which is an unreasonable restriction on the licensee's trade. Certainly if 'special occasions' means any occasion which appeals to the mood of the Financial Commissioner or has other casual fascination for him the rule may suffer from arbitrary and unreasonable features. Gandhiji's birthday and also Vinobaji's birthday have been included in the licence itself. 'Special occasions' contemplated by Section 59(*f*) (*v*) are not stricken by such a vice for the obvious reasons we have elaborately given in the earlier part of our argument. The occasion must be special from the point of view of the broad considerations of national solemnity, public order, homage to national figures, the likelihood of eruption of inebriate violence on certain days on account of *melas,* festivals or frenzied situations or periods of tension. Bapuji's birthday, election day, hours of procession by rival communities when tensions prevail or festivals where colossal numbers of people gather and out-break of violence is on the agenda, are clear illustrations. 'Special occasions' cannot be equated with fanciful occasions but such as promote the policy of the statute as expounded by us earlier. There is no merit in this argument either and we reject it.

67. As between temperance and prohibition it is a policy decision for the Administration. Much may be said for and against total prohibition as an American wit has cryptically yet sarcastically summed up:[41]

> The chief argument against prohibition is that it does not prohibit. This is also the chief argument in favour of it.

68. This survey of the law-ways of Article 19 and the police power is sufficient in our view to clinch the issue.

([41]) *Reconsiderations H. L. Mencken—Anti All Kinds of Blah* by Lila Ray, appeared in "Span" August, 1978, p. 41.

69. Our conclussions may now be set out:

(a) Section 59(*f*)(*v*) of the Punjab Excise Act, 1914, is perfectly valid;

(b) The regulation of the number of days and the duration of the hours when supply of alcohol by licensees shall be stopped is quite reasonable, whether it be two days in a week or even more. We leave open the question as to whether prohibition of the number of days and the number of hours, if it reaches a point of substantial destruction of the right to vend, will be valid, since that question arises in other writ petitions;

(c) The exercise of the power to regulate, including direct closure for some days every week, being reasonable and calculated to produce temperance and promote social welfare, cannot be invalidated on the imaginary possibility of misuse. The test of the reasonableness of a provision is not the theoretical possibility of tyranny; and

(d) There is enough guideline in the scheme and provisions of the Punjab Excise Act to govern the excercise of the power under Sections 58 and 59.

70. In a few beer bar cases the grievance ventilated is regarding the manipulation of hours of sale. Nothing has been made out to hold that the re-adjustment of the hour of beer-bibbing is unrelated to the statutory guidelines or destructive of the business. We reject the objection.

71. We have reasoned enough to justify the ways of the Constitution and the law to the consumers of social justice and spirituous potions. The challenge fails and the Writ Petition Nos. 4108-4109 etc., of 1978 are hereby dismissed with costs (one hearing fee). May we hopefully expect the State to bear *true* faith and allegience to that Constitutional orphan, Article 47?

Writ Petition Nos. 966-971 etc. from U. P.

72. We have today disposed of a batch of writ petitions arising under the Punjab Excise Act, 1914 (Annexure A). There the petitioner had challenged Section 59(*f*) (*v*) and Rule 37 as unconstitutional. In the present batch of writ petitions the contention is identical except that the enactment and rule

are formally different but *in pari materia.* Section 41(*e*) (*v*) of the U. P. Excise Act empowers the Excise Commissioner to make rules fixing the days and hours during which licensed premises may be kept opened or closed. Rule 13B is one such rule which forbids sale of liquor "on all Tuesdays as well as the first day of every month". Aggrieved by rule 13B (as amended), because it prohibits liquor trade on the 1st of every month the petitioners, who are licensees, have come up to this Court challenging its vires. Rule 13B reads thus:

> 13B. All excise shops (including foreign liquor, country spirit, home drugs, opium, tari and outstill ships) shall not be kept open on Independence day (August 15), Mahatma Gandhi's Birthday (October 2) and on the day of Mahatma Gandhi's Tragic Death (January 30) every year and also on all Tuesdays as well as on the first day of every month.
>
> Provided that if the first day of the month happens to be a public holiday, the day next following of that month shall be the day on which the excise shops shall not be kept open. Provided further Excise Commissioner may, in consultation with the Collector of the District concerned, waive the condition of not keeping an excise shop open on Tuesdays or the 1st day of the month or the day next following of that month, as the case may be, for such specified period as he may think fit, in the case of hotels possessing a licence in Form F. L. 6 for the sale of foreign liquor for the benefit of such foreign tourists as may hold a valid permit under the All India Liquor Permit Scheme of the Government of India.

73. The source of the rule-making power is Section 41 (*e*) (*v*) which hardly needs reproduction.

74. It is easy to see that the provisions in the Punjab Law, challenged unsuccessfully before us, and these U. P. provisions are virtually the same. The contentions put forward by counsel for the petitioners and the submissions by the Solicitor General and Shri O. P. Rana in reply are also identical with what we have heard and considered in the punjab cases. Indeed, the U. P. cases, from the point of view of the State, are stronger because the licences

were awarded at public auctions and all the conditions now objected to in these writ petitions regarding closure of business on certain days are printed in the auction notice. With full knowledge of these restrictions, which they considered reasonable when they participated in the bids (and which we consider reasonable for reasons we have given in the Punjab cases), they took the licences. So their present challenge must meet with its Waterloo in the decision of this Court in the Punjab Cases. Without more ado, we dismiss the Writ Petitions with costs (one hearing fee).

Writ Petition Nos. 4154, 4209, etc. from Haryana

75. The State of Haryana, like the other States of India, has on its statute book a legislation for liquor regulation and fiscal levy. In fact, it is the same as the Punjab Excise Act, 1914. To bring in progressive restriction in the sale of alcohol, Rule 37 was amended in Haryana making the 1st and the 7th of every month a holiday for liquor shops. This rule and the statutory source of power to make rules, namely, Section 59(*f*)(*v*) of the Punjab Excise Act, 1914, have been challenged before us on a variety of grounds and we have heard counsel on both sides. The arguments being identical with those already considered by us in the Punjab batch of writ petitions that judgment governs these cases also and therefore we annex it to this judgment and we do not think it necessary to launch on any additional discussion.

76. A few other submissions, which hardly merit mention were made but we do not deal with them.

77. One cautionary signal we would like to sound. Haryana and Punjab are neighbouring States and unless identical days of teetotalism for the liquor shops are declared in both the States, the exercise in prohibition will prove futile, at least in the border districts. If the days are different in the two States, there will be a massive trek of the drinking population from the border districts of one State to the other, thus defeating the statutory purpose. We hope that liquor lobby notwithstanding, the State will streamline the 'dry' days in both the States.

78. For reasons given in Writ Petition Nos. 4021-4022 of 1978 etc. we dismiss the present batch of writ petitions with costs. (one hearing fee).

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Annexure D

NEW BILLS RECOMMENDED BY THE COMMISSION

LIST I: BILLS FOR NEW LEGISLATIONS

1. The Kerala Free and Compulsory Education Bill
2. The Kerala Public Canals and Backwater (Protection and Navigation) Bill
3. The Kerala Corrupt Public Servants (Forfeiture of Property) Bill
4. The Kerala Christian Marriage Bill
5. The Kerala Prohibition of Plastic Articles Bill
6. The Kerala Disposal of Confiscated and other Vehicles Bill
7. The Kerala Emergency (Control, Supply and Distribution of Essential Commodities) Bill
8. The Kerala Preservation and Protection of Mangroves Bill
9. The State—Appointment of Commissions (Regulation of Authority, Status, Powers, Functions, Accountability, Conditions of Service and Related Matters) Bill
10. The Kerala Public Grievances Redressal Tribunal Bill
11. The Kerala Vexatious Litigation (Prevention) Bill
12. The Kerala Urban Land (Ceiling and Regulation) Bill
13. The Kerala Recovery and Distribution of Government Land Bill
14. The Kerala Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Bill
15. The Kerala (Prevention of Seeking Alms and Just Rehabilitation) Bill
16. The Kerala Regulation to Control Noise Generated from Loudspeakers, Fireworks Display and other Plural Sources Bill
17. The Creative Communication (of Law Declared by Supreme Court and High Courts and Judicial Compliance) Bill

18. The Kerala Domestic Workers (Livelihood Rights, Regulation of Employment, Conditions of Work, Social Security and Welfare) Bill
19. The Kerala Unorganised Workers (Rights, Regulation of Employment, Conditions of Work, Social Security and Welfare) Bill
20. The Kerala Public Health Code
21. The Kerala Senior Citizens (Maintenance, Care, Protection, Welfare and Creative Involvement) Bill
22. The Kerala Energy Self-Sufficiency Bill
23. The Kerala Equal Opportunities Commission Bill
24. The Kerala Police Bill
25. The Kerala Clean Air Bill
26. The Kerala Disposal of Garbage and Waste Management Bill
27. The Kerala Muslim Women (Relief on Irretrievable Breakdown of Marriage and Prohibition of Talakul Bidaat) Bill
28. The Kerala Public Servant's Right to Medical Attendance and Reimbursement Bill
29. The Kerala Panchayat Courts Bill
30. The Kerala Buildings and Apartments (Lease, Fair Rent and other Facilities) Bill
31. The Kerala Children's Code Bill
32. The Kerala Environment Courts Bill
33. The Right to Justice for Victims of Criminal Injuries Bill
34. The Kerala Inland Fisheries and Aquaculture Bill
35. The Kerala Land (Fixation of Maximum Value) Bill
36. The Kerala Repealing and Saving Bill
37. The Kerala Access to Justice Bill
38. The Kerala Alternative Energy Sources Bill
39. The Kerala Public Charitable Societies Bill
40. The Kerala Prohibition Bill
41. The Population Planning for Family Well-being and Children's Development Bill
42. The Kerala Medical Practitioners Bill

43. The Kerala Electronic Waste Management Bill
44. The Kerala Right to Property (of Legal Heirs of Predeceased Child of Muslim) Bill
45. The Kerala Medical Practitioners (Protection from Frivolous and Unjust Prosecutions) Bill
46. The Kerala Rural and Town Planning Bill
47. The Kerala Widow's Right to (Shelter and Maintenance) Bill
48. Compassion for Living Creatures Bill
49. The Kerala Ad Hoc and Itinerant Courts Bill
50. The Kerala Terminally Ill Patients (Medical Treatment and Protection of Practitioners and Patients) Bill
51. An Act for Fair Negation, Salutary Regulation and Special Legitimation, in Public Interest , of Hartals and Validation of Workers Right to Strike Bill
52. The Kerala Essential Commodities and Services (Regulation) Bill
53. The Kerala Rights of Illegitimate Children Bill
54. The Kerala Preservation of Secular Ethos and Prevention of Anti-Secular Activities Bill
55. The Kerala Information Technology (Additional Provision) Bill
56. The Kerala Code for Custodial, Correctional and Habilitative Justice to Women Bill
57. The Kerala Muslim Marriage and Dissolution by Talaq and Khula (Regulation) Bill
58. The Kerala Right to a Small Farm and Shelter Bill
59. The Kerala Property Dealers (Licensing and Regulation) Bill
60. The Kerala Public Interest Litigation Procedure Code
61. The Secular Norms for Administration of Places of Public Worship Bill
62. The Kerala Christian Church Properties and Institutions Trust Bill
63. The Kerala Christian Adoption Bill
64. The Kerala Women's Code Bill
65. The Nava Kerala Agro cum Biospheric Developmental and Democratic Utilisation of Rural Phenomenal Resurrection Bill
66. 2008-ലെ ദാരിദ്ര്യരേഖയ്ക്കു താഴെയുള്ള കുടുംബങ്ങളെ നിർണ്ണയിക്കുന്നതിനുള്ള ബിൽ

LIST II: BILLS FOR AMENDING EXISTING LEGISLATIONS

1. Kerala Stamp (Amendment) Bill
2. The Code of Civil Procedure (Kerala Amendment) Bill
3. The Land Acquisition (Kerala Amendment) Bill
4. The Kerala Industrial Single Window Clearance Boards and Industrial Township Area Development (Amendment) Bill
5. The Kerala Construction Workers Welfare Fund (Amendment) Bill
6. The Kerala Court Fees and Suits Valuation (Amendment) Bill
7. The Kerala Land Reforms (Amendment) Bill
8. The Kerala Lok Ayukta (Amendment) Bill
9. The Kerala High Court (Amendment) Bill
10. The Kerala Preservation of Trees (Amendment) Bill
11. The Kerala Abkari Workers Welfare Fund (Amendment) Bill
12. The Kerala Panchayat Raj (Amendment) Bill
13. The Kerala Highway Protection (Amendment) Bill
14. The Kerala Education (Amendment) Bill
15. The Kerala Protection of River Banks and Regulation of Removal of Sand (Amendment) Bill
16. The Indian Penal Code (Kerala Amendment) Bill
17. The Criminal Procedure Code (Kerala Amendment) Bill
18. The Kerala Prohibition of Ragging (Amendment) Bill
19. The Kerala Government Land Assignment (Amendment) Bill
20. Indian Registration Act (Kerala Amendment) Bill
21. The Kerala Municipality (Amendment) Bill
22. The Kerala Land Reforms (Amendment) Bill
23. The Dowry Prohibition (Kerala Amendment) Bill
24. The Kerala Animals and Bird Sacrifices Prohibition (Amendment) Bill
25. Indian Divorce (Kerala Amendment) Bill
26. Indian Succession Act (Kerala Amendment) Bill
27. The Special Marriage Act (Kerala Amendment) Bill
28. The Kerala Abkari (Amendment) Bill
29. The Explosive Substances (Kerala Amendment) Bill

LIST III: BILLS FOR AMENDING RULES, REGULATIONS etc.

1. The Kerala Minor Mineral Concession (Amendment) Bill
2. Registration Rules (Kerala) Amendment Bill
3. The Kerala Motor Vehicle (Amendment) Bill
4. Amendment Proposed to be Effected in the Municipality Conduct of Election Rules, 1995
5. Amendment to the Special Rules for the Posts of Deputy Director of Prosecution and Senior Assistant Public Prosecutor Grade I and Assistant Public Prosecutor Grade II 1996
6. Amendment of Guidelines for Functioning of State Prison Review Committee
7. Legal Benefit Fund (Amendment) Bill
8. The Kerala Captive Elephants Management and Maintenance (Amendment) Rules
9. Amendment to Rule 184 of the Criminal Rules of Practice, 1982

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