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LAW COMMISSION OF INDIA

ONE HUNDRED THIRTY-FIRST REPORT

ON

ROLE OF THE LEGAL PROFESSION
IN ADMINISTRATION OF JUSTICE

1988



D. A. DESAI
Chairman

Tel. No. 384475

विधि आयोग
LAW COMMISSION
भारत सरकार
GOVERNMENT OF INDIA
शास्त्री भवन,
SHASTRI BHAWAN,
नई दिल्ली
NEW DELHI

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D.O. No. 6(2)(6)/87-LC(LS)

Shri B. Shankaranand,
Minister for Law and Justice,
Government of India,
Shastri Bhavan,
NEW DELHI.

Dear Shri Shankaranand,

This is the journey's end. By the letter dated February 17, 1986, your predecessor, the then Law Minister Mr. A.K. Sen, conveyed a decision of the Government of India to the Law Commission that the task of studying and recommending judicial reforms, for which a separate commission was mooted, is assigned to the present Law Commission. The reference also contained a request to give top priority to it because of the day-to-day deteriorating situation in the system of administration of justice. The Law Commission rescheduled its work accordingly.

I have great pleasure in informing you that all the terms for the proposed Judicial Reforms Commission which were forwarded to us have been duly taken into account and a report, or, where necessary, more than one report, has been submitted covering each term of reference. Among the terms of reference, term No. 6 was with regard to 'the role of legal profession in strengthening the system of administration of justice'. That was reserved for the last report.

I am happy to forward to you the 131st Report covering this term and by sheer coincidence, this is the last report of the present Law Commission.

I am sure that all these reports would be expeditiously implemented with a view to reclaiming the system before someone has to call 'Amen' to it.

With kind regards,

Yours sincerely,

Sd/-
(D.A. DESAI)

Encl : A Report

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CHAPTER I

INTRODUCTORY

1.1. While responding to the inaugural address of the President of India at the Fourth Commonwealth Law Conference on January 4, 1971, Lord Hailsham of St. Marylebone, Lord Chancellor of Great Britain said: "Sir, you have been very generous about our profession. But we cannot altogether conceal from ourselves the fact that lawyers, whom I am here to represent, are a race not universally popular; nevertheless, I believe, they are universally found to be indispensable. How can they be universally popular when it stands to reason that in all contested litigation one party at least must go away disappointed, and is usually readier to blame his own lawyer, or his adversary's or, perhaps, shocking as it may seem, even the Judge, rather than his own conduct, or the weakness of his case? ... we lawyers are profoundly proud of our calling. Whatever other people may think of us, we regard ourselves as being in the service of mankind."¹ Reserving the opinion on the cause assigned for lack of popularity referred to in Lord Chancellor's speech, the position of the Bar vis-a-vis administration of justice is here neatly summed up. And the authority of the maker of the statement is unquestionable because he combines in his person the Judge, the Minister, the legislator and the lawyer rolled into one. The legal profession has acquired a high visibility profile and consequently has held multi-disciplinary attention of many sociologists of law.² This led a jurist unfairly accused of pathological dislike for the profession to assert that 'if little sociology leads one away from the law, much sociology (in a generic sense) returns one to the study of the law'.³ A number of sociological studies of legal profession have recently appeared.⁴

1.2. Legal profession is multi-dimensional in character. This report does not purport to study and analyse the legal profession with reference to all dimensions or its structure, organisation and functioning, nor does it purport to be the sociometry of the relationship of legal profession to various groups, such as litigants, Judges, politicians, academics and even amongst themselves. The limited scope of the report may be articulated viz. role of legal profession in strengthening the system of administration of justice.

1.3. This report would be the last link in the chain of reports prepared and submitted by the present Law Commission after the task of studying judicial reforms was assigned to it. One of the terms of reference drawn up by the Government of India for study of judicial reforms is: 'the role of the legal profession in strengthening the system of administration of justice'. The term articulates the scope and ambit of the report. Legal profession is one of the most leading professions of intellectuals in this country and, as stated earlier, it is multi-dimensional. The present report concerns itself with the role of the legal profession in strengthening the system of administration of justice. It is, therefore, necessary to prescribe the parameters of this report.

1.4. The present system of administration of justice owes its origin to the advent of the British rule in India. In its structure and organisation, the administration of justice in India as at present in vogue has the stamp of 'Made in U.K.'. The British system of justice is inconceivable without the barristers and solicitors being integral part of the same. When the British rulers by gradual doses introduced the institution of British justice in India, simultaneously the institution of legal profession came along with it. Came the barristers and solicitors also. The form and organisation in which the institution of legal profession exists today has no relevance or connection with the period of Indian history prior to the advent of British rule in India. A research in this behalf has

revealed that while some researchers maintain that the litigants in pre-British rule or even in ancient India had rights to delegate the representation of their claims to some other person sustaining the belief that lawyers did exist in ancient India,⁵ the contrary assertion is that lawyer never existed as a distinct category within the legal system of ancient India on the plea that, as per scriptures, it was the duty of the King or the Judge to sift the evidence and do justice.⁶ In the pre-British period, the system of administration of justice did not acquire the overtones of adversarial system with the result that the profession of lawyers was hardly needed in the said cultural context to assist the litigant or his delegates argue their cases before the King who, as stated earlier, was supposed to analyse the evidence and arrive at the truth directly personally. The same situation obtained throughout the Mughal period which ended just before the British appeared on the scene.

1.5. The entry of the British in India towards the middle of the 18th century ushered in a very significant development resulting in several systematic changes. As part of a systematic process of consolidation of the empire, English common law and British statutory laws were to be made a part of the Indian legal system. Towards that end, members of the British Bar were recruited as Judges. Conversant with the British law and the common law, they interpreted the textual law, whatever it was, giving it the overtones of common law. This needed a Bar able to assist in this transformation. Macaulay did the rest of it while codifying laws in India. In the earlier period of the history of Supreme Court and Sadar Courts, the legal profession largely consisted of British Barristers and solicitors. The upshot of all these developments was the inescapable emergence and development of legal profession in the country which had an automatic relevance in the context of court-based rational legal system of administration.

1.6. It was the Charter of 1774 which empowered the then existing courts to approve, admit and enrol advocates and attorneys to plead and act on behalf of the suitors, simultaneously conferring power on the courts to remove lawyers from the roll of the courts 'on a reasonable cause and to prohibit practitioners not properly admitted and enrolled from practising in the court'.⁷ The Royal Charter of 1774 was, in course of time, extended to other two presidencies—Madras and Bombay—which also came to have their own Supreme Courts in 1801 and 1823 respectively. All this indeed provided a great boost to the legal profession which now stood as statutorily recognised. With this, the lawyers now not only came to enjoy the tremendous prestige but also had handsome earnings—a fact, which has been reported by Samuel Schmitthener⁸ rather dramatically.

1.7. It must, however, be briefly made clear that the legal profession continued to be fragmented in two different court-settings, that is, Mofussil (comprised of two-tier system of courts, i.e., Mofussil and Sadar Courts) and the Presidency Courts. Broadly stated, the Presidency Courts followed the law, codified by the British in India, or formulations of common law, and the Mofussil Courts by and large followed Hindu and Mohammedan Law. Further, as against the completely British composition of the profession at the Presidencies, the profession at the Mofussil Courts, at least till 1846, was exclusively Indian, that is, Hindus and Muslims. This divergence between two co-existent variance of professions at two levels continued till 1858 when the British Government superseded the Company and took direct charge of the colony. First, the British brought about a consolidation of the Royal Courts with the Company's Mofussil Courts. They established High Courts which were at the apex of the new system. With the expansion of the Empire and larger areas being brought under the Queen's Domain, High Courts were established at Allahabad (1880), Patna (1916) and Lahore (1919). The whole point in detailing the evolution of legal profession in India during the British time is meant to underscore that the said unification greatly helped in universalising the professional ethos and also lent a certain

collective character to the legal community. A number of Indians were attracted to this profession. Indian lawyers could henceforth practise side by side with their British counterparts and thus imbibe from them such norms of professional conduct and practice as the latter had brought with them as part of the British legal system.

1.8. The Indian legal profession proliferated as the western legal system struck deeper roots in India. More and more Indians adopted law as their career and started performing as well as their British counterparts did. Barrister's qualification had the respectability of its own. A large number of Indians started going to Britain to get themselves trained as barristers and then returned to practise in Indian courts.

1.9. Apart from the barristers and solicitors qualified in England, a provision was made for appointment of *vakils* or native pleaders in the Court of Civil Judicature. The Bengal Regulation, VII of 1793 regulated the appointment of *vakils*. It contained an extraordinary provision whereby only Muslims and Hindus could be enrolled as pleaders. Later on, this discrimination between various communities was waived. Under the Punjab Chief Courts Act, 1866 a provision was made that 'Any person duly authorised by the Secretary of State for India-in-Council to appear, could plead or act on his behalf'.

1.10. Although the establishment of the Indian legal profession was originally a case of 'transfer of a western institution' brought about by a foreign power to meet the exigencies of its administration in India, it soon assumed the leadership of national struggle for independence. The profession played a stellar role in the movement for independence. It acquired its awareness because of its connection with British democratic institutions through legal literature. The Indian National Congress which led the movement for independence became the rallying ground for the legal luminaries of the time, such as Gopal Krishna Gokhale, Lokmanya Bal Gangadhar Tilak, Mahatama Gandhi, the Father of the Nation, Motilal Nehru, Chittaranjan Das, Dr. Rajendra Prasad, Sardar Vallabhai Patel, Vithalbai Patel, Pandit Jawaharlal Nehru and many others. Most of them who survived occupied positions of eminence in independent India.

1.11. It is uncontroverted that the members of the Indian legal profession occupied a vantage position in freedom movement. Members of the legal profession acquired the respectability of being leaders of thought and society. Participation of the members of the legal profession in the then socio-political stream was also evidenced by growing participation of Indians in the administration of various Provincial Legislative Councils under the British Government's policy of granting limited Provincial autonomy. Till the advent of freedom, it cannot be gainsaid that the members of the legal profession occupied a vantage position.

1.12. Is that position maintained till today? In the post-independent era, has the legal profession maintained and augmented its position as leaders of thought and society? If it has not, the causes of decay and deterioration will have to be objectively analysed, not by the approach of a hostile or carping critic but a sympathetic friend who was also a member of the legal profession and who, by introspection, would like to find out the causes and suggest remedies for restoration of the position to that place of eminence and acquire its pristine glory. That, however, would require an extensive research and that is beyond the scope of this report.

1.13. The report will concern itself with the role of the legal profession *vis-a-vis* administration of justice. As pointed out earlier, British system of justice is adversarial in character and that system survives till today. Adversarial system renders the position of a Judge to a passive listener, a sort of an umpire in a game of cricket, denying him the active participation in unravelling the truth. The members of the legal profession in adversarial system enjoy a position of absolute indispensability.

If the adversarial system is to continue since it is here for over 200 years for a further period of trial and error, the role of the legal profession in making the adversarial system functionally operational in the process of rendering justice will have to be fully appreciated and if any infirmities and drawbacks have developed, they have to be eliminated so that the legal profession would render assistance in strengthening the system of administration of justice.

1.14. This approach needs to ascertain the role of the legal profession in trial by adversarial system in contradistinction to inquisitorial system and that of the Judge operating the same system with a view to rendering justice. Mr. Warren Burger has set the goal for both by saying that 'Our constant purpose must be to keep in mind that the duty of lawyers and function of Judges is to deliver the best quality of justice at the least cost in the shortest time'.¹⁰ This is the respective role of the lawyers and Judges. If role assigned to each is properly, adequately, sincerely and efficiently performed, the adversarial system against which pungent criticism has been offered can still be retained only on the ground of antiquity, extending over two centuries. However, as the criticism can be said largely to be well-merited, the defects, deficiencies and imperfections have to be cured before a fresh lease of life can be imparted to it.

1.15. As some of the ugly features of the present justice delivery system, namely, prolixity, high formality, dilatoriness and expensiveness, surfaced, those connected with the system attempted to unravel the causes which generated these festering sores. Undoubtedly the whole system came under pungent criticism. When a system is criticised, its imperfections and deficiencies are highlighted. Once they are highlighted, the search turned towards unravelling the causes for the same. Amongst the causes now preferred for the decay and stratification of the justice delivery system, some are attributable to the foreign nature of the system. But the fact should not be lost sight of that the system is in vogue for over two centuries in this country. To some extent also it can be said to be indigenized, though its overall picture remains British and, therefore, foreign. Even the profession which developed as an integral part of the system has also retained in its approach, sartorial significance, mode of addressing the court and the colleagues, and the way of ascertaining the truth as in vogue in United Kingdom. Till very recently, even the designations were imported, such as 'Barristers' and 'Solicitors'. The language of the superior courts is unquestionably English. Common law formulation are looked upon with reverence. Therefore, a sizeable body of opinion has developed that some of the ills of the system are attributable to adversarial system. Even in the land of its birth, serious doubts are raised about the efficiency of the system.

1.16. Sir John Foster Q.C. reflected upon the English legal system. Says he :

"I think the whole English legal system is nonsense. I would go to the report of it—the civil case between two private parties is a mimic battle in which the Champions are witnesses chosen by each side but who are not necessarily people who know the facts. And the battle is conducted accordingly to medieval rules of evidence. There is no need for a Q.C. to always have plumber's mate. The use of juniors should be tailored to the demands of the case. And legal aid is so vastly expensive because the system is so silly—you have to have everybody in court on the same day It is too easy to persuade an English Court that black is white; it would be less easy if the arguments were presented in writing".¹¹

Lord Devlin, speaking about the legal methods in England, made a cryptic observation :

"If our business methods were antiquated as our legal methods, we should be a bankrupt country. There is need for a comprehensive inquiry into the roots of our procedure, backed by a determination to adapt to fit the conditions of the Welfare State".¹²

1.17. Justice Krishna Iyer, a former Judge of the Supreme Court of India, evaluated adversary system as under :

"The adversary regime, a legacy of Anglo-American legal culture, is splendid in principle in many respects and is a victory in practice for human rights, viewed historically with Star Chamber memory, but is hostile to the actualisation of court justice unless operational innovations to conscientize, sensitize and radicalize current judicial methodology be creatively and crusadingly undertaken".¹³

'In the final third of this century, we are still trying to operate the courts with fundamentally the same basic methods, the same procedures and the same machinery' ... Roscoe Pound said, 'were not good enough in 1906. In the supermarket age, we are trying to operate the courts with crackerbarrel corner grocer methods and equipments—vintage 1900'.¹⁴ There is a body of opinion that of all the ugly features, the two most important being prolixity and expensiveness are attributable to the role of legal profession. This is not said in any derogatory sense but with a view to pointing out where reform is possible.

1.18. While examining the role of legal profession in strengthening administration of justice, these benchmarks will have to be kept in view.

CHAPTER II

THE DEBATE

2.1. Ordinarily a group, class or category generally tries to safeguard and defend its image and interests, nevertheless, in order to have a comprehensive view of the problems related to profession, the Law Commission considered it desirable to explore profession's own perceptions on various issues, including its role in strengthening judiciary. The Law Commission accordingly prepared a Questionnaire, annexed at *Appendix I*, and gave wide circulation to it. Every attempt was made to send the Questionnaire to the organisations of the members of legal profession, such as Bar Councils and Bar Associations. Anyone interested in the subject was invited to call for a copy of the Questionnaire. The Questionnaire was also sent to each High Court requesting the Registrar to bring the same to the notice of the Chief Justice and Judges of High Court so as to obtain a cross-sectional view. The questions were devised to focus attention on various facets of legal profession, such as :

- (i) the state of profession and its public image;
- (ii) profession's attitude towards the policy of social change intended under the Constitution;
- (iii) the functioning of the Bar Councils and the question of disciplinary jurisdiction;
- (iv) the strike by lawyers, its implications and fall out;
- (v) the question of hobnobbing between the Bar and politicians, between the Bar and the Judiciary;
- (vi) regulation and standardisation of fees chargeable by the members of the profession in relation to the monopolistic character of the profession.

2.2. Before the response to the Questionnaire is tabulated, the inadequacy of the response of the organised Bar may be adverted to here. If the Bar Council of India, the apex body of the organized Bar, had responded to the Questionnaire and had shown willingness to have debate and dialogue, the Law Commission would have extended every facility for the same. In fact, Secretary of the Bar Council Trust, who was an expert assisting the Law Commission in the matter of assessing, evaluating and, if need be, reforming the role of legal profession in strengthening the administration of justice, suggested that the Bar Council of India, if some financial assistance is forthcoming, would be willing to organise a representative seminar to discuss the topic. The Law Commission seized upon this opportunity and agreed to extend financial help within the parameters of its overall policy decision in this matter. Earlier, a suggestion had also emanated from the Indian Law Institute, New Delhi, to organise a seminar on the same subject in collaboration with the Law Commission. So when the Secretary of the Bar Council Trust mooted the idea of a seminar, the Law Commission suggested to him whether all the three, namely, the Law Commission, Bar Council of India and Indian Law Institute, can jointly organise the seminar. He said that it would be the best thing to do. Accordingly, the Indian Law Institute was informed to be a co-sponsor of the seminar. Later on, the Bar Council of India had some reservations about the participation of academics represented by the Indian Law Institute and suggested that the Indian Law Institute should not be a co-sponsor. The Bar Council of India also suggested that it would alone organise a seminar without the financial contribution of the Law Commission. The dates of the seminar were fixed. The Law Commission had sent its contribution also. Ultimately, the Bar Council of India, for the reasons which need not be elaborated here, returned the contribution made by the Law Commission, postponed the seminar and never convened it. It also failed to submit its response to the Questionnaire. The loss, of course, is of the Law Commission and the Indian legal fraternity.

2.3. Total respondents to the Questionnaire were 36. A list of persons/bodies who responded to the Questionnaire is annexed at *Appendix II* to this report. The tabulation is as under :—

Legal Practitioners	Bar councils/ Associations etc.	High Court Admn.	Judges	Voluntary bodies/ consumers of justice	Academics
7	11	2	6	6	4

Before the views expressed by the respondents are summarised, the grievances against the Questionnaire may be summed up to avoid an unmerited criticism that critique of the Questionnaire is not highlighted. The *Bombay Bar Association*, while forwarding its responses to the Questionnaire, expressed its chagrin at the language and tenor of the questions, feeling that 'the queries were framed in a populist manner with a pronounced bias against the legal profession. It appears on a perusal of the questions that the draftsman had already pre-determined some of the issues therein. Some of the questions themselves were unclear, some had built-in assumption and some were illogical'. In order to appreciate the merit of this criticism, the Law Commission has annexed the Questionnaire as *Appendix I* to this report. Without commenting on the views expressed, because the Law Commission cannot enter into polemics with the Bombay Association as it started the debate to ascertain the views, the Law Commission would leave it to the readers to look at the questions and make their own assessment. One can only say that the criticism lacks merit. Only one assertion may be made that the truth hurts. But that is inevitable if introspection is a primary necessity for salvaging the situation in which the profession *vis-a-vis* the society is viewed. The *Ahmedabad Bar Association*, while responding to the Questionnaire, expressed the feeling of the majority of the members that 'the innuendo emanating from the language and the frame of the questions is despicable and hence resented'. On the other hand, the *Bihar Bar Council* expressed the opinion that, 'the Questionnaire is thought provoking and if answers are forthcoming and are implemented, can accelerate the pace of fulfilment of the goal of social change. It further stated that, 'it is true that contemporary legal profession has fallen in the popular estimation, mainly because lawyers have grown up participating in public activities. They have now become too self-centred and have concentrated on earning money alone'. Further, it is stated that it is not 'denied that the image of the legal profession in the country has gone down. The factors contributing to the lowering of the image are manifold—some are printable and some are not printable'. Bar Council of a State represents the Bar of the State and one of its representative also sits on the Bar Council of India. *Muzaffarpur Bar Association* in the State of Bihar has expressed itself on this point by saying that 'the contemporary legal profession has fallen in the popular estimation because the economical gain and benefit has become their first goal due to economic upheaval and devaluation of money, and their main role to assist in the administration of justice has become subordinate to the said first goal'. On the other hand, the *Bar Council of Punjab and Haryana* has stated that 'legal profession has not fallen in the estimation of the general public. It may have fallen in the estimation of the State as it may not have toed the line of the State when it felt endangered'.

2.4. One Bar Council expressed an opinion that there is all round deterioration about the image of every limb of Government and 'the primary responsibility for this rests with the Executive which does not provide sufficient Judges and staff and does not enforce law or itself indulges in lawlessness'. It was also stated that 'the fall of legal profession in the popular estimation has its roots in overcrowding at the Bar, delay in disposal of court cases and inaction and apathy on the part of the Bar Council of India in observing its statutory duties towards legal profession'.

2.5. Before one adverts to the views expressed by persons other than members of legal profession, it must be stated that even amongst the bodies representing the legal profession there is a feeling that the legal profession has suffered devaluation in the estimation of the public. Of course, members of the legal profession would hesitate to accept this impalatable fact. And obviously while stoutly denying this universally accepted fact the organisation of the legal profession would cast aspersions on the Questionnaire which provoked the assertion. That is how the *bonafides* of those who drew up the Questionnaire have been questioned by at least two bodies which have been specifically set out here-inabove.

2.6. The non-professional voluntary bodies have a different tale to tell. One respondent stated that 'people are openly saying that the legal profession is no longer service-oriented that it is only profit-oriented, and that the lawyers are out only to squeeze the clients to the maximum extent possible'. Another voluntary body devoted to providing legal aid to the needy women, opined in a similar reframe that 'the contemporary legal profession has fallen in the popular estimation because of the greed for money, lengthening of the case for years together for small reasons and even changing their loyalty to the other party for the sake of money only. Sometimes, lawyers of both sides join hands to make both the parties compromise even if the clients have to suffer the loss. Majority of the lawyers harass their clients for more and more fees, false bills while not taking the required interest in the case'.

2.7. Some Judges of the High Court found time from their busy schedule to respond to the Questionnaire. By aptitude and temperament, they generally chart the middle course. Thus, even though recognizing that 'to some extent the present day profession has moved far from the primary function of the legal profession to assist in rendering justice', it was maintained in the same breath that 'though we cannot go to the extent of saying that its present role is counterproductive, but a timely introspection and proper change are of immediate necessity'. By and large Judges were of the opinion that certain modifications in the Advocates Act are desirable and should be carried out on the basis of responses to the Questionnaire received.

2.8. The academics in general tend to perceive the problem of declining standards of professional conduct, not as an isolate but in relation to other problems of society, polity and legal system. It is said :

"Legal profession by itself cannot be an impediment to the administration of justice. It operates as one of the components of the justice system and is subject to stresses and strains generated by other components. Technically speaking, dilatoriness and prolixity cannot be brought about by profession alone; other factors, such as attitude of the Judiciary, complexity of procedural and substantive law, deficiencies in the system of legal education, equally impinge upon the functioning of the system'. 'It is rather the failure of the State to regulate the profession than the grow quick rich propensities of the members of the profession which has been responsible for the existing state of affairs'".

2.9. Still another academic states :

"We cannot say that legal profession is an impediment to justice. The complex, technical and formal approach is mainly to seek justice because the justice is filtered through procedures and the consumer gets it clean and unbiased. It is not only the profession but mainly it is Government which is responsible for delays because it keeps the Judiciary understaffed".

2.10. While suggesting measures necessary for restoring the lost self-esteem and public image of the profession, the academics repeatedly emphasise the necessity of—(i) uplifting standards of legal education, (ii) cautious selection of advocates on the part of Bar Councils; and (iii) the role to be played by the academic lawyers. On the last of these three suggestions, one academic remarks :

"New modalities need to be devised for interaction between academic lawyers and members of the profession. The Legal Education Committee of the Bar Council of India should be reorganised. Representatives of the Committee should be selected from institutions well-known for excellence as also from outstanding academicians who have made contribution to legal education".

2.11. Strike by lawyers has become a nauseatingly recurring phenomenon. It is of recent origin. Strong views are held on either side whether members of the legal profession can go on strike or not and if they can, what would be the justifying and compelling reasons and for what length of time. In the Questionnaire issued by the Law Commission, part of question No. 4 and question No. 5 referred to recent strikes by the members of the legal profession in different parts of the country. Members of the organised Bar with one voice supported the right to strike. On the other hand, a number of voluntary organisations, judges of High Court and individuals expressed the opinion that the lawyers have no right to go on strike.

2.12. The High Court of Orissa expressed the view that members of legal profession should not go on strike, nor should they resort to strike in support of their demands or ventilating their grievances. Some Judges of the High Courts in their individual capacity responding to the Questionnaire clearly expressed themselves against a strike. The Bombay Bar Association was of the view that the Bar should follow other means of protest in keeping with its dignity and resort to strike only if no other solution is possible. On the other hand, Ahmedabad Bar Association clearly expressed itself in favour of legal profession going on strike in support of the ends coveted by the Bar. In between these extreme views, opinions for and against strike were expressed by lawyers responding in their individual capacity. Voluntary organisations and others expressed an opinion that ordinarily members of the legal profession should not resort to strike because strike in the long run undermines the administration of justice.

2.13. A local journalist in his column stated that :

"Lawyers are the most organised community in the country with statutory Bar Councils, voluntary Bar Associations and a host of legal societies well-oiled with funds derived from their licensed monopoly to run the legal business market provided by courts and tribunals. All this power is of awesome proportions for the ordinary citizen in Delhi. ... their strike raised some troublesome questions".¹

The lawyers' strike with reference to the incidents that occurred at Tis Hazari Court in January-February 1968 led a journalist writing in Statesman to remark that 'lawyers' strike is delaying justice.'² By and large, the print media showed little sympathy for the cause of the strike or for the strike itself. A Jurist has expressed himself that 'the members of the Bar proceeded on strike for maintaining the status quo'.

2.14. Some causes of the strike may be examined in view of the claim that there are justifying and compelling causes for which the Bar, if it does not resort to strike, would be failing in its duty. The Gujarat High Court Bar was on long strike on the ground that the acting Chief Justice was not confirmed. The entire Bar in the State of Gujarat went on strike for a couple of months on the ground that some of the persons recommended for elevation to the Bench by the Chief Justice of the High Court were not appointed by the Government. The Delhi High Court Bar Association went on strike on the ground that the acting Chief Justice should have been appointed in a permanent capacity. The repeat performance was when a district judge was elevated to the High Court

over the head of his senior. The Allahabad High Court Bar Association resorted to strike for a period of about 13 days in May 1980 when the then Chief Justice initiated several reforms in the administration of the High Court, accusing the Chief Justice of 'massacring justice'. In November 1987, the members of the Delhi High Court Bar Association went on strike in protest against the decision of the High Court to raise its pecuniary jurisdiction to five lakh rupees in respect of civil suits. This strike dislocated the work in the High Court to the extent that more than 20 civil suits which were either to be decided or had been listed for recording of evidence on the first two days of the strike would most probably be coming up for hearing around 1991-92.³ In January-February, 1988 advocates practising in all courts in the capital went on strike protesting against handcuffing of a lawyer by police and the two subsequent incidents in which police allegedly resorted to lathi charge. Sometimes the Bar so dominates the Bench as to subvert both the spirit and the text of law seeking to achieve a modicum of expedition in trial.⁴ About a few days back, lawyers practising in Tis Hazari Courts in the capital revived their strike which led Hindustan Times to comment editorially that the lawyers, by their over reaction, have put the public into much inconvenience and they seem to be reluctant to change their line of action. The paper exhorted the people to resist this attempt to dictate because, according to it, lawyers in Delhi are setting a bad example to their community in the rest of the country.⁵ The members of the Criminal Court Bar Association, Ahmedabad, went on strike on the ground that the powers under sections 107 and 151 of the Code of Criminal Procedure are being withdrawn from the Executive Magistrates and are being conferred upon Commissioner of Police wherever a Police Commissioner is appointed for an area. Taking cue from their learned friends in Delhi over 17,000 advocates in Bombay and adjoining Thane district abstained from courts to protest against police assault on a lawyer and his reported handcuffing.⁶ It will thus appear that the causes which have provoked strike would leave one bewildered.

2.15. Analysing the responses, the first thing that strikes us is that by and large the members of the legal profession individually or through organisations were unwilling to abdicate the right to strike which is fiercely and self-righteously claimed. The right to strike is claimed as a fundamental right, being a non-violent means of expressing protest to the unjust and improper actions of the authorities. It was claimed that if the right to strike is taken away from the lawyers, it will make the lawyers impotent which will jeopardise Indian democracy. The contrary view expressed in the debate needs mention :

"The lawyers, as a class, have come to believe that they are entitled to special consideration distinct from ordinary citizens because they have an access to courts and deal with the Judges direct, from day to day. A succession of strikes which ended with the acceptance by Government or the courts of their demands, has in effect, provided them with a clout, which they are now in a position to wield to bring the judicial system to halt".

It was maintained by the members of the legal profession that the strike is not against the court but against the actions of the Government. But it was further claimed that if a member of the Judiciary is unfairly treated, the Bar has a duty to show its resentment by resorting to strike.

2.16. Individuals who had something to do with the court and voluntary organisations by and large adversely commented upon the strike by lawyers. It was said that it is not at all proper for the members of the Bar to go on strike for any reason, including an unfair treatment of a member of the Judiciary by the Government. It was generally maintained that the strike by lawyers caused irreparable and irreversible harm only to litigants and, in the long run, weakens the system of administration of justice.

2.17. To recall, the Law Commission is examining the role of legal profession in strengthening the system of administration of justice. What is the fallout of this recurring strike? Available figures indicate that even if the strike, may be, from the point of view of the legal profession, was wholly justified and for a compelling reason, it had at least the dubious

distinction of piling up the arrears and the victims are the consumers of justice, namely, litigants, whose cases could not be listed for hearing and would not be listed for years to come. This can be substantiated by statistical information with regard to the piling up of arrears in the Supreme Court of India and the Delhi High Court between 31-12-1987 and 30-6-1988, during which period the lawyers almost in all courts in the capital were on strike for a fairly long period. The pendency as on 31-12-1987 in the Supreme Court of India was 1,75,748.⁷ The pendency as on 30-6-1988 in the Supreme Court of India is 1,85,950.⁸ There is thus an increase of 10,202 in the backlog of cases in a period of six months. If previous graph of increase in pendency yearwise⁹ is compared to the present graph, what stares into the face is that this sudden rise is purely attributable to the strike of the lawyers even in the Supreme Court of India. Similarly, in Delhi High Court where the lawyers were on strike, the pendency on 31-12-1987 was 77,444 and it rose to 82,712 on 30-6-1988.¹⁰ Latter figure does not include cases which, though filed, were awaiting registration. Can a claim that the strike is for strengthening the administration of justice be entertained in the face of these stark facts? The irreducible minimum which flows from this situation is that while not strengthening at any rate the strike of lawyers weakens the system of administration of justice.

2.18. The next subject that elicited a ferocious debate with entrenched positions being taken on either side is with regard to the disciplinary jurisdiction of the Bar Council over the members of the legal profession. Question No. 11 of the Questionnaire invited a debate on the disciplinary jurisdiction over the members of the Bar. The question was framed keeping in view the accountability of the profession to the consumer of its service. A view was expressed that the transfer of disciplinary jurisdiction to the Bar Council has weakened the control over the members of the Bar and, therefore, attempt must be made to examine whether the jurisdiction should be retransferred to the High Court.

2.19. Before Chapter V of the Advocates Act, 1961 came into force, the disciplinary jurisdiction over the members of the Bar vested in the High Court under the repealed sections 10 to 13 of the Indian Bar Councils Act, 1926. There was a demand for what is called Peer's justice which led to the conferment of disciplinary jurisdiction on the Bar Council, simultaneously extinguishing the jurisdiction of the High Court. The debate revealed irreconcilable positions between those who are enjoying the jurisdictions and those who desire a change. The Bar Councils generally were wholly opposed to any change in disciplinary jurisdiction; on the other hand, the Judges strongly felt that disciplinary jurisdiction of the High Courts should be restored. The individuals who responded to the Questionnaire and some voluntary organisations were in favour of restoring the disciplinary jurisdiction of the High Courts. One voluntary organisation asserted that, 'most of the matters pending before the Disciplinary Committees of the Bar Councils are the complaints by the litigants against their advocates. That such complaints are at present evaluated and decided by the professional brothers of the accused is by itself ironic and strange'. One reason why Bar Councils are not geared up, the way they ought to be, is that, 'criticisms of the Bar Councils and Bar is absent because people are afraid of this pressure group, even Judges are afraid of them, then how can any individual dare to do it'. This was the view expressed by another voluntary organisation. A suggestion was made by a third voluntary organisation that in order to confer credibility on the Disciplinary Committee of the Bar Council, the complainant should be empowered either to be a member of the Disciplinary Committee or to nominate his representative on the Disciplinary Committee.

2.20. The Law Commission had the expert assistance of an academic who, for long number of years, was closely associated with the Bar Council of India. His view is :

"Closely related to the above issue is the lack of adequate enforcement of professional discipline and standards of ethical conduct. Very few people outside the profession are aware of the existing system of punishing erring advocates. Peer Group Justice has not been a success if one were to go by the statistics of violations and

the extent of indiscipline often noticed among the advocates. Punishment had to be corrected by the Supreme Court.¹¹ The cases are not published and the public are in dark about the misdeeds of many lawyers on whom they depend for their life, liberty and property. A number of unholy practices, such as 'Bench fixation', fee sharing, etc., are not even recognised as unethical conduct inviting disciplinary jurisdiction. Besides, strike and boycott of courts at State and local levels have become a regular feature with the advocates who are getting unionised on political and regional grounds. The fond hope of the All-India Bar Committee for an integrated Bar with high professional standards is steadily being eroded by the actions and omissions of a certain section of the advocates themselves The situation call for a revision of the rules of professional conduct and etiquettes keeping in mind not only the interests of the members of the profession but also those of the litigating public Supervisory role of the High Courts on disciplinary matters may have to be revived at least in a limited manner to enforce accountability from recalcitrant members of the Bar".

2.21. It is undoubtedly true that section 38 of the Advocates Act confers appellate jurisdiction on the Supreme Court of India over the decision of the Disciplinary Committee of the Bar Council of India at the instance of any person aggrieved by the same or at the instance of the Attorney General of India or the Advocate General of the concerned State, as the case may be. The appellate jurisdiction inheres the power to vary the punishment which has been interpreted to include the power to enhance the punishment also. It is for consideration whether this jurisdiction is sufficient to allay the apprehension of the litigating public about the outcome of peer's justice. It is equally necessary to examine this aspect from the point of view of the accountability of the profession, amongst others, to the litigants.

2.22. One more facet of the debate which needs to be examined has reference to the mounting cost of litigation which litigants have to bear at present.¹² In the present context, the aspect is examined with regard to only one limb of it, namely, lawyer's fees. Question No. 14 in the Questionnaire was whether it was desirable to have a standardised schedule of fees that would be charged by the lawyers from the clients. If the view favours such a standardisation, a request was made for suggesting a method for enforcing the same.

2.23. The trend is not in favour of standardisation of fees. The view varied from it being desirable but not practicable 'because the cost of living and the standards of living differ not only from man to man but from locality to locality also', on the other hand, it was stated that, 'the need to have a standardised schedule of fees that may be charged from clients is being largely felt but it is important to arrive at a schedule of fees and to enforce it'. One State Bar Council was of the opinion that such a measure, if adopted, would give rise to greater corruption and encourage the growth of black money. Voluntary organisations, on the other hand, suggested that they or para-legal bodies should be given due encouragement to appear in the court to render assistance to the needy for legal services. The voluntary bodies working in the field of legal aid to the needy favoured standardisation of fees payable to lawyers. In fixing the schedule of fees, it was recommended that it must be done after consultation with the organised bodies of legal profession. There should be a committee to which alone the fee will be paid and the committee will render account to the lawyer.

2.24. Though it is difficult to quote any single specific instance, the fees charged by some senior advocates are astronomical in character. And it so happens that the corporate sector is willing to retain talent at a very high cost. The payment thus develops into a culture and it permeates down below. Undoubtedly a schedule of fees has been drawn up by the Bar Council of India but the views expressed to the Law Commission would reveal that nobody takes note of it. It is not merely the attempt to prescribe standardisation of fees but the enforcement machinery that would become more relevant.

CHAPTER III

CONCLUSIONS AND RECOMMENDATIONS

3.1. Legal profession enjoys on the one hand uninhibited eulogy and on the other hand no holds barred condemnation. Free from either, objectively and dispassionately, the role of legal profession may be examined with a view to making its role justice and people oriented.

3.2. Socialists and analysts have found something in the atmosphere of the law schools which tend to produce a finished product which is impervious to change. Charles Reich in this context said:

"Finding themselves in law school..... (students) discover that they are expected to become 'argumentative' personalities who listen to what someone is saying only for the purpose of disagreeing; 'analytic' rather than receptive people, who dominate information rather than respond it; and intensely competitive and self-assertive as well. Since many of them are not this sort of personality before they start law school, they react initially with anger and despair, and later with resignation..... In a very real sense, they 'become stupider' during law school, as the range of their imagination is limited, their ability to respond with sensitivity and to receive impressions is reduced, and the scope of their reading and thinking is progressively narrowed."

3.3. This led George Bernard Shaw to quip that, "All professions are conspiracies against the laity..... In a society where justice, in theory at least, is held up as the highest ideal, lawyers", it is said, "are always looking for technical and sometimes dubious means of bending the law to their advantage." The criticism against the profession is as old as the profession itself. William Shakespeare said that 'the first thing to do, let us kill all the lawyers'.

3.4. Abjuring this criticism, in our country, the role of legal profession has to be assessed in the context of the constitutional mandate as set out in article 39A of the Constitution. It is the duty of the State to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.⁵ The role of legal profession in strengthening administration of justice must be in consonance with the intent underlying article 39A. In other words, in an adversary system as in vogue in law courts being the fulcrum of administration of justice, the role of legal profession must ensure equal opportunity to all litigants in search of justice. In the process, opportunity for securing justice should not be denied to any citizen by reason of economic or other disabilities. Legal profession is expected to ensure that anyone who has not the economic wherewithal to seek justice must not turn away from law courts on the only ground that he is unable to incur necessary expenditure for securing justice. Equally important is the fact that social disabilities should not deny access to centres of justice of which legal profession is an integral and inseparable adjunct. The State, which has conferred a monopoly on the legal profession by permitting it to regulate its own admission, qualification for admission and be the regulator of its own internal discipline, should so conduct itself as affording every facility for securing justice. To discharge this obligation, the legal profession must make its services available to those needy who otherwise cannot afford to pay the cost of legal services. Costs as also their other social disabilities may not come in the way of legal profession assisting such persons from securing justice. The profession must develop its own public sector.

Briefly stated, ways and means must be devised so that the profession plays a meaningful role in promoting the quality of justice and to bring about such changes in society as are in consonance with the egalitarian goals, to which we are committed both constitutionally as also as our policy objectives. Within these parameters, the role of legal profession in strengthening administration of justice must be spelt out.

3.5. Monopoly is resented by the society because consumers of the monopoly can be held to ransom in the absence of availability of alternative services. A monopoly without a liability of accountability is likely to lead to tyranny. It is unquestionable that legal profession is monopolistic in character. This does not need elaboration. If the profession is monopolistic in character, it must be accountable to the consumers of its services and let the consumer class be not narrowed down only to litigants. Even the court system of which it is an integral part can be said to be the consumer of its service. Therefore, apart from the wider concept of accountability of monopolistic profession to the society at large, there must be ways and means of making the legal profession accountable to the litigants and the court system.

3.6. The legal profession continues to be central to the socio-political domain of the Indian society, its structure as well as process tend either to change or sustain the existing order of things. Members of the legal profession constitute the single largest group in Parliament which is vested with the task of taking the most vital decisions affecting the present and future of the Indian nation. It can, therefore, be stated with confidence that they do exercise the single largest influence over the national life. The members of the legal profession can, therefore, have a decisive voice in law-making. Therefore, they can also promote the quality of justice by so shaping the laws as would advance justice. It is true that the professional bodies of the members of the legal profession are sensitive to criticism because some of them viewed the Questionnaire of the Law Commission as motivated. Even in the matter of strike, the members of the profession asserted that right to strike is beyond question. An impression is likely to be formed that the members of the profession are keen to guard their own interests notwithstanding the fact that by their attitude sometimes public good is impaired. The profession must maintain the difference between profession and guild or business.

3.7. Therefore, the question must be posed : What can the organised profession do at their level individually and collectively to promote the quality of justice ? The answer lies in the intentment underlying article 39A.

3.8. It is unquestionable that in any organised profession, there are bound to be some persons who are unable to maintain the high standard of profession. In some cases, evidence reveals a sordid state of affairs in lawyer-client relationship. This itself cannot be sufficient to condemn the profession as a whole but this aspect cannot be ignored also. It is here the question of accountability of the profession to the litigant and system comes to fore. The leaders of the Bar must show a deliberate concern with the fate of the poor and the indigent by volunteering to take up their cases in courts of law. They must also take up the role of questioning the credentials of persons who do not maintain high professional standards, its accountability by introspection or by internal regulation of the profession. It must submit itself to social audit. It is too much to expect a litigant coming from rural areas to understand what is expected of his lawyer and to complain against him if he feels cheated and thereafter to prosecute his complaint before the Bar Council. It is for the profession to provide a self-regulating mechanism whereby it takes notice of an errant lawyer and deals with him without anyone coming forward to lay a complaint. This would be its first and foremost task, namely, to perform its duties both towards the profession and the wider society. Maintenance of the irreducible minimum standards of profession cannot be left to members of the society complaining against anyone. That is a tall order. Accountability can be provided for by a self-regulating mechanism. This must also include an improper or unprofessional behaviour in the court that would be impairing the system.

3.9. The foremost requirement of the present day is to reclaim the glory of the profession. No doubt there are some sociologists who believe that the prestige of the legal profession since the independence has not declined. It is said that "a perusal of facts available suggests that the public position of Indian lawyers has not declined after independence."⁴ Of course, he reaches this conclusion by asserting that the "lawyers had prestige in the context of anticolonial struggle *not* as professionals but as freedom fighters. Not that some of them did *not* enjoy lucrative practice; but they were venerated by the people *precisely* for *giving up* the same, for altruism they demonstrated."⁵ On the other hand, the role of the profession in independence movement is eulogised by asserting that the profession had pragmatic and dynamic participation in the socio-political history of the past two centuries but as against this backdrop, the present times present a picture of contrast.⁶ In the year 1958, a finding was based on the evidence collected by the Law Commission that "There is a fall in efficiency and standards at the Bar. The recent recruit to the profession is said to be inferior in his legal equipment, less pain-staking and in a hurry to find work".⁷ Three decades after, a leading Gujarati daily described the members of the legal profession in its editorial columns as *kajiya dalals* (dispute brokers).⁸ The editor went on to state that the members of the legal profession have been encouraging litigation more and more by giving impetus to disputes.

3.10. By a concerted action to be taken by the organisation of legal profession, a serious attempt should be made to erase this picture of the profession even if it is in the minds of few. Every step has to be taken to restore the respectability and credibility of the profession not only in the eyes of the society but even the litigating public.

3.11. Therefore, the first step that is required to be taken is not to encourage litigation but to reduce litigation. The role of the legal profession is to resolve disputes and only in the last resort the matter should be permitted to go to court. "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser-in fees, expenses and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man. There will be business enough."⁹ The role of the lawyer is clearly spelt out here. From the accusation that the lawyers perpetuate disputes, the members of the profession must undertake discouraging litigation, persuade parties to compromise, and impress upon the parties how futile is the litigation. There could not have been a better summing up of the role of lawyers.

3.12. This very aspect has been put in a different form when it is said that the slogan of the members of legal profession should be 'arbitrate, don't litigate'. Undoubtedly, there is a body of opinion that arbitration proceedings may be disastrous in character.¹⁰ This extreme statement even about arbitration proceedings need not discourage the members of the legal profession because arbitration as a mode of resolution of disputes by a Judge of the choice of the parties was considered preferable to adjudication of disputes by courts. Viewed from this angle, it has already been recommended that as soon as a notice making a claim is served, the other side should nominate a lawyer and both the lawyers should meet and try to resolve the dispute or narrow down the area of conflict and this will be their both statutory and professional obligation.¹¹ And this approach enhances the role of the legal profession and affords it a vital role at the most preliminary stage even before the courts step in to resolve the dispute and thereby to eliminate litigation.

3.13. There is widespread belief, both among the litigating public and legislators, that intervention of lawyers in court proceedings have the built-in tendency to delay the disposal of cases. In other words, the dilatoriness and prolixity of the proceedings in the court are being attributed to the members of the legal profession. Expeditious resolution of disputes is one of the fundamental requirements of any effective and efficient system of administration of justice. Today, unquestionably, the

3.16. For a positive check, while deciding the cost quantum to be pointing out that the cases in the Supreme Court are pending from 1968 onwards and in this year they have become two decades old. Even criminal appeals of 1975 are pending in the Supreme Court. Similarly, in the 18 High Courts, 30,970 civil cases and 615 criminal cases over 10 years old are pending as on 1-1-1987.¹² Can anyone be expected to wait for a generation in search of justice? Any system which delays disposal of cases or resolution of disputes over decades can be said to have outlived its utility. The system may need basic changes but, without minimising and law were raised, the same must enter the verdict and quantify the time spent in resolution of disputes.

3.14. It is an oft-repeated suggestion that the lawyers must be excluded from appearing before certain tribunals and certain types of cases. This is sought to be justified by reference to a provision like sub-section (3) of section 36 of the Industrial Disputes Act, 1947, which provides that no party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceeding under the Act or in any proceeding before a court. There are similar provisions in some other statutes, more especially statutes dealing with agrarian reforms. The Law Commission does not subscribe to this view. Appearance of the members of the legal profession provides a healthy check on the angular behaviour of the presiding Judges. The presiding Judges may be able to control the members of the legal profession and *vice versa*. The role is complementary. The experience of excluding members of the legal profession from appearing in certain proceedings has neither contributed to the expeditious disposal of cases nor to a more satisfactory solution of disputes. Therefore, exclusion is not the answer. The accountability of the members of the legal profession, while appearing in proceedings and dealing with the same, will provide a healthy check on the possible dilatory tactics sometimes resorted to in some need-based litigation, such as a position of a tenant under the Rent Act who is under a threat of eviction or the position of an employer when a dismissed employee is likely to be reinstated. Even here, the dilatory tactics should be completely eschewed. And, for this purpose, the hands of the presiding officers should be strengthened by appropriate provisions so that this tendency to delay the disposal of the cases may be effectively controlled.

3.15. Another tendency which has become very recently visible, especially where pleadings are drawn up for Mofussil Courts, is to raise all and sundry, frivolous and untenable points of facts and law. It would be difficult to come across a single pleading in the Mofussil Court where a dispute as to court fees and as to limitation is never raised. They are the standard defences. This is attributable to excessive dependence on seniors as well as para-professionals by the new entrants into the profession who are trained in the old worn out methods of drawing up pleadings. 'In the first case it is often oppressive and in the second case it is invariably degrading to the new entrants. In either event, to become independent from this occupational cobwebs, the new entrant into the legal profession has to have a long gestation period.'¹³ Longer the gestation period, the fear that he will absorb all the worn out techniques of the profession becomes real. It is, therefore, necessary for the Bar Council to provide for a training period before being enrolled as a lawyer for the new entrants to the profession in subjects of drafting, cross-examination, court manners and making precise and accurate statements before the court.¹⁴ Some of those subjects meant for training of judicial officers can be well adopted for training the new entrants to the profession.

3.16. For a positive check, while deciding the cost quantum to be awarded one way or the other, the presiding Judge must also certify whether untenable and frivolous defences were raised, necessitating framing of the issues on which parties were at variance and the time spent in recording decisions on them. If the presiding Judge is satisfied that such frivolous and totally untenable defences with regard to facts and law were raised, the same must enter the verdict and quantify the costs to be awarded.

3.17. Recording of oral evidence consumes too much time. It is often noticed that large number of witnesses are examined on the same point, the cross-examination is prolix, rambling, partaking the character of a fishing expedition. Multiplicity of witnesses on the same point, coupled with cross-examination by way of rambling fishing inquiry, accounts for consumption of court's valuable time to a considerable extent. This area is referred to here because the members of the legal profession in adversary system can contribute in not only improving the situation but removing the malaise. A duty must be cast on lawyers, if need be by a statute, to decide how many witnesses are required to be examined. Equally the cross-examination must be pointed and limited to specific inquiry. One more improvement can be made by lawyers in this area by agreeing to get the evidence recorded by a Court Commissioner. How can this be achieved has been fully examined earlier and it is not necessary to reproduce the approach of the Law Commission in this behalf.¹⁵

3.18. The next point that the members of the legal profession can assist effectively is the stage where summing up of the case is undertaken after the evidence is recorded. Oral arguments are heard for days on end. Once the argument is adjourned to another day, repetition becomes unavoidable. Again this stage consumes valuable time of the court. And it is avoidable. The arguments must be addressed on specific points which must be submitted to the court in advance; only minor elaboration may be permitted; time for listening the arguments on each side can be fixed in advance; both the parties must be given right to submit written submissions and this is the area where lawyers alone can contribute to the speedy and expeditious disposal of trial. An innovation in this behalf, if need be by a provision in the Code of Civil Procedure, is overdue.

3.19. The last stage where the lawyers can contribute effectively is the exercise of the right to appeal. There is a feeling that sometimes the party which loses the action is encouraged by the lawyer out of his deflated ego on account of loss to prefer an appeal. In fact, the lawyer of the losing party is the best Judge whether there is any merit in his case and whether the Judge of the trial court has committed a reversible error and that appeal will advance the cause of justice. He has to examine this aspect dispassionately and he must honestly and sincerely advise whether to appeal or not to appeal. If he opines that the case is not good for appeal, any other member of the profession, if approached, should enquire from the trial lawyer what opinion he has given. If the other lawyer differs, he should have valid grounds in support of his conclusion. Otherwise, the client must be discouraged from preferring an appeal.

3.20. The features of the trial herein discussed are those in which apart from the litigants, the lawyers alone have a role to play. Therefore, while examining the role of legal profession in strengthening administration of justice, these features are referred to here. If the lawyers play a positive, constructive and creative role in the areas herein discussed, they would be establishing their accountability both to the litigant and to the system.

3.21. As pointed out earlier, a time has come when, as the system is under such a stress that it is likely to collapse, alternative modes of resolution of disputes must be seriously explored. One such mode which the Law Commission has examined and already recommended is pre-trial conciliation proceedings. It is the lawyers appearing on either side who can encourage the client to agree to refer the matter to the Conciliation Court. The Law Commission has already recommended setting up of such Conciliation Courts in all urban areas. A Conciliation Court scheme has been devised by the Chief Justice of the Himachal Pradesh High Court. The same has been annexed as Appendix V to the earlier report of the Law Commission.¹⁶ Further, the whole scheme has been discussed in detail.¹⁷ The success of the scheme wholly depends upon the members of the legal profession assisting the parties in adversarial system.

3.22. It has been pointed out repeatedly that legal profession is monopolistic in character. A monopoly tends to be impervious to the consumers of its service. Why the profession is called a monopoly profession need not be discussed here; only two salient features which make it a monopoly may be referred to. The members of the profession have a power to regulate admission to the profession and they alone, save in rare cases where the court permits someone else to appear and plead in courts, have the right to appear and plead cases in courts. It can decide charges for its services. Therefore, it cannot be gainsaid that the profession is monopolistic in character.

3.23. Monopolies are generally frowned upon. Monopoly abjures competition. Absence of competition tends to adversely affect the services rendered by the monopoly. Competition in a market economy guarantees both the price and the quality. Monopoly forswears competition.

3.24. Article 19(1)(g) guarantees to a citizen the right to practise any profession, or to carry on any occupation, trade or business. This right is subject to the reasonable restriction that can be imposed under clause (6) of article 19. As clause (6) was originally drafted, a question arose whether the Union or the State Legislature was competent to pass law in regard to commercial and industrial monopolies. The State of U.P. set up a monopoly of transport for operating bus services under the name and style of Government Roadways. This action was challenged and the Allahabad High Court struck it down as unconstitutional, holding that such a monopoly totally deprived the citizens of their rights under article 19(1)(g). By the Constitution (First Amendment) Act, 1951, clause (6) of article 19 was amended to confer power on the State, either by itself or by a Corporation owned and controlled by the State to carry on any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. After this amendment, it was again contended before the Supreme Court that the amendment made in clause (6) has not the effect to exempt the law passed from creating a State monopoly from application of the rule prescribed by the first part of article 19(6).¹⁸ Upholding largely the validity of the legislation, namely, Orissa Kendu Leave (Control of Trade) Act, 1961, the Court observed that the essential attributes of the law creating a monopoly will vary with the nature of the trade or business in which the monopoly is created. They will depend upon the nature of the commodity, the nature of commerce in which it is involved and several other circumstances. The purpose of this discussion is to point out that monopoly has the inbuilt tendency to abuse its position. If legal profession is monopolistic in character, as it unquestionably is, provision has to be made to free it from the possible abuse. Accountably would be check on abuse.

3.25. What constitutes accountability especially in or in relation to legal profession? Ordinarily, accountability is confined to professional ethics, discipline and professional regulation. There is, however, a body of opinion that accountability of legal profession has a broader spectrum than mere ethics, discipline and regulation. It inheres public perception of professional responsibility and professional response to such public perception. It also concerns itself with public expectation aroused by professional services. In the context of legal profession, constitutional goals and the role of legal profession in achieving the same would also constitute a parameter of accountability. In short, the determinant is the involvement of professional interest with public interest and their ultimate coincidence.¹⁹ In thus specifying the parameters of accountability, it was noticed that 'the movement of all professions, hitherto has been from chaos to organisation, organisation to consolidation and consolidation to autonomy and monopoly'. On achieving the monopolistic status, a general outcry against it is heard. 'It is said that they are exclusive; they are elitist; they do not represent the people; they show no concern even for the basic problems of the people. Their contribution to society is minimal. Lawyers and Judges, doctors and surgeons, working and non-working journalists, teaching and non-teaching teacher from

a holy alliance to intimidate any layman presumptuous or foolish enough to enter into a dialogue with them..... People are slowly fed up of the professions and there has now emerged a demand for accountability.²⁰ Recalling the famous statement of Jimmy Carter, the former President of United States of America, that 'lawyers as a profession have resisted both social change and economic reform', it was said that 'the Bar must remember that its members must make out a *Prima facie* case for the monopoly it enjoys and reorganise the profession into a public sector which ensures human rights and remedies against human wrongs to the weakest and the protestant. Public law demands of public profession public commitments in public interest and disrobes it of its mistakes.²¹

3.26. To some extent, disciplinary jurisdiction over the errant members of the profession may provide a corrective against monopoly. As pointed out earlier, disciplinary jurisdiction, till Chapter V of the Advocates Act, 1961 came into force, vested in the High Court under sections 10 and 13 of the Indian Bar Councils Act, 1926. While discussing the debate, it has in terms been pointed out that the peer's justice system is far from effective. That is not only the view of the consumers of services of legal profession but even some experts closely associated with the functioning of the Bar Council of India. It is, therefore, time to have a second look at the disciplinary jurisdiction enjoyed by the members of the profession itself. Without attempting to introduce any far-reaching change, the High Court must be invested with *suo motu* power to review the decisions of the Disciplinary Committee of the Bar Council of State. Either the High Court should be invested with jurisdiction to do it *suo motu* or at the instance of the complainant. An appeal to the Bar Council of India and a further appeal to the Supreme Court of India is beyond the reach of many indigenous litigants. Therefore, a step of minor significance should be taken by investing jurisdiction in the High Court *suo motu* to review the decision of the Disciplinary Committee of the Bar Council of the State or the power must be exercised at the instance of the complainant or at the instance of the Advocate General of the State.

3.27. On the vexed question of strike, having given earnest consideration to all the arguments for and against, it can be said that the members of the legal profession not in general but with specific reference to ventilate their grievances or in support of some causes held dear by them. At any rate, any strike on the supposed ill-treatment of a member of the Judiciary must be wholly avoided because it has the pernicious tendency of eating into the vitals of the independence of the Judiciary. It is too obvious to need spelling out. One may spellout a rare cause on which the strike is justified but it must be treated as the weapon of last resort. If the administrative side of the court creates serious difficulties in the way of the members of the legal profession practising in the court and these are remediable, the members of the profession practising in the court should highlight the difficulties and bring them to the notice of the presiding Judge, informing him that these are remediable problems. On such information being laid with the presiding Judge, immediate steps should be taken to convene a meeting of the representatives of the Bar and of the presiding Judge and to undertake deliberations and dialogue to find out the solution. If the presiding Judge or the administrative side of the court turns deaf ears to the difficulties experienced by the members of the profession which have been brought to the notice of the administration, an intimation may be given that, as a matter of last resort, strike would be resorted to. Save this exceptional area, the strike by the members of the legal profession on the ground of their dispute with police, other administrative departments or some other grievances not attributable to the court administration must be wholly eschewed. This is suggested in the larger interest of the consumers of the service of legal profession the harassed victims of the strike

3.28. No one can seriously question, though evidence of a concrete nature is hard to come by for reasons not difficult to foresee, that the fees charged have reached astronomical figures. There may be a class of litigants who can afford the same. But that microscopic minority class need not destroy the culture of legal profession nor the market of fees. If legal profession enjoys a monopoly through a statute passed by Parliament, it is the duty of the Parliament to prescribe fees for the services rendered by members of the legal profession. The profession cannot merely have privileges and no obligations. It is time, therefore, to take a first step to prescribe the floor and ceiling in fees. The organised Bar must have administrative department where the client can go, pay the prescribed fees and seek the assistance of a lawyer. Therefore, there is no negotiation for fees and nothing more is payable. It is not for a moment suggested that some revolutionary suggestion is being pressed into service. Look around and there are countries where this system is in vogue.²²

3.29. An additional limb in support of the recommendation that the fees chargeable by the members of the legal profession for their services must be standardised within the floor and the ceiling is that, according to the representatives of the organised profession, a large number of lawyers are unable to earn minimum to keep body and soul together. The representatives of the organised Bar approached the Government of India for enacting a legislation to set up Advocates Welfare Fund.²³ The Government of India appointed a Committee under the chairpersonship of retired Judge of the Supreme Court of India and Member of the Rajya Sabha, Mr. Justice Baharul Islam. The Committee has submitted its report recommending setting up of the Fund as well as the method of funding the Fund. The Committee has also drawn up a model Bill that may be moved in the Parliament. If this is the assistance which members of the legal profession seek from Parliament, it is equally their duty to accept the power of the Parliament to prescribe fees, beyond which no one can charge.

3.30. Closely allied to the question of prescribing the floor and ceiling in fees chargeable by members of the legal profession for rendering service to litigants is the question of providing totally free service to a class of litigants who are unable even to pay the minimum of fees. The philosophy underlying article 39A of the Constitution has to be translated into an action-oriented programme. Even if the ceiling and floor in fees are prescribed, there will still be members of our society who would suffer denial of justice because they can ill-afford the fees payable to the legal profession. The fee would be a barrier to access to justice. Article 39A was a promise to them, when it was said that the State shall ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. If such seekers of justice who cannot even afford to pay the minimum fees would suffer denial of justice on account of economic disability, article 39A would stand violated. To make effective the intendment underlying article 39A, the legal profession has to gear up to provide service to such seekers of justice. The legal profession is, to all intents and purposes, in private sector. The medical profession is also in private sector but free public hospitals have been set up where anyone can get medical service without the obligation to pay any fees. The poorest can have access to such hospitals. Unfortunately, till today, there is no public sector in legal profession. It is the duty and obligation of the organised legal profession to set up its public sector unit where the services of its members would be available to those needy who cannot afford to pay the fees for their services. Legal aid scheme operated by the Government of India to some extent helps in this behalf. However, concrete measures have to be taken to set up public sector clinics, operated by members of the legal profession, where anyone who is needy and cannot afford to pay the fees of the private sector can walk in and not only get advice but even initiate proceedings for seeking justice. This is an overdue measure which the legal profession must undertake. To some extent this will also resolve the problem of accountability.

3.31. That brings us to the last limb of our examination. The approach herein indicated flows from the monopolistic character of the profession. If, as stated earlier, accountability is a check on the abuses of monopoly, equally social audit of the profession is a positive check on possible abuses of a monopoly. That needs us to spell out what is social audit. This term has been made current by the sociologists and is very much in vogue when sociology of professions is examined. The Law Commission uses it in a limited sense. As pointed out earlier, a complaint by an aggrieved litigant against a member of the legal profession is hard to come by for the fear that the concept of Peer's justice would permit probing of the charge by the compatriots of the delinquent lawyer himself. Social audit must be done by a body which does not inhere preponderance of the members of the legal profession. And the audit, to be effective, must be by a body representing persons who would otherwise claim to be aggrieved. Two institutions can effectively jointly undertake social audit of the profession. That consists of the members of the Judiciary who day in and day out have directly to deal with the members of the legal profession. And the other body consists of consumers of justice. They know where the shoe pinches. Therefore, the Law Commission is of the opinion that the social audit of the errant members of the legal profession as well as of the profession as a whole must be undertaken by a body to be statutorily constituted by introducing adequate provisions in the Advocates Act, 1961, to consist of retired Judges and consumers of justice. A methodology will have to be devised to give representation to the consumers of justice. The constituency must be of those who had to go to the court and had an unfair treatment at the hands of the members of the legal profession. It is, therefore, for consideration that legal profession must individually and collectively be subject to social audit by a body herein indicated.

3.32. If all the steps herein indicated are taken, the role of the legal profession in strengthening the system of administration of justice would be fully appreciated and the situation, both qualitatively and quantitatively, change for the better.

3.33. The Law Commission recommends accordingly.

CHAPTER IV

ACKNOWLEDGMENTS

4.1. The role of legal profession in strengthening the system of administration of justice has been examined. To repeat, this report does not concern itself with examining the role of legal profession in all its dimensions. This report concerns itself with the limited task of examining the role of legal profession in strengthening the system of administration of justice. Therefore, the parameters of the report may be viewed and understood in this context.

4.2. Legal profession is very vocal. It would not suffer any criticism of it. It is very sensitive to criticism. In fact, it resents criticism. This will be clear to any reader of this report. It is, therefore, necessary to specify clearly that apart from the Debate set out in Chapter II of this report, the Law Commission was assisted in preparing this report by Dr. Madhava Menon, Director of the Law School at Bangalore and for years Secretary of the Bar Council of India Trust and even now the editor of the Indian Bar Review, the mouthpiece of the Bar Council of India Trust. Unfortunately, Mr. Menon submitted his expert advice only on points he found time to deal with. On the other hand, Dr. J. S. Gandhi, Prof. of Sociology, Jawaharlal Nehru University, was requested to assist the Law Commission as an expert to examine, analyse and evaluate the role of legal profession from the point of view of a sociologist. He helped the Law Commission with his findings. The Law Commission acknowledges with thanks the assistance received by it from Dr. Madhva Menon and Dr. J. S. Gandhi.

(D. A. DESAI)
Chairman

(V. S. RAMA DEVI)
Member Secretary

NEW DELHI,
August 31, 1988.

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2. *Ibid.* Preface, p. 9.
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4. T.K. Oommen, "The Legal Profession in India : Some Sociological Perspectives" in N.R. Madhava Menon ed. *The Legal Profession: A Preliminary Study of the Tamilnadu Bar* (1984) p. 3
5. *Ibid.*, p. 4.
6. Dr. J.S. Gandhi, *Lawyers and Touts : Study in the Sociology of the Legal Profession*, p. 33.
7. LCI, 14th Report, Vol 1. p. 556.
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LAW COMMISSION OF INDIA

QUESTIONNAIRE

**ON
THE ROLE OF THE LEGAL PROFESSION IN STRENGTHENING
THE SYSTEM OF ADMINISTRATION OF JUSTICE**

LAW COMMISSION OF INDIA

The terms of reference drawn up for the proposed Judicial Reforms Commission were assigned to the Law Commission. One of the terms in the context of studying judicial reforms is 'the role of the legal profession in strengthening the system of administration of justice.' The Law Commission is now poised to deal with this term of reference. The role of the legal profession ordinarily should not resort to strike either to strengthening the system of administration of justice may have to be examined from different angles. One such angle is: what role the legal profession in India can play in promoting and accelerating the process of social change through the instrumentality of legal justice system. The desired social change is in the direction of building-up the egalitarian and equalitarian society as envisaged by the Constitution.

The institution of legal profession is an old one. Its present structure and format have been shaped during the Raj days. Following the Queen's proclamation in 1857, when the Crown assumed direct responsibility for the governance of India leading to the setting-up of the High Courts in three principal towns, English Barristers and Solicitors came over to India by their training and tradition shaped the legal justice system on British model. The Barristers became the symbol of status. Numerous Indians went to U. K. for becoming Barristers and acquired the British training and culture and tradition and on return to India transformed the indigenous legal profession into the British model. Even the division in the profession Solicitors-Barristers was on the same lines. Undoubtedly, because of the knowledge of the English language and their contact with British justice system, some of the Barristers of those days participated in the independence movement and played a pioneering role in it. However, on the advent of Independence, the legal profession in India failed to transform itself from one serving the colonial legal justice system into the system suited for the republican India to be governed under the liberty-oriented Constitution. The profession persisted with the out-dated and wornout legal formulations of the Raj days and for this purpose, the Court of Appeal and the House of Lords became their source of inspiration. This had led considerably to the present malaise. The most glaring reason being that a system suited to a highly literate elitist society could hardly be effective for a society with high percentage of illiteracy and poverty.

With the spread of education, more and more people turned to legal profession as it became very lucrative in course of time. Its fall-out is that the element of service has totally disappeared and the profession is wholly profit-oriented willing to squeeze the maximum profit. All undesirable tendencies unequivocally have entered the profession.

Every institution has to be socially useful for the purpose of transforming the society in which it is operating. The role of legal profession, it being a powerful vocal institution has to be examined in the context of its assistance in achieving the goals of the Constitution, the most important being amongst others to secure that the operation of the legal system promotes justice on the basis of equal opportunity, and shall, in particular, provide free legal aid, and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

It is a moot point whether the legal aid movement both voluntary and State-backed came into being on the failure of the legal profession to discharge its social obligations. It cannot be questioned that many in search of justice failed to invoke the jurisdiction of the court for want of wherewithal to pay the lawyer. Legal profession is wholly monopolistic in structure and functioning and it is now necessary to enquire whether the evils of monopoly have overtaken the profession. This is not in the spirit of criticism but introspection to find out solutions.

The Law Commission proposes to examine the role of the legal profession primarily for strengthening the system of administration of justice. The Law Commission has been in touch with the Bar Council of India and also with the bar councils at the State level on various connected issues. These bodies represent the institutional format of the organised Bar. But the society as a whole is interested in the role of the legal profession. The injustice ridden teeming millions of India are the largest body of consumers of justice and they may be given an opportunity to articulate their views. They may have a grievance syndrome against the legal profession. There are voluntary organisations, activists, protagonists of social action litigation and several others, who may make a useful contribution in analysing, examining and evaluating the role of legal profession. It is to them the Law Commission approaches by this small questionnaire and invite them to participate in the debate. The Law Commission would be interested in responses to the following questions :

1. Is the feeling rampant throughout the people who have to deal with the legal profession, that legal profession is an impediment, roadblock and obstruction to justice because of its dilatory, prolix, technical and formal approach, valid ?
2. One of the primary function of the legal profession is to assist in rendering justice. Is it true that the present day profession has moved far from it and its present role is clearly counter-productive ?
3. Law is an instrument of social engineering. Its two most important limbs are the Judiciary and the legal profession. And obviously for achieving the goals, their role must be complimentary to each other. Is it true that instead of becoming complimentary, a sort of a confrontationist situation has developed between the organised profession and the Judiciary ?
4. If the answer to the last question is in the negative, how, would you assess and evaluate recurrent strike by the legal profession ?
5. The concept of strike came from the World of industrial relations. It subsumes that the one, who is in a position to meet or satisfy the expectations of the other, fails to do so, and by direct action can be made to act in consonance with notions of justice and fairplay. If this assumption is valid, a strike by the legal profession absenting from the court cannot in most of the cases help in introducing notions of fairplay and justice, because the strike is for extraneous reasons such as where police and lawyers came in conflict in some remote city and members of the Bar in the capital went on strike. Is it proper for the members of Bar to go on strike in support of their belief that a sitting member of the Judiciary has been unfairly treated by the Government ? Would it in the long run not impair the Independence of Judiciary coveted by the Bar ? Can the Bar go on strike ? If yes for what cause and with what justification ?
6. How would you view the disinclination of the senior members of the Bar to accept Judgeship.
7. If causes which have in fact impeded and obstructed social change in the society such as resistance to agrarian reforms, resistance to bank nationalisation, abolition of privy purses and related items, would it not reflect on the legal profession that it impedes movement towards transformation of society as contemplated by the Constitution ?
8. In what sense—if at all, the contemporary legal profession has fallen in the popular estimation ? How would you evaluate the movement amongst consumers of justice for inclusion of lawyers appearing in tribunals and courts set up under socially beneficent legislations ?

9. What can be done to restore the lost image or esteem of the legal profession in the country? Among various steps that may be recommended for this purpose, can we also think of some modifications, minor or major, in the existing Advocates Act? Or, can we think of new Act to replace the present one. If so, what can be its general outline?
10. Should the professional bodies such as Bar Council of India or State Bar Councils only confine themselves to "entering" lawyers on their rolls as of now? Should they not lay down specific norms such as the ones lawyers should follow with regard to the poor and indigent clients?
11. Formerly, disciplinary jurisdiction over the members of the Bar vested in the High Court. A demand for Peer's justice led to the profession in the Advocates Act which abolished the jurisdiction of the High Courts and vested it in the Disciplinary Committee of the Bar Council at the State and National level. Has it improved the situation? Would a mere appeal under section 38 of the Advocates Act to the Supreme Court of India, be adequate in restoring the balance?
12. What measures may be taken to curb or contain the alleged hobnobbing and intimacy between :—
 - (i) The Members of the Bar and Judiciary;
 - (ii) The Members of the Bar and prosecuting officers.
13. Is it necessary to prevent a tie-up between professional bodies on the one hand and politicians and political parties on the other?
14. Is it desirable to have a standardised schedule of fees that may be charged from the clients? If so, how should it be arrived at? How would it be enforced?
15. What can possibly be done to tone down monopolistic character of professional business? It is possible to think of some norms for distributing case-load among seniors in the bar and those who are relatively juniors?
16. Is it not now opportune to devise a system by which indigenous litigants must be in a position to appear before courts and tribunals on their own and be assisted by voluntary agencies and para-legal bodies?

APPENDIX II

List of persons/bodies who responded to the questionnaire.

1. HIGH COURTS

1. High Court of Orissa
2. High Court of Karnataka

2. JUDGES

1. Justice Jayachandra Reddy, Andhra Pradesh High Court
2. Justice Y. V. Anjaneyulu, Andhra Pradesh High Court
3. Justice S. T. Ramalingam, Madras High Court
4. Justice S. M. Daud, Bombay High Court
5. Justice Tipnis, Bombay High Court
6. Shri Sanjeev Dutta, Trainee Judge Morena, M. P.

3. BAR COUNCILS/BAR ASSOCIATIONS

1. Shri Gobardhan Pujari, Member, Orissa State Bar Council
2. Shri K. A. Palanishwami, Member, Bar Council of Tamil Nadu District
3. Shri Satender Narayan Das, Bar Council, Madhubani, Bihar
4. Shri G. D. Panda, Secretary, Lawyers' Association, Parlakhemundi District, Ganjam
5. Shri P. C. Biswas, Secretary, Shillong Bar Association
6. Bombay Bar Association
7. Ahmedabad Bar Association
8. Bihar State Bar Council, Patna
9. Bar Association, Muzzafarpur, Bihar
10. Bar Council of Maharashtra and Goa
11. Bar Council of Punjab and Haryana, Chandigarh

4. ADVOCATES

1. Mrs. M. Sharma, Advocate, Shillong
2. Shri Koka Raghava Rao, Advocate, Hyderabad
3. Shri T. V. S. Dasu, Advocate, Hyderabad
4. Shri R. Rama Krishnayya, Advocate, Tenali, Guntur
5. Shri L. Ramanandha Rao, Advocate, Tenali, Guntur
6. Shri R. K. Bhatt, Advocate, Ajmer
7. Shri Ranjit D. Chaudhari, Advocate, Nagpur

5. ACADEMICS

1. Shri D. N. Saraf, Ahmedabad
2. Shri K. P. Singh Mahalwar, M. D. University, Rohtak
3. Shri P. C. Juneja, M. D. University, Rohtak
4. Shri O. P. Shukla, Indian Law Institute

6. VOLUNTARY ORGANISATIONS/CONSUMERS OF JUSTICE

1. Shri D. B. Mane, Nyaya Sudhar Sangathan, Sangli, Maharashtra
2. Shri H. D. Shourie, Common Cause, New Delhi
3. Legal Aid Centre for Women, New Delhi
4. Shri R. N. Vasudeva, New Delhi
5. Shri Harish Uppal, New Delhi.
6. D. M. I. Furtado, Goa.