JOURNAL SECTION

Foreign Exchange Management Act (FEMA) - Bill

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FEMA signifies a change. It is not merely a change of name. Nor is it a change in the form only. FEMA signifies a change in substance. Some changes at macro level have been referred to herein.

2. One aspect may be clarified at the outset. Coming into force of FEMA regime would not mean that everything under FERA regime would immediately abate. It may be noted in this connection that "FERA/FEMA" as a nomenclature in broad terms encompasses, besides the statutory provisions, the policy measures, administrative schemes, circulars, instructions, et al. The regime in this broader sense would not abate. As regards the legislative changes, the very substitution of an existing legislation by a new legislation requires continuity in respect of certain areas. This continuity is maintained by clause 49 of FEMA. In terms of clause 49(3)(b), notwithstanding the repeal of FERA, anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under FERA shall, insofar as it is not inconsistent with the provisions of FEMA, be deemed to have been done or taken under the corresponding provisions of FEMA. Similar position is maintained in respect of the judicial proceedings, already commenced. It is only in respect of the investigation and adjudication proceedings, a clear picture is still to emerge.

3. The most striking change is discernible in the 'form' of the new legislation. This is demonstrated by the statutory scheme of FEMA. The FERA scheme comprises the Act, Rules, Notifications, and Directions. In FEMA, besides the Act, there would be only Rules to be framed by the Central Government and Regulations to be framed by RBI. This change of 'form' also represents a change in substance. The FERA scheme is based on prohibition and regulation by grant of permission. The statutory scheme of FEMA is totally different, inasmuch there is no express provision for RBI permission. The permission regime, which is the hallmark of FERA, is totally done away with in FEMA. It is a moot point if subordinate legislation, namely, Rules or Regulations under FEMA can vest power in Reserve Bank to grant permission. More importantly, it also needs to be seen if this change would subject the forex regulations to a judicial review of a different nature than hitherto.

4. There are many other changes of substance. FEMA represents change in the very direction of the foreign exchange legislation. Preamble to FEMA itself records the change which pervades through the other provisions of this legislation. Unlike under FERA, conservation of foreign exchange is not the objective of FEMA. The objective of FEMA is to facilitate external trade and payment and to promote orderly development and maintenance of foreign exchange market in India.

5. Coming to the provisions of FEMA, a significant change may be noticed in the definition of person resident in India. This is now sought to be related to the duration of actual stay in India.

In respect of this definition, various difficulties have been pointed out, suggestions and recommendations have been made, which will come up for consideration when the Bill is taken up for passing in the Parliament.

6. Clauses 5 and 6 of the FEMA Bill mark a significant departure from the existing provisions of FERA. These provisions seek to provide for regulations with reference to the nature of the transaction. While sale or drawal of foreign exchange for current account transaction would be free in terms of clause 5, restrictions may be imposed in public interest by the Central Government in consultation with the Reserve Bank. As regards capital account transaction however, it can be undertaken when permissible as specified by the Reserve Bank in consultation with the Central Government and subject to such limits as may be specified. The Reserve Bank has been further empowered to prohibit, restrict or regulate the specific transactions mentioned in sub-clause (3) of Clause 6.

7. FERA also regulates transactions - both current and capital, though these are not expressly defined as such. FEMA clearly defines these transactions. "Current Account Transaction" is defined to mean a transaction other than a capital account transaction. It also includes trade/business payments, short-term banking and credit facilities, interest on loans, net income from investments, remittances for living expenses as also expenses in connection with foreign travel, education and medical care of specified persons. In FERA regime, these matters are covered by various general permissions granted under the Act, as also by delegation to authorised dealers.

8. Definition of 'Capital Account Transaction' has two ingredients. First, it means a transaction which alters the assets or liabilities including contingent liabilities. Second, the assets or liabilities may be outside India of residents or may be in India of non-residents. It also includes the transactions referred to in clause 6(3) of the Bill.

9. "Transaction which alters the assets or liabilities" may raise issues for examination. "Alteration" would pre-suppose existence of an asset or a liability. Whether asset or liability coming into existence for the first time would also be covered?. In this connection, reference to sub-clauses (4) and (5) of clause 6 would be useful. Those sub-clauses permit a person, to hold, own, transfer or invest in currency, security or immovable property, in or outside India, depending on his resident status, if such currency, security or property was acquired, held or owned by him as resident or non-resident, or inherited from a person who was resident, or non-resident, as the case may be. But for such permission, the transactions representing these acts, namely, acquiring, holding, owning, transfer or investment, would have been subject to the regulations to be framed for regulating capital account transactions. This would show that the transactions represented by these acts are intended to be covered by the expression 'alteration' of assets and liabilities. Had it not been so, there would have been no need to expressly permit them as provided in subclauses (4) and (5) of Clause 6 of the Bill.

10. Inclusive part of the definition of 'capital account transaction' is also significant. That part refers to transactions referred to in clause 6(3), which transactions the RBI may by regulations prohibit, restrict or regulate. These transactions are expressly covered by diverse provisions of

FERA, such as, issue or transfer of securities (Section 19 of FERA), borrowing or lending and acceptance of deposits in foreign exchange or in rupees (sections 8 and 9 of FERA), currency export/import (section 13 of FERA), transactions relating to immovable property (sections 25 and 31 of FERA), giving of guarantee etc. (section 26). Establishment in India of a branch, office or place of business referred to in clause 6(6) of the FEMA Bill corresponds with section 29(1) of FERA.

11. On a bare comparison of these provisions, one may find several similarities. In fact, considering the extensive liberalisation already achieved under the flexible mechanism of FERA, one may be justified in saying that FEMA environment has already been built up by using FERA framework. If that is so, the similarities may suggest that FERA regime may continue under the FEMA framework. However, as stated above, despite these similarities, FEMA actually represents a change of substance, as enshrined in the preamble of the FEMA Bill.

12. Another change is regarding the nature of contravention. The contravention under FEMA would not be treated as an offence punishable as such. It has been equated with a civil wrong and as such made liable to a penalty. It is only when there is a failure to make full payment of the penalty imposed on the contravener, that the liability for civil imprisonment can arise.

13. The further major change is with reference to enforcement provisions. Under FEMA, the adjudication and investigation functions have been bifurcated and vested in two different authorities. Under clause 16, adjudicating authority may be appointed by the Central Government for holding an enquiry in the manner prescribed after giving the accused person a reasonable opportunity of being heard for the purpose of imposing a penalty. The Officers of enforcement would be concerned with only investigation of the contravention.

14. For the purpose of investigation, the Officers of enforcement have been enabled to exercise the like powers which are conferred under chapter XIII of the Income-tax Act, 1961, which powers are to be exercised subject to such limitations as laid down under that Act. Chapter XIII of the Income-tax Act confers very wide powers on Income-tax authorities in the matter of discovery and production of books of account, (Section 132A), calling information (Section 133), survey (Section 133A), inspection of registers of companies (Section 134). Principles for exercise of powers by Income-tax Authorities have been laid down in several Court judgements, which principles will have to be taken note of while exercising similar powers for the purposes of FEMA. More importantly, while the more-dreaded powers of arrest and custodial interrogation would not be available to ED, it remains to be seen if conferral of investigation powers available under the Income-tax Act, really widens the extent and contents of ED's powers presently available under FERA.

If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.

- Cardozo, Banjamin N. Wendt v. Fischer, 243 N.Y. 439, 443 (1926)

A conspiracy is a partnership in criminal purpose - Holmes, Oliver Wendell in United States v.

Kissel, 218 U.S. 601, 608 (1910)

The constitution does not make conspiracy a civil right - Jackson, Robert H. in Dennis v. United States 341 U.S. 494, 572 (1951)

Who is Guilty?

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CRIMES BY COMPANIES

The question of holding companies guilty of criminal offences poses some peculiar problems related with its juristic personality. A blameworthy state of mind namely *mens rea*, intention or knowledge or otherwise is a necessary ingredient of many crimes. It contemplates a human being committing the crime with a guilty mind. It is obvious that a company, which is a juristic person, cannot have a mind, much less, a guilty mind.

2. Various crimes such as, murder, theft etc. requiring *mens rea* as an ingredient, cannot be committed by companies. The rule of *ultra vires* does not bind a company to any act which it is not permitted to do under the objects clause of its Memorandum of Association. As committing any crime cannot be one of the objects for which a company can be incorporated, commission of any crime is *ultra vires* its objects clause.

3. PUNISHING COMPANIES

Punishing a company for offences poses another difficulty as the punishment for many crimes includes imprisonment. Again, even if the commission of the crime is proved against a company, the punishment of imprisonment would be futile.

4. There are however, various statutory crimes in which *mens rea* is not an ingredient. Irrespective of whether there is a guilty mind or not the violation of the statute is made punishable under some statutes. When the punishment for such offences is only fine, the company can be held guilty of the offence and the fine, imposed.

5. One of the main purposes of making violation of statutory provisions, a criminal offence is to achieve a deterrent effect. The deterrent effect is in the form of a social stigma attached to criminal prosecution and the punishment of imprisonment. As such, if a company is held guilty of a criminal offence and it is punished by imposition of a fine, the deterrent effect of the criminal prosecution and the punishment of imprisonment cannot be achieved. For ensuring compulsory compliance with the requirements of a statute, the punishment of fine therefore is not effective.

6. PUNISHING THE GUILTY OFFICIALS

Affluent companies may violate the statutory provisions with near impunity by paying fine. In

order to avoid such a situation, statutes normally provide for the punishment of imprisonment also. This necessarily follows that when a company violates the statutory provisions, the persons responsible for such violation will be liable to be punished with imprisonment.

7. The general rule is that the juristic personality of a company is different from that of the human beings who form it, such as the shareholders or the persons who manage it. To overcome the said fiction of law which protects such persons against the liabilities of a company, the statutes have provided different methods for bringing to book, the persons who are guilty.

8. One method is to require the officials themselves to comply with the statutory requirements and stipulating punishment to them in case of violation or default. Such a scheme is found in Companies Act 1956. In respect of many violations, the Act provides for punishing the officer who is in default. Another method is to require the company to comply with the provisions and proceeding both against the company and its officials, in case of violation or default. Such a scheme is provided for in many statutes including RBI Act. This paper compares the merits and demerits of these provisions from the point of view of ensuring compliance with statutory requirements.

9. OFFICER WHO IS IN DEFAULT

Section 5 of the Companies Act 1956 deals with the meaning of the expression "officer who is in default". Prior to the amendment of that section by the Companies (Amendment) Act 1988with effect from 15/7/1988, that section read asunder.

> S.5. Meaning of "officer who is in default"- For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment of penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means any officer of the company who is knowingly guilty of the default, non- compliance, failure, refusal or contravention mentioned in that provision, or who knowingly and wilfully authorises or permits such default, non-compliance, failure, refusal or contravention.

10. By the 1988 Amendment, the above section has been substituted by the following:

> S.5 Meaning of "officer who is in default":- For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely:-
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> (a) the Managing Director or Managing Directors;
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> (b) the whole-time Director or whole-time Directors;
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> (c) the Manager;

(d) the Secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision:

Provided that the person so charged has given his consent in this behalf to the Board:

(g) where any company does not have any of the officers specified in clauses(a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under clause(f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.

11. PROOF OF KNOWLEDGE OR WILFUL CONDUCT

Under Sec.5 as it stood before the 1988Amendment, in order to hold an officer guilty, it was necessary to establish that he was knowingly guilty of the default etc., or knowingly and wilfully authorised or permitted such default. The mental element of knowledge on the part of any particular officer is very difficult to prove. As such, to proceed against an officer for violating any of the provisions of the Companies Act, the difficult task of identifying the officer who has knowingly committed the default or wilfully authorised it was necessary. The serious difficulty faced in identifying such person could make the statutory provisions futile in their practical implementation.

12. MANAGING DIRECTORS, WHOLE-TIMEDIRECTORS ETC.

The amended section 5 does not require such a knowledge to be established in respect of officers namely, Managing Directors, Whole-time Directors, Managers and Secretaries. Under clause (a) to(d) of Sec.5, they are included in the definition of the expression 'officer who is in default' irrespective of whether they have any knowledge of the violation or whether they have wilfully authorised the violations or not.

13. PERSONS IN CONTROL

In addition to the above officials, in terms of clause (e) of Sec.5, any other person in accordance with whose directions or instructions the Board of Directors of a company is accustomed to act, is also included. This covers the persons who do not hold any of the above posts but dictate to the Board of Directors. If it is proved that a person, though not a Managing Director or a whole time Director or a Manager or a Secretary, is a person in accordance with whose directions and instructions the Board of Directors is accustomed to act, it would not be necessary to establish

that such person had the knowledge of the violation in question. It is again quite a difficult task to establish that the person in question is the one in accordance with whose directions or instructions the Board of Directors of a company is accustomed to act.

14. PERSONS ENTRUSTED WITH DUTY

A person who has been charged by the Board of Directors with the responsibility of complying with any provision is included in clause (f) of Sec.5, if he has given his consent in this behalf to the Board. If there is a Board Resolution and the consent of the person concerned, without proving any knowledge of wilful conduct, it is possible to book such person as an officer who is in default.

15. WHEN THERE IS NOBODY, EVERYBODY

Clause (g) of Sec.5 takes care of a situation where a company may not designate any officer as Managing Director, or a whole time Director or a Manager, and may not charge any particular individual with the responsibility of complying with any provision. In such a situation, the expression officer who is in default would cover every Director.

16. MERITS AND DEMERITS

The provisions of the amended Sec.5 of the Companies Act may be regarded as effective, from the point of view of enforcing strict compliance, under the pain of imprisonment for violations. The major advantage in this provision is that the mental element, which is very difficulty to establish, need not be proved, to establish that he is an officer who is in default. From the point of view of the Directors and the officials listed in Sec.5, it may be regarded as very harsh in so far as they could be exposed to criminal liability involving the punishment of imprisonment for certain violations neither intended by them nor known to them.

17. IN CHARGE OF AND RESPONSIBLE……

Some statutes including RBI Act, have provided a different method for proceeding against individuals for the violations committed by companies. Sub- secs. (1) and (2) of Sec.58 C of the Reserve Bank of India Act 1934 which are relevant, read as under.

> 58C. (1) Where a person committing a contravention or default referred to in section 58B is a company, every person who, at the time the contravention or default was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention or default and shall be liable to be proceeded against and punished accordingly:
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> Provided that nothing contained in this sub- section shall render any such person liable to punishment if he proves that the contravention or default was committed without his knowledge or that he had exercised all due diligence to prevent the contravention or default.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the same was committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary, or other officer or employee of the company, such director, manager, secretary, other officer or employee shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

18. Same provisions are there in Sec.141 of the Negotiable Instruments Act 1881 and other Acts also. The Supreme Court has interpreted these provisions contained in other statutes.

19. CASE LAW

The Supreme Court has examined such provisions of Prevention of Food Adulteration Act, 1954, in Municipal Corporation of Delhi V/s P.D. Jhunjunwala, reported in AIR 1983 SC 158. In that case, the Court was examining whether at the stage of issuing summons, an allegation in the complaint that respondents no. 7 to 11 were the Directors of the mill and were in charge of and responsible for the conduct of its business at the time of the commission of the offence was sufficient. The Court held that as to what would be the evidence against the respondents is not a matter to be considered at the stage of issue of summons but would have to be proved at the time of trial. It is thus clear that in order to hold a Director liable under such provisions, it is necessary to establish that the Director was in charge of and was responsible to the company for the conduct of its business.

20. In Municipal Corporation of Delhi V/s R.K. Rohtagi reported in AIR 1983 SC 67, the Supreme Court has examined such provisions of the Prevention of Food Adulteration Act, 1954. The following observations made in paragraph 15 are relevant in this context.

"15. So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any Act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable".

In order to hold a Director liable, it is clear that it is not sufficient to merely establish that he was a Director of the company, but it is further necessary to prove that he was in charge of and responsible to the company for the conduct of its business, with reference to the nature of his duties. It cannot be presumed that by virtue of his position as a Director in a company, he is automatically in charge of and responsible to the company for the conduct of its business.

21. The Supreme Court has recently considered such provisions of Drugs and Cosmetics Act, 1940 in State of Haryana V/s Brij Lal Mittal and others, reported in (1998) 93 company cases 329. The Supreme court has observed as under;

" Simply because a person is a Director of the company it does not necessarily mean that

he fulfils both the above requirements so as to make him liable. Conversely, without being a Director a person can be in charge of and responsible to the company for the conduct of its business".

22. EVIDENCE REQUIRED

Whenever it is provided in the law that a person who is in charge of and responsible to the company for the conduct of its business is liable to be punished for the offences committed by the company, it is clear from the above decisions of the Supreme Court that there should be evidence to establish from the nature of duties performed by that person, that he was in charge of and responsible to the company for the conduct of its business. Unless there is such a proof, it is not possible to hold even the Managing Director or a whole time Director liable under such provisions.

23. To prove that such a person is in charge of and responsible to the company for the conduct of its business, the nature of duties performed by him will have to be established. Though it is not necessary to prove the state of mind such as knowledge or wilful Act or omission, it is not a simple task for an outsider to prove the nature of his duties and that he was in charge of and responsible to the company for the conduct of its business.

24. CONSENT, CONNIVANCE & NEGLIGENCE

To bring a person within the scope of Sub Section (2) of Sec.58C, it is necessary to prove his consent, connivance or negligence in respect of the violations or default. This requires the proof of the state of mind of the person concerned. As such, it is quite difficult to press this subsection into service in practical terms.

25. CONCLUSION

From the point of view of building pressure on specific officials to comply with the requirements of statutes, the provisions similar to Sec.5 of the Companies Act may be quite effective. For covering any official who is not necessarily a Director, Manager or a Secretary, the provisions of Sec.58C of RBI Act appear to be more effective, if it is possible to establish from the nature of the duties performed by the official concerned that he was in charge of and responsible to the company for the conduct of its business. Given the kind of evidence required in Criminal Courts for holding a person guilty of any offence, the onus of proving that a person is in charge of and responsible to the company for the conduct of its business is not an easy task, if contested. However, it should not be difficult for the regulatory bodies regulating the activities of the companies concerned, to prove it.

26. Too many escape routes in criminal courts particularly through the loopholes in the evidence may end up with nobody being held guilty. The proof of the pudding is in the eating. The efficacy of these two sets of provisions should be evaluated in the light of the extent to which they have been successful in ensuring compliance with the statutory provisions.

history and reason, between past reason and present needs.

- FRANKFURTER, Felin, Mr. Justice Holmes and the constitution.

Chanve just for the sake of change is not necessarily good. But, change to adapt to the situation is survival.

- Public Relations Corner, "Adapt or Lose!" Ohio State Bar Association Report Vol. XL.

To take an interest in public affairs, and to further and promote those principles which are believed to be vital or compontant to the general welfare, if every citizen's duty. It is a just complaint that so many good men abstain from taking such an interest.

- BRADLEY, Joseph P., En Parte Curtis 106 U.S. 371, 371 (1882).

Law Relating to Account Payee Cheques-Need for Amendment

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The age - old practice of crossing a cheque with the legend "Account payee" has become an integral and indispensable part of banking transactions. Payment by crossed cheque with the addition of the words "Account payee" is widely recognised as a safe and convenient means of transferring funds from one source to another. However, the matter is not as simple as it may seem at first blush. The foregoing analysis would reveal the ticklish issues in the gamut of account payee cheques and that the prevailing law needs a review and overhaul.

1. Purpose and effect of "Account payee" crossing

In terms of Section 123 of the Negotiable Instruments Act, a cheque is crossed generally when across its face the words "and company" or any abbreviation thereof between two parallel transverse lines is added. The addition of the words "Account payee" to a crossing, general or special is made with the purpose of eliminating or minimising the chances of fraud or deceit in the payment of the cheque. The object of the said addition is to ensure that the cheque is not paid across the counter but is paid only to a banker who may be either the drawee banker or a different banker.

The "Account payee" addition is not prohibited by Section 78 of the Negotiable Instruments Act which stipulates as to whom payment should be made since it is only a direction to the receiving banker. The words "Account payee" operate as a caution to the collecting banker that the proceeds of the cheque should be credited only to the account of the payee named in the cheque and to no one else. If, due to disregard of this mandate loss is caused to the drawer of cheque, the collecting banker may be held liable for conversion or required to pay compensation for negligence. The complete effect of the words "Account payee" added to the crossing is in the three following directions:-

(i) They do not place any restriction on the negotiability of the instrument.

(ii) The collecting banker would be deprived of the statutory protection under Section 131 of the Negotiable Instruments Act unless he is able to show that in collecting the proceeds of the cheque he acted in good faith and without negligence.

(iii) The paying banker is entitled to disregard the words "Account payee". No additional obligation is imposed upon the paying banker to secure the compliance of drawer's mandate.

As a matter of banking practice, on receipt of an account payee crossed cheque the collecting bank issues a certificate or endorsement reading that the payee's account has been credited or will be credited. Further, if the account payee crossed order cheque has more than one indorsement including that of the payee with or without a certificate from the collecting banker confirming the indorsement, it is not generally paid by the bank and the instrument is returned with a remark, "cheque crossed account payee only".

2. Paying and collecting banker

It is imperative on the part of the collecting bank to take utmost care to inquire into the title of the customer and satisfy itself that there is no defect in the title of the customer presenting such cheque for collection. If the title of its customer to the cheque in question turns out to be defective the bank could be liable to the true owner of the cheque and protection under Section 131 of the Negotiable Instruments Act may not be available to the collecting banker.

In case of payment to a wrong person the true owner of the cheque is entitled to recover the amount of the cheque from the person who received the said payment as he had no title to the cheque. If the cheque was payable to order and the indorsement of the payee is forged, the drawer or the payee, as the case may be can recover the amount of the cheque from the person who received payment thereof if he can be found. In the case Importers Co. Ltd. V/s. Westminster Bank Ltd. (1927. 2KB. 297) the Court had to consider whether the word "only" in "Account payee only" has any further significance. The Court appeared to be of the view that it did not, because probably the intention of the drawer is to restrict transfer of the instrument. The marking "Account payee" is addressed to and binds a collecting banker and there appears to be no good reason why the addition of "only" should place any greater obligation on the collecting banker or raise one on the paying banker which he would not otherwise suffer.

The scope and effect of the account payee crossing has been considered in the case Anupama Stationery Suppliers V/s. Vishnuvardhana Enterprise and Others (1987. 62. Company Cases, p. 271) by the High Court of Karnataka. In this case the cheque was drawn by the plaintiff in favour of the first defendant and the same was crossed with the addition "Account payee only". The second defendant Karnataka Bank was plaintiff's banker. The said cheque, on enquiry it was learnt, had gone into the hands of third defendant Vysya Co-operative Bank who had endorsed it to the plaintiff's banker for collection. Due to the endorsement made by third defendant on collection the Karnataka Bank sent the proceeds to third defendant and debited that amount to the account of the plaintiff. Thus the plaintiff had been put to loss. The Court held in this case that the third defendant was extremely negligent in making the endorsement reading as "payee's account credited" and is alone guilty of negligence and it is liable to pay damages to the plaintiff. It was further held that the Karnataka Bank cannot be held responsible.In Union Bank of India, Madras V/s. Salem Central Co-operative Bank Ltd. before the High Court of Madras (Bankers Journal 1994, Vol. 10) the case was as follows. An account payee cheque was intercepted while in transit by 'x' who altered the name of payee by putting his own name. 'x' presented the said cheque for collection and for crediting in his account. The amount was credited and 'x' withdrew the cash from his account. The Court held that the cheque was apparently altered which could have been easily detected had the bank been diligent. Protection under Section 131 of the Negotiable Instruments Act would not be available and it was held that the bank was negligent in receiving the cheque and sending it for encashment.

Practical difficulties may arise if the payee has no bank account of his own and does not propose to have a new account opened for the purpose of getting the cheque collected. In that event the payee may have to transfer it to another person having a bank account. As a matter of course a banker would hesitate to collect such a cheque since he may then run the risk of losing the protection under Section 131 of the Negotiable Instruments Act. In exceptional circumstances a banker may agree to collect a cheque of this type for a customer of good standing after getting a satisfactory explanation as to why the cheque was transferred by the payee to the customer. This is so because if the banker were later held negligent he may be able to get the resulting loss, if any, indemnified by the customer.

In P.B. Lonarkar vs. The State of Maharashtra (1991, Bankers Journal, 273, Bombay) a co-operative society issued cheques in favour of the petitioners who were cultivators and its members towards the price of cotton supplied by them to society under monopoly scheme. The cheques were marked "Account Payee with District Central Co-operative Bank only". The Court observed that the cultivators are entitled to deposit their money in any bank and are at liberty to utilise the money as per their choice. Hence, the Court held that the crossing of cheques "Account payee" making it payable only at a particular bank as a condition is wholly illegal and making special endorsement is without authority of law.

3. Negotiability of cheque

By adding the words "not negotiable" to a crossing a cheque is taken out of the category of negotiable instrument. This is so because it no longer has the most important characteristic of negotiability, namely, the acquirement by an honest transferee for value of an absolute title to the instrument regardless of prior defects of title of which he had no notice. To give an example if 'x' steals a cheque crossed "not negotiable" and transfers it to "B", then 'B' will be liable to the true owner of the cheque although he might have taken it for value and without notice of 'x"s defective title. Any person who takes a cheque marked "not negotiable" takes it at his own risk and his title to the money got by its means is as defective as his title to the cheque itself.

The object of "not negotiable" crossing is to afford to the drawer of a cheque who is desirous of transmitting it to another person, as much protection as can reasonably be afforded to him against an act of dishonesty or actual miscarriage in the course of transit of the cheque. The words "not negotiable" makes it difficult to get the cheque cashed until it reaches its destination.

A cheque payable to bearer is negotiable by mere delivery thereof and indorsement is not necessary. Banks can collect crossed bearer cheques to the accounts of their customers even though the customer is not the payee named in the cheque. The combination of "not negotiable" and "account payee" crossing is stated to have two-fold advantage. Firstly, the cheque becomes non- negotiable and cannot be negotiated. Secondly, the account payee crossing is a direction to the collecting banker to collect it for the payee only and a warning that if he collects it for somebody else, he may be liable for damages.

To illustrate, a cheque payable to bearer is crossed generally and is marked "not negotiable". The cheque is lost or stolen and comes into the possession of 'B' who takes it in good faith and gives value for it. 'B' delivers the cheque into his own bank and his banker presents it and obtains payment for his customer from the banker upon which the cheque is drawn. The banker paying the cheque and banker collecting the cheque may both be exonerated from liability under Section 131 of the Negotiable Instruments Act. But 'B' is liable to refund the money to the true owner for the cheque is not a negotiable instrument. 'B' does not obtain any better title than his immediate transferor who had either stolen or found the cheque and is not the true owner of it. As regards the true owner, 'B' is in no better position than his transferor.

A crossed cheque or an account payee cheque is a negotiable instrument under Section 131 of the Negotiable Instruments Act and as such can be negotiated by indorsement. A crossed bearer cheque may pass from hand to hand without any indorsement while a crossed cheque payable to order may be negotiated by indorsement as in the case of cheques uncrossed. The crossing with the words "and company" does not alter the above position as the cheque continues to be crossed generally.

If a cheque marked 'Account payee' bears indorsement other than that of the payee named therein, the cheque can be returned by the paying banker with the remark marked "Account payee only". The negotiability of a crossed account payee cheque is not affected and therefore a bank collecting such a cheque to the account of its customer who is not the payee named on the face of the cheque should inquire into the title of its customer and satisfy itself that there is no defect in the title of its customer presenting such a cheque for collection. If the title of its customer to the cheque in question turns out to be defective the bank could be liable to the true owner of the cheque as protection under Section 131 of the Negotiable Instruments Act will not be available tothe bank collecting such cheques.

In Vysya Bank Ltd. vs. Indian Bank, Madras (AIR 1988, Madras 256) the Court laid down the following four principles which should guide the Court in deciding the question of banker's negligence:-

(i) The standard of care required of bankers is that to be derived from the ordinary practice of bankers. (ii) The standard of care required of bankers does not include the duty to subject an account to microscopic examination. (iii) In considering whether a bank has been negligent in receiving a cheque and collecting the money for it, it has presumably to scrutinise the circumstances in which a bank accepts a new customer and opens a new account and (iv) The onus is upon the bank to show that it acted without negligence.

4. Transferability of cheque

A cheque with "not negotiable" crossing can be transferred from person to person and so long as there is no defect in title or absence or failure of consideration each successive holder will have full right and title. But a cheque marked with the words "not transferable" can be paid to the payee only and to no one else. No indorsement or transfer on such cheques is legally recognizable.

At present the Explanation to Section 13 of the Negotiable Instruments Act corresponding to Section 8 (1) of the Bills of Exchange Act neither specifically declares the effect of words prohibiting transfer, as rendering the instrument not negotiable nor it says that they shall be "valid only between the parties thereto", i.e., "non transferable" as the English Act does.

When the provisions of Section 78 of the Negotiable Instruments Act is read with Section 8 of that Act it would appear that the drawer of a "not transferable" cheque would be discharged only when the payment is made to the payee named in the cheque, for only the payee named in the cheque can be a "holder" of such cheque. The English Act draws a more discernible line of distinction between the two by making a specific treatment of "not transferable" bills/cheques and declaring them as "valid only between the parties thereto".

In a South African case, Dungarin Trust Ltd. vs. Import Refrigeration Co. Ltd., (1971. 4. SALR.300) the Court observed that although the words "Account payee only" are not an express prohibition on the transfer of the cheque, they preclude it by implication as they indicate that the instrument should be paid only to the acount of the ostensible payee.

Although the "Account Payee" crossing does not restrict the negotiability or transferability it would be difficult in practice to transfer or negotiate such a cheque effectively. Both Indian and English statutes make a distinction between "transferability" and "negotiability" so that a cheque may not be negotiable and yet transferable. A cheque crossed generally or specially bearing in either case the words "not negotiable" is still transferable. The "not negotiable" crossing only subjects it to the consequences or restrictions mentioned in Section 130 of the Negotiable Instruments Act. It does not, however, cease to be transferable. Negotiability involves two elements namely, transferability free from equities and transferability by delivery or indorsement and while the first has been lost by reason of the crossing in question the second is retained.

5. Law in United Kingdom

In the United Kingdom, the Bills of Exchange Act, 1882 read with the Cheques Act, 1957 and the Cheques Act, 1992 constitute the basic statutory framework for the law relating to negotiable instruments. In the United States of America, the uniform commercial Code Title Article 3 govern the law on the subject. As regards the United Nations, the general Assembly adopted the U.N. convention on International Bills of Exchange in the 76th Plenary meeting on 9th December 1988. In the year 1992, the Government of Britain amended the Bills of Exchange Act 1882 and the Cheques Act 1957 to recognise the practice of account payee crossing. The amendments constitute the Cheques Act, 1992. It is to the effect that where a cheque is crossed and bears across its face "Account payee" the cheque shall not be transferable but shall only be valid as between the parties thereto and a banker is not to be treated as having been negligent by reason only of his failure to concern himself with any purported indorsement of a cheque which is not transferable. As a consequence, if a collecting bank credited the proceeds of a non-transferable cheque to the wrong account it would be unambiguously liable to the payee named on the cheque, the paying bank would not be liable. In his book "Bills of Exchange and Bankers' Documentary Credit", Hedley gives the following practical results of the new legislation -

(a) The drawer of a cheque marked "Account payee" and crossed will intend the named payee to receive the money, with no possibility of the cheque being passed to anyone else.

(b) The payee named in the cheque will pay it directly into his bank account and not try to negotiate it.

(c) If the payee does try to negotiate it and the indorsee pays it into his bank, the bank should refuse to accept it. The cheque and the funds the cheque represents are "not transferable".

(d) It follows, a prospective indorsee should not accept a cheque marked in this way.

(e) Presumably under the general law, a drawer of a cheque can always delete the marking and initial it to cancel the effect of the new Act. Since the new Act does not imply the words "Account payee" they must be expressly written or printed on the cheque for the new provisions to apply.

(f) One of the probably unintended results of the new Act is that cheques crossed and marked "Account payee" will no longer be capable of passing into the hands of a bank as holders in

their own right. So that, if a bank allows its customer to overdraw against uncleared effects and the cheque which comprise those "uncleared effects" is dishonoured, the bank will have no right to pursue the drawer of the cheque in its own right, since the cheque is, in the terms of the Act, "not transferable".

6. Statutory recognition

The Law Commission of India had carried out a scientific study of the old statute, i.e., Negotiable Instruments Act, 1881 in the modern context. The result was the preparation of the 11th Law Commission report which was submitted to the Central Government in the year 1958. The crossing of cheques with the words "Account payee" formed part of this study. The Law Commission found that the existing law relating to such crossing of cheques was uncertain and the mercantile practice in this regard as unstable. Therefore, the Law Commission had recommended for statutory recognition of the "Account payee" crossing.

In the year 1972, the Government of India had constituted the Banking Laws Committee under the chairmanship of Dr. P.V. Rajamannar, Retd. Chief Justice of Madras High Court. The Banking Laws Committee submitted its report in 1975 and made several recommendations for changes in the law relating to negotiable instruments. The Banking Laws Committee following suit and like the Law Commission, it too recommended for statutory recognition of the "Account payee" crossing and corresponding protection to the bankers.

7. Need for amendment

The provisions of law relating to account payee cheques including the payment and collection thereof prevailing in India at present are found to be inadequate. This is reflected in the magnitude of incidents of theft of cheques in course of transit in mail and subsequent fraudulent encashment by way of third party collections which has assumed alarming proportions. A glaring example is the cheques scam which took place in Mumbai a few years back involving the fraudulent encashment by third parties of account payee cheques amounting to crores of rupees mainly pertaining to dividend/interest warrants and refund orders.

Incidentally, there does not seem to be any doubt regarding the character of dividend/interest warrants being cheques since they fulfill the requirements of a cheque within the definition of Section 6 of the Negotiable Instruments Act.

There is a pressing need for introducing similar reforms as done in Britain by carrying out amendments to relevant provisions of the Negotiable Instruments Act. It is suggested that if a cheque is marked as 'not negotiable' it would be better if apart from stating its effect in a circumlocutary manner as has been done in Section 130 of Negotiable Instruments Act it would also be specifically stated in the legislative provisions themselves, that it becomes non-negotiable. An ancilliary provision can be introduced stating that a cheque marked as "Account payee" shall have the same effect as a cheque marked as "not negotiable".

As early as in the year 1963, in the case of Tailors Priya V/s. Gulabchand Danraj (AIR 1963, Calcutta) a Judge of the High Court of Calcutta had observed that if the crossing "not negotiable" can make a cheque a non-negotiable instrument, I do not find any sufficient reason why crossing "Account payee" would not have that effect. The Negotiable Instruments Act has to be amended to give statutory recognition to the "Account payee" crossing of the cheques and to the effect that a crossed cheque bearing the words "Account payee" shall not be transferable. The following practical results will follow as and when Negotiable Instruments Act is amended.

(i) The Negotiable Instruments Act would accord specific recognition to "Account payee" crossing. Such a cheque would neither be negotiable for transferable.

(ii) A cheque crossed "Account payee" will cease to be a negotiable instrument. Accordingly, none of the general presumptions applicable to negotiable instruments under Section 118 of the NI Act would be applicable to an "Account payee" cheque.

(iii) None of the provisions of the Negotiable Instruments Act regarding indorsement and transfer would apply to an "Account payee" cheque.

(iv) The paying banker cannot pay a cheque crossed "Account payee" otherwise than to a banker who certifies that the proceeds will be credited to the account of the payee.

(v) A collecting bank would not get any statutory protection if it collects the proceeds for the account of a customer who is not the payee.

8. Proposed amendment

(1) Insertion of new section 124A

"Cheque crossed Account payee" - where a cheque bears across its face an addition of the words "A/c. Payee", "account payee" or "Payee's Account" or "Payee's A/c." either with or without the words "only" between two parallel transverse lines constituting the general crossing, the cheque besides being crossed generally is said to be crossed account payee and such a cheque shall not be transferable whether or not it also bears the words "order or bearer".

(2) Amendment of Section 126

In Section 126 of the Principal Act, after the second paragraph, the following shall be inserted, namely:-

"Payment of cheque crossed account payee" - where a cheque is crossed account payee the banker on whom it is drawn shall not pay it otherwise than to the banker who certifies that the proceeds have been or will be credited to the payee's account."

9. Conclusion

As and when the amendments on the proposed lines are introduced, the new law would be instrumental in minimising the perpetration of fraud relating to the encashment of account payee cheques. This in turn would immensely benefit the public at large by preventing loss and enhance their faith in the banking system.

Human Rights Protection Movement

- A LEGAL PERSPECTIVE

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In this sub-continent, the idea of Human Rights protection is well recognised. On 8th January, 1994 THE PROTECTION OF HUMAN RIGHTS ACT, 1993 (ACT No. 10 OF 1994) was enacted to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights. "Human Rights" as defined in the Act means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India (Section 2 (1)(d) of the Act). "Today, Human Rights jurisprudence in India has Constitutional Status", says Krishna Iyer .. J .. in **SUNIL BATRA (No. 2) Vs Delhi ADMINISTRATION (AIR 1980 SC 1579).**

The idea of Human Rights is the reassertion of the greatest single idea offered by humans to humanity. The theo-edifice of Human Rights protection makes us understand that "life and liberty" is a manifestation of God and rightfully commands our reverence. "Thou shall not kill" was intended mainly as a commandment against killings of one's own kind, i.e. human kind. It is wrong to take away the life and liberty of another Human being, because you have no right to deprive someone else, of the same privilege or freedom and liberty and the existence that you enjoy. You have no right to take from anyone else something you, yourself don't want to part with. The greatest love man has is for himself and for his liberty; hence depriving of life and liberty is wrong, because you wrest from another the very thing you love most. Another justification is that every individual is created by God in his form. Since you are not the maker of life or liberty, since you cannot create or confer life and liberty, it is not your prerogative to destroy it. Finally to say that God has built on this universe a school of human life where souls come and learn: you do wrong if you deprive a soul of his chance of learning/schooling here. "When you deprive liberty or kill life you transgress the laws of the society and laws of the God".

The real concept of "Ahimsa" involves the core concept of protection, preservation and propagation of Human values, now Westernised in the name of Human Rights and the ancient and present Hindu way of life has its emphasis on upholding Human dignity in all spheres of life.

I. SIGNIFICANCE AND NEW HORIZONS

The primary idea of human rights involves rights against the Government. The present day concept/idea includes the rights to be satisfied by the Government. To understand this ideology of "Human needs/wants", real clarity of thought is needed and a true sense of priorities would

suggest that the essence of liberty which comprises rights against the State should not be confused with claims or entitlements which need to be satisfied by State.

In fact, to attempt to define human rights would be merely to illustrate how the Human mind tries, and tries in vain, to give a more precise definition than the subject matter warrants. The natural rights of a man which had their origin from the respect for human personality, due reverence for human consciousness, protection and preservation of Human dignity and a totality of approach to ensure smooth play of cozy life and liberty can be considered as core concept. In one word that can be called LIBERTY. But, Isaiah Berlin has noted that there are more than 200 definitions of liberty, and Abraham Lincoln observed, that the world has never had a good definition of the word "liberty". Therefore, human rights briefly represent a vital expression of human values in civilised society.

The observations of a legal theorist Clarence Dias, an Indian lawyer in United States, are worth noting. He said "Human Rights" can play a significant role in the empowerment of the impoverished. The oppressed can become more self-reliant through an understanding of their rights. Indeed the rights to organise and rights of association are vital for the poverished groups seeking to mobilise and organise themselves and thus develop countervailing power. Moreover, such impoverished groups become more empowered as they develop their capacities to assert rights through collective action. An awareness of rights not only helps but at the same time diminishes dependency and builds up confident self-reliance when "have nots" appreciate that they are entitled to resources as a matter of entitlement and not just benign charity. Moreover, rights safe guarding the dignity of the human being are of considerable psychological importance in the struggle to come out of the culture of dependency and to establish self-esteem and a sense of self-worth.

Human rights can play a significant role in securing the accountability of those who wield power and control of resources essential to the satisfaction of basic human needs. Rights to secure mandamus and prohibition are important checks on abuse of power, right of access to information, right to public hearing and freedom of speech and of the press are crucial in checking the governmental lawlessness and abuse of discretion or powers by bureaucratic and Government officials.

Human Rights are important as a means for securing participation. Perhaps, more importantly human rights represent a vital expression of human values" (International Workshop on Human Rights - Key Note Address - by Subhash C. Pratap, CJ of AP at Bhagwatipuram, Hyd, D/-11.8.1991, AIR 1992 Journal Section, PP. 113 to 115). Jurists and lawmen have categorically stated that Human Rights are never closed and they are ever expanding in their nature. This century has witnessed the emergence of new rights, i.e.

(a) Right to Development

(b) Right to Global Human Security

In developing countries there is now greater emphasis on realisation of social, economic and cultural rights for the vital masses of people who are living in want and destitution. The focus of

Human rights in these countries is shifting from civil and political rights to social, economic and cultural rights and this is assisted by two recent developments. One is the decision of Human Rights Commission that it will examine violations of social, economic and cultural rights (see Bulletin of Human rights, Volume 19) and the other is increasing recognition which has now been given to the "Right to Development" as a human right.

It is now realised that Right to Development is a basic human right without the realisation of which it is not possible to enjoy any other human rights. It is not only social, economic and cultural rights which are geared to the level of economic development prevailing in a country but even the protection of civil and political rights is, to some extent, linked with the stage of development in the country. There can be no meaningful exercise of many human rights in a country where economic resources are scarce and bulk of the society/ population lives below the poverty line or at best at the marginal level of subsistence. The Right to Development is, therefore, one of the most important basic human rights and constitutes the culminating point of human rights movement. The right to human development is now well recognised and received both as individual and a collective right and infact several international bodies such as International Commission of jurists have started concentrating their efforts on developing and elaborating the various constituent elements of this right. If, large masses of people who inhabit the developing countries of Third World have to achieve full and equal realisation of the right to development, it is necessary that they should have effective access to :

(a) tangible resources to achieve their basic needs of productive and equitably paid, work, sufficient nutrition, health care and hygiene, shelter, energy resources, and clean water and air.

(b) the necessary intangible resources, especially education and information, to enable them to utilise resources and to participate freely in the process of development.

- The Government need to assure fair and equitable allocation of the above resources. There should be facilities and services to organise public participation to monitor, evaluate and review development programmes and to hold them accountable responsible for implementation.

These are the necessary conditions which must be fulfilled if the under-privileged segments of the society are to be ensured a life of basic human dignity on the basis of full participation in the process of development and a fair share in the fruits and benefit of development.

The right to Global Human Security which is in its true nature a different kind of manifestation of right to protect the integrity of human beings, is an outcome of inner voice of the life. The possible forms of threats to this right are listed below :

- Disparities in Economic opportunities
- Unchecked population growth
- Excessive international migration
- Drug production and trafficking
- Environmental degradation and ecological imbalance

- International Terrorism

"Right to Global Human Security" is just a thought among jurists and lawmen. In the years to come it will have its full recognition in international forums and help the Human Rights movement to focus its torch on meaning of Human existence.

The Human Rights protection movement is basically intended to arrest/curb the atrocities of a human being or a group either against an individual or group or society or a particular race or vice-versa. In a zoo at Bangaloe there is big cage, wherein a big mirror was hoarded, at the entry point it is written "COME AND SEE THE MOST DANGEROUS ANIMAL ON THIS EARTH AND BEWARE OF IT". Any one who enters in the cage can see his/her own image in the mirror, and know how dangerous a human being is at times.

In fact it is difficult to measure whether the repression wind of Human Rights is increasing or decreasing. But, awareness of that repression has undoubtedly increased, since Human Rights movement started as a World wide movement.

II. GROWTH & DEVELOPMENT OF HUMAN RIGHTS MOVEMENT

The oldest human rights organisation - the Antislavery Society - was founded in 1839. It is still in business, because slavery is still in business. Slavery was abolished in British Empire only in the later years of 18th century and in United States in 1862. When we adopt historical perspective to document the Growth and Development of the Human Rights Movement, we come across the famous Magna Carta (1215) and Petition of Rights (1688) in England and the US Declaration of Independence (1776) followed by Declaration of Rights of Man and Citizens in 1789. It may be interesting to note that the concept of "Rights of man" in its crystallised form emerged after the French and American Revolutions in the 18th century. The legal notions of natural law paved way for declaration of these rights. The Bill of Rights embodied in US Constitution in 1971 is another significant event in the history of Human Rights movement. The representatives of various nations assembled and met at San Francisco in 1945 and adopted the United Nations Chapter which interalia is a declaration of faith "In Fundamental Human Rights, in the dignity and worth of a Human Person, in the equal rights of Men and Women and of Nations, large and small".

Four months thereafter the world at large witnessed the establishment of United Nations Organisation on 24.10.1945, which adopted the universal declaration of rights of man on 10.12.1948. Soon thereafter followed the European Convention of Human rights, signed in November 1950 and brought into force in 1953. This convention created the bodies such as the European Court of Human Rights established in 1959. In the same year i.e., in 1959 the United Nations General Assembly proclaimed the Declaration of Rights of the Child. In May 1961 Amnesty international had launched a World wide movement of protection of Human Rights. The year again witnessed the adoption of the international covenant on economic, social and cultural rights and the international covenant on civil and political rights: the optional protocol to the International Covenant on Civil and Political rights, and the International Covenant on the elimination of all forms of racial discrimination came in the year 1979 and with the convention

of elimination of All Forms of discrimination against women. In the year 1986, the United Nations General Assembly proclaimed the Declaration on Rights of Development. These conventions, covenants, declarations do constitute and act as a true catalyst to all concerned all over the world. These have also served to spell out and embody the principles underlying them in a large number of treaties and international instruments. So human rights violations are measured in terms of political imprisonment/s, torture, disappearance, press censorship and deprivation of civil rights and liberties.

There are two important aspects of hope. Firstly, the concept of human rights - the new gospel - has worked its way through the subsoil of human consciousness with speed and strength, and has become one of the great driving forces of our time. Secondly, there is a growing solidarity among the nations of the world who believe in freedom. The human rights record of a state has become the legitimate concern of the international community.

In England where freedom is spread in the bones of the people, eminent judges like Lord Devlin, Lord Gardener, Lord Hailsham, Lord Salmon, and Lord Scarman have advocated the incorporation of Bill of Rights in British Law. In fact, Canada has adopted a charter of Rights and freedoms in 1982. We also now have the African charter of Human and People's rights. China has also incorporated 24 Articles in their Constitution providing for Human Rights.

In fact, Human Rights generally grows with the growth of awareness and consciousness in human beings and gets strengthened with strength of unity in the human beings. So it is evident from the above that the awareness has undoubtedly increased as the ever expanding code of Human Rights now includes the right to international peace, the right to satisfactory environment and the rights of ethnic, religions and linguistic minorities.

III. HUMAN RIGHTS JURISPRUDENCE IN SUB-CONTINENT INDIA

The pre-independence period witnessed Human Rights violations and can be called us 'dark period'. The post independence period specifically from 1973, The Apex Court (SUPREME COURT) has been functioning as a true catalyst for protection and preservation of Human Rights. The permanence of the core of human rights has been ensured in India by our Supreme Court which held in **Kesavananda Bharathi Vs State of Kerala (AIR 1973 SC 1461)** that parliament, in exercise of the power to amend the Constitution, cannot destroy or alter its basic structure. A Constitution is not a Jelly fish: it is a highly evolved organism. It has an identity and integrity of its own, the evocative preamble of the Indian Constitution being its identity card. It cannot be made to lose its identity in the process of amendment. (See page 208, we the people by N.A. Palkiwala) The fundamental rights are the very heart of our constitution, taking them away would deprive the constitution not only of its identity but also of its life itself. Parliament, when it claims the right to amend the constitutional law, cannot set itself up as the official liquidator of the constitution. In fact the fundamental rights are in the true sense the basic rights of man or human rights. So, this judgement is a milestone in the path of human rights protection movement in India.

The Golden triangle in the constitution which had its best interpretation in the famous case i.e. **Menaka Gandhi Vs Union of India (AIR 1978 SC page 597)** wherein the Supreme Court has

held that right to "LIVE" is not merely confined to the physical existence but includes within its ambit the right to live with human dignity. Endorsing and elaborating the same view, the Supreme Court in **Francis Coralie Vs Union Territory of India (AIR 1981 SC 746)** held that right to live is not restricted to mere animal existence.

Following the spirit of law in Menaka Gandhi and Francis cases the Supreme Court in **People's Union for Democratic Rights Vs Union of India (AIR 1982 SC 1973)** held that non-payment of minimum wages to the workers employed in various Asiad Games Projects in Delhi was a denial to them of right to live with basic human dignity and held to violate of Article 21 of the constitution. This decision has heralded a new legal revolution and it has clothed millions of workers in factories, fields, mines and project sites with Human dignity.

Subsequent to the Asiad Games Village Case the pavement dwellers case, deserves a mention on this occasion, in this case, it was held that right to life includes right to livelihood. **(OLGATELLIS Vs Bombay Municipal Corporation (AIR 1986 SC 180).**

The increase thrust for human dignity is recognised in the famous case, **Jolly George Vergese Vs Bank of Cochin (AIR 1980 SC 470)** wherein justice V.R. Krishna Iyer delivered the majority judgement and held that the arrest and detention of an honest judgement debtor in civil prison, violates Article 11 of the International Covenant on Civil and Political Rights and Article 21 of the constitution.

In **Vikram Deo Singh Tomar Vs State of Bihar (AIR 1988 SC 1982)** a public interest litigation it was brought to the notice of the Court that the female inmates of the 'Care Home Patna' were compelled to live in inhuman conditions in an old ruined building. They are illetarate and provided insufficient and poor quality of food and no medical attention is afforded to them. It was held by SC that "Right to live with human dignity" is a fundamental right of every citizen and the State is under a duty to provide at least the minimum conditions ensuring Human dignity.

Justice V.R. Krishna Iyer had declared that 'Right to Free Legal Aid casts the duty of the State and not the Government's charity' in as early as 1978 in the case of **M.H. Hoskot Vs State of Maharashtra, (AIR 1978 SC 1948).**

In **Hussainara Khatoon (AIR 1970 SC 1360)** Case the Supreme Court held that right to a speedy trial is a fundamental right and the same is implicit in the Guarantee of life and personal liberty enshrined in Article 21 of the constitution.

The Supreme Court has also pronounced sensational judgements of far reaching importance as far as violation of life and liberty are concerned. The court awarded the compensation of Rs. 6.00 lakhs to the widow of the deceased as well as special family pension and children allowance **(Chiranjit Kaur Vs Union of India (1994), 2 SCC 1)** in the case relating to the death of a Army Officer due to the negligence of Army Officers resulting in great mental agony and physical and financial hardship to the window of the deceased and two minor children.

Human Rights jurisprudence has reached new hights in the craftsmanship of the Supreme Court

in the recent years. A few of the more important cases are cited below.

(a) **Arvinder Singh Bagga Vs State of UP (AIR 1994 SCW 4148)** : This case relates to illegal detention by police, wherein the court has expressed its strong displeasure of the concerned police officer and issued directions to the UP Govt. to take immediate steps to launch prosecution against the police officers involved in the affair and directed the State to pay monitory compensation to the illegal detainees.

(b) **Inder Singh Vs State of Punjab (AIR 1994 SCW 447)** :A habeas corpus petition filed by the appellant in relation to abduction of 7 persons. Considering the leisurely manner in which the Punjab Police acted the court felt deeply concerned about the safety of the citzenry at the hands of such an errant, high handed and unchecked police force and observed that the request of the DGP was outrageous. The court felt unwilling to entrust the investigation of abduction and presumable liquidation of 7 persons to the State police and directed the Director, CBI to conduct the enquiry within 4 weeks, if necessary employing services officials of CBI of the rank of Deputy Director CBI and above. The court further directed that the report should be sent in a sealed cover.

(c) **Supreme Court Legal Aid Committee Representing Under Trials Vs Union of India AIR 1994, SCW 5115** : Expressing the displeasure at the long detention and greater delay in disposal of cases the court stressed the need for setting up sufficient number of special courts and to set up a committee to review the cases of under-trials for a long duration including those released under the present order and to recommend to the State Govt. to ascertain which of the cases deserved withdrawal. Further the court recalled its earlier emphasis in a series of decisions that Articles 14, 19 and 21 sustain and nourish each other and any law depriving a person of "personal liberty" must prescribe a procedure which is just, fair and reasonable.

(d) **Chemeli Singh Vs. State of U.P. (1996 (2) SCC 549)**: In this case it has been held that right to shelter is a fundamental right under Art. 21 of the Constitution. In any organised society , the right to live as a human being not ensured by meeting only the animal needs of man. It is secured only when it is assured of all facilities to benefit himself. Right to live guaranteed in any civilised society implies right to food, water, decent environment, education, medical care and shelter. These are the basic rights known to any civilised society. All Civil, Political, Social and Cultural rights enshrined in the Universal Declaration of Human Rights or Convention or under the Constitution of India can not be exercised without these basic human rights. In view of the importance of the right to shelter, the mandate of the Constitution and obligations under the Universal Declaration of Human Rights, the Court held that it is the duty of the State to provide housing facilities to Dalits and Tribes, to enable them to come to mainstream of National Life.

(e) **Jogender Kumar Vs. State of UP (AIR 1994 SC 1349)**: Denying a person of his liberty is a serious matter. The court directed the DGPs of all the states in India to issue necessary instructions requiring due observance of the requirements before arrest. The court further directed that Departmental instructions shall be issued that a police officer making an arrest

should also record in the case diary, the reasons for making the arrest.

(f) **Delhi Development Horticulture Employee's Union Vs. Delhi Administration (AIR 1992 SC 789)**: The petitioners who were put up in work for 240 or more days on daily wages in the Jawahar Rozgar Yozana had filed a petition for their regular absorption as a regular employees in the Development Department of the Delhi Administration. The petitioners have contended that right to life ,includes the right to livelihood and therefore, right to work. The Court held that right to life would include the right to livelihood and therefore right to work but this country has so far not found feasible to incorporate right to livelihood as fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it and not because it considers it any less fundamental to life.

(g) **P.Rajagopal case Vs. State of Tamil Nadu (AIR 1994 (6) SCC362)**: The Editor of a Tamil Magazine has moved the Supreme Court and asked for a writ restraining Government officials from interfering with their right to publish Autobiography of Auto Shankar who had been convicted of several murders and awarded capital punishment. The Supreme Court has expressly held that 'right to privacy' or the right to be alone are guaranteed by Art. 21 of the Constitution. A citizen has right to safe guard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among the other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudator or critical, if he does so, he would be violating the right of the person concerned and would be liable for an action for damages.

(h) **Joginder Kumar Vs. State of U.P. (1994 (4) SCC 2 60)** the Supreme Court has laid down guidelines governing the arrest of a person during investigation. This has been done with a view to striking a balance between the needs of police on the one hand and the protection of human rights of citizens on the other hand.

(i) **Delhi Domestic Working Women's Forum Vs. Union of India (1995 (1) SCC 14)**, the Supreme Court has rightly observed that the defects in the present system are, basically that complainants are handled roughly and are not giving such attention as is warranted. The victims, more often than not are humiliated by police. The victims have invariably found rape trials a bad experience. The victims often say, they considered the ordeal to be given worse than rape itself. Undoubtedly the court proceedings add to and prolong the psychological stress they had to suffer as a result of the rape itself. Eventually, the Supreme Court has laid down the guidelines for trial of rape cases.

(j) **National Human Rights Commission Vs. State of Arunachal Pradesh (AIR 1996 SC 742)** : In this case a public interest litigation was filed by National Human Rights Commission under Art. 32 of the Constitution for enforcing the rights under Article 21 of the Constitution of about 65,000 chakmas. The facts of the case was that a large numbher of chakmas who migrated from Bangladesh in 1964, first settled in Assam and Tripura and became Indian Citizen in due course. Since the State of Assam had expressed its inability to rehabilitate all of them then about 65,000 of them were shifted to the State of Arunachal Pradesh. They have been residing in the State for more than 30 years and have raised their

families in the State. Their children were born in India. They have developed close social, religious and economic ties. The All Arunachal Pradesh Students Union (AAPSO) had threatened to forcibly expel them from the State. Since all efforts to tackle the problem of their security had failed the National Human Rights Commission was compelled to approach the Supreme Court for appropriate relief. The Supreme Court held that the State is bound to protect the life and liberty of every human being whether he is a citizen or non-citizen.

(k) **Vishaka & Others Vs. State of Rajasthan & Others (1997 (6) SCC 241)** : By way of public interest litigation a writ petition was filed by Vishaka a non-governmental organisation working for "gender equality". The cause for filing the petition was alleged brutal gang rape of a social worker of Rajasthan. The Supreme court has spelt out that there is an urgent need to ensure safety, and dignity of Woman Employees and for creation of a mechanism thereof and its enforcement (may be the responsibility of legislature or executive). So the Court held that it is the duty of the employer or other responsible person in work places and other Institutions whether public or private to prevent sexual harassment of working women.

(l) **D.K.Basu Vs. State of West Bengal (AIR 1997 SC 610)** : The Supreme Court in this case has held that, any form of torture, cruelty, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution whether it occurs during investigation, interrogation or otherwise.

The Human Rights Protection Act, 1993 provides for constitution of a National Commission and State Commissions and Courts for protection of Human Rights and it is undoubtedly an expression of our concern for protection of Human Rights. The provisions of the Act confer on the Commissions and function the powers of a Civil Court trying a suit under the Civil Procedure Code, 1908 (Sec. 12 and 13).

Before concluding, it needs to be placed on record that the efforts of Chief Justice of the American Supreme Court, Earl Warren (1891- 1974), who rewrote the Corpus of American Public Law and declared that the document (Bill of rights) will not have exactly the same meaning as it had when they received it from their forefathers. In enforcing the liberties guaranteed by Bill of Rights, the Warren Court forged a new and vital place for itself in the constitutional structure. More and more the court came to display its prime concern for individual rights. Freedom of speech, press, religion, the rights of minorities and those accused of crime, and those of Individuals subjected to legislative and administrative inquisitions all came under the Warren Court's fostering guardianship. The judgements delivered by Warren Court have shown greater impact and concern for Human Rights around the globe and some of the judgements of our Supreme Court derived their spirit from the judgements of Warren Court.

The Supreme Court has also made it clear that the Government has a positive duty to promote the Welfare of the Community and human dignity being the vital fabric of Social Texture. The Judge made laws show that protection of liberty has received an added emphasis in the recent times and the specific guarantee of the "Right to Life and Personal Liberty" in the constitution has became substance of human dignity.

IV. Conclusion

Human Rights protection today is a worldwide movement and is widely accepted. This movement requires to be strengthened with the tools listed below:-

(a) Free access to justice

(b) Dissemination of information

(c) Establishment of International Forums

(d) Diffusion of tensions around the globe

(e) Phase wise conceptualisation of every expanding right

(f) Reform the law to suit the protection and preservation of human rights in the International context

(g) Design a new aid policy dialogue

(h) Creation of new and effective correlation of rights with duties

In the 20th Century, there emerged new social and economic freedoms which call for a collective or Governmental effort for their realisation. These rights include right to security, right to work, right to education, right to have minimum standard of living.

The Supreme Court's judgements in the field of Human Rights Movement, makes us confident that the Court never stops its efforts to extend protection against the violations of Human Rights by enforcing the fundamental rights, in particular to **Art. 14, 19, 21 (Golden Triangle)** of the Constitution of India.

We stand at the threshold of a new century. Indeed, we all see a vision of a new world, a world reflecting universal brotherhood of humanity and true Independence of human race which cherishes the dignity of life and personal liberty. 'Human Rights Protection' emanates from the totality of this sub-continent's constitutional spirit to protect personal rights.

Human being is the **founder and guardian of his life and liberty.** The changes in the pattern of Human existence have resulted in the change of ideas about justice and the law has accordingly started recognizing certain NEW LIMBS of Human Rights relating to life, liberty, equality and dignity of the individual.

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Huf as Partner in a Partnership Firm -a Misconceived Concept

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I. Introduction

In this article an attempt has been made to analyse the conceptual position and legal significance of partnership firms. While dealing with the issue, it has been examined whether a "HUF as such" can become a partner in the firm with some other strange partners.

II. Partnership

Partnership is the relationship between two or more "persons" who have agreed to share the profit of a business carried on by all or any of them acting for all (Section-4 of the Partnership Act).

The relationship of partnership arises from the contract and not from status. On the contrary HUF is based on status. Thus the family business carried on by members of HUF inter-se is not a partnership. The concept of Hindu Undivided Family is the creation of the Hindu Law and not by any contract between the parties. The firm, which consists of the male members, becomes a joint family firm and karta of the family becomes manager of the firm who is accountable to the family.

In legal parlance it is partnership arising out of status and created by the operation of Hindu Law as such joint hindu family business is outside the provisions of the Partnership Act, 1932. It is, therefore, clear that provisions of the Partnership Act alone are relevant for finding out who could join as partners.

III. Whether HUF is a person

A firm is a compendious way of describing the individuals constituting the firm. When section 4 of the Partnership Act speaks of "persons" who had entered into partnership with one another, it could only be individuals and not a body of persons. HUF is neither a natural person nor a legal

person (incorporated body). But there are certain provisions in different enactments which includes HUF in the definition of the word "person". For example Section 2(32) of the Income Tax Act recognises HUF as person. The expression "person" as has been defined under the General Clauses Act shall also include any company or association or body of individuals, whether incorporated or not, within the fold of the definition of person. But the above exceptional provisions defining the word "person" cannot be imported in the specific law of partnership.

The concept of partnership law is that a firm is not an entity or a "person" in law but only a compendious mode of designating persons who have agreed to carry on the business in partnership. As observed by the Supreme Court in the case of commissioner of Income Tax V/s Figgies & Comp. (1953) 24 ITR 405 and in the case of Dulichand Laxminarayan V/s Commr. Of Income Tax -AIR 1956 SC 354- A firm is not a "person" and as such was not entitled to enter into a partnership with another firm or an HUF or an individual and the definition of "person" in Section 3 (42) of the General clauses Act can not be imported into section 4 of the partnership Act.

However, only under the Income Tax Act some relaxations are extended for some specific purposes to the firms or HUF treating them as independent & distinct juristic persons for the purpose of assessment as well as for recovery of Taxes as it is a persons within the meaning of section 2 (32) of the Income Tax Act.

IV. Whether HUF can be a partner in a firm with strangers

In this context, attention is invited to a landmark case decided by the Hon'ble Supreme Court i.e. **M/s Agarwal & company V/s C.I.T**. **U.P**. **AIR 1970 SC 1343**. In this case the Supreme Court has held that:-

> "It is now well settled that HUF can not as such enter into a contract of partnership with another person(s). The Supreme Court further held that the concept of a HUF joining a partnership presents considerable difficulty. A HUF is a floating body. Its composition changes by births, deaths, marriages and divorces. Such a partnership is likely to have a precarious existence. The assumption in section 4 (3) of the old Companies Act, 1913 that a HUF can be a partner in a partnership appears to be based on a erroneous view of the law".

The above view has again been confirmed by the Hon'ble Supreme Court in a recent case of **M/s Rasiklal & Comp V/s C.I.T**., **Orrissa**. **AIR 1998 S.C. 401.** It is specifically held that …….." A HUF directly or indirectly can not become a partner of a firm because the firm is an association of Individuals. A HUF not being a "person" can not enter into an agreement of partnership. The partnership Act contains various provisions regulating the relationship between partners.

All these provisions relating to mutual rights and liabilities are only applicable to the individual partners who are members of the firm. There is no way that the HUF can intrude into the relationship created by a contract between certain individuals". The Supreme Court further held that having regard to the definition of "Partnership" and "Partners" it is not possible to hold that an HUF being a fluctuating body of individuals, can enter into a partnership with other

individual partners. It can not do indirectly what it can not do directly.

V. Karta as partner

If a "Karta" or any other member of the HUF joins a partnership, he can do so only as an individual. In such a situation neither the HUF nor any member of the HUF can claim to be partner or connected with the partnership through a nominee. Where the karta of an HUF enters into a partnership agreement with a stranger the "Karta" alone in the eye of law is the partner. IF any payment by the firm to a partner is prohibited by law, the karta can not take plea to say that the payment was received by him not as a partner but in some other capacity. Even if a person nominated by the HUF joins a partnership, he will be partner in his individual capacity and not otherwise. His rights & obligations vis-à-vis other partners are determined by the partnership Act and not Hindu Law. A Karta who enters into a contract of partnership in his individual capacity with a stranger may be accountable to the other members of the HUF for the profits received by him from the partnership business. But that is some thing between the karta and his HUF. But so far as the partnership firm is concerned, the karta is a partner like any other partner.

VI. Effect of section -11 of the companies Act, 1956 on the partnership

Section 11 of the Companies Act, 1956 imposes restrictions regarding number of partners in a partnership. For non banking firms, companies or associations the maximum number of partners is prescribed as 20. As soon as the number of partners in a partnership exceeds 20, it will become a illegal body and partners will also be liable personally for punishment.

For a moment if we hypothetically presume a partnership with HUF as one of its partner alongwith some other partners, it will be very difficult to restrict the number of partners within 20 because HUF is a floating body and its composition changes by births, deaths, marriages and divorces. Such a partnership is likely to have a precarious existence as has been rightly held by the Supreme Court.

Once the number of partners exceeds the statutory limit of 20, such partnership will automatically become unlawful in view of the section 11 of the Companies Act. Therefore, on this score also a partnership with HUF is not feasible.

However, restrictions imposed by section 11 of the Companeis Act are not applicable to the sole HUF business. But if two or more joint families carry on business with more than 20 adult persons, the association will be unlawful. A pooling contract is also not hit by this section.

VII. Whether two distinct HUF units can form a partnership

The answer to this question is certainly negative. However, Kartas of the HUF units can enter into a partnership inter-se. In Kshetra Mohan V/s E.P.T. Commissioner the Supreme Court pointed out that when two kartas of different families constituted a partnership the other members of the families do not IPSO-facto become partners through the kartas. The kartas are however accountable to their respective families.

VIII. HUF property as security

It may be emphasised that with extreme case HUF property may be accepted by the bankers as security in the loans/advances granted to partnership firm in which either karta or other nominee of the HUF is one of the partner in his individual capacity. Because HUF property is governed by Hindu Law and every coparcener of the joint hindu family, whether adult or minor or unborn child in the womb, has got right in that property. Rights of the minors in the HUF property can not be put to stake for the purpose other than the family benefits or benefits of the minors.

IX. Conclusion

In the light of the above legal position and verdict of the apex Court of the country, a partnership firm, with HUF as one of the partner cannot be constituted lawfully. Hence, the accounts of such partnership firms where HUF happens to be one of the partners, should be dealt with very cautiously and security aspects should be examined very carefully, so as to ensure that bank's interest is not jeopardised.

Civil liberties had their origin and must find their ultimate guaranty in the faith of the people.

- JACKSON, Robert, Douglas v. Jeannette, 319 U.S. 157, 182 (1943)

You will not got clients if you stay home six nights a week.

- SELIGSON, Harold P.

The common law is not a brooding Ommpresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.

- HOLMES, Oliver Wendell, in Southern Pacific Co. v. Jensen, 2 & 4 U.S. 205, 222 (1917).
