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HUMAN RIGHTS AS OBJECTS OF THOUGHT AND EXPRESSIONS OF GLOBAL CONSCIENCE*

PROFESSOR R. P. DHOKALIA**

Introduction

The anniversary of the Universal Declaration of Human Rights is celebrated all over the world on 10th of December every year. It was on this day in 1948 that the General Assembly of the United Nations Organization adopted the Declaration (Resolution 217 III) which is known as the "International Magna Carta of all mankind", as it spelled out for the first time in human history the individual's rights as a common standard of achievement for all people and all nations.

The recognition by the members of the United Nations, that all human beings regardless of nationality, race, sex, language and religion possess rights deserving international recognition and protection, indeed marked a revolution of international law to the extent that it inaugurated a new era of the elevation of the status of the individual. Under the classical theory of international law, the individual had no *locus standi in judicio.* The purpose of a celebration of the Human Rights Day is to see that everyone knows and understands these rights and freedoms so that like many good ideals these rights too may not wither away for lack of public interest. It is also its object to do some stock taking of the achievements so far of the failures, shortcomings and obstacles in the way of realization of the goals, and to assess what contribution each one of us of the present generation can make so that these rights and freedoms, to which every human being is entitled, should come true not only for our generation but also for our children's children.

It is perhaps the most important development in the cultural history of *hemo sapiens* that today we are in the midst of the human rights revolution which has not only aroused aspirations of people all around the world but also created an awareness of human rights problems and a motivation to question human rights abuses and violations.

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* This is the revised verision of the U. G. C. National Lectures deliverd at the University of Bhubaneshwar, 1982.

** Secretary-General, Indian Academy/Society of International Law, New Delhi and former Professor and Dean, Law Faculty, Banaras Hindu University, Varanasi.

Human rights have raised the status of the individual under international law and provide a criterion of legitimacy for government and civilized entity for a society.

The Evolving Concept and the Movement of Human Rights

There is a variety of expressions, like '*inherent* rights', 'natural rights', 'inalienable rights', 'basic and fundamental rights', which are interchangeable terms to express the rights that a human being possess. They are essentially conceived against the state and the exercise of its unfettered authority. What are the connotations of these expressions ?

'*Inherent Rights :* Man's only right, in the last analysis, is the right to be a man, to live as a human person. Man's rights as a human person are inherent in him and belong to him as a rational and moral being and, as such, they are all based on man's right to live a human life. Therefore, inherent rights of man in this sense entitle him to judge a society, or the state, as the fundamental instrument of society, by the manner in which it seeks to secure for him the substance of those rights which are the groundwork of the state. They are the quality which give to the exercise of the state power a moral penumbra.[1]

Natural Rights : It is a necessary aspect of human nature, that men exist in and sustain a peaceful life. Those principles which are necessary for peaceful and harmonous life are "laws of nature". From this it follows that the defence of those principles just and action inconsistent with those principles is unjust. Power is thereby subordinated to reason, and there is an objective measure for the just exercise of power. Natural rights of man are conceived to exist prior to and independent of the State and government which are established to secure these rights and which are necessary to a good life. The pre-existence of these rights of man is the whole basis of political theory, and the philosophical foundation of these rights is natural law.[2] In the words of Lord Acton : *The sacred rights of mankind are not to be rummased for among old parchments of mustly records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be obscured*

1. Harold Laski, *Grammar af Politics*, 1925, 39-40.
In *Dallas v. Mitchell* the Supreme Court of the USA laid down that "the rights of the individual are not derived from government agencies either municipal, state or Federal or even from the Constitution. They exist inherently in men by endowment of the creator, and are merely reaffirmed in the Constitution, and restricted only to the extent that they have been voluntarily surrendered by citizenship to the agencies of the government, 16 C. J. S. see. 199.
2. Jacques Maritain, *Man and the State*, 1957, 80-81.

by moral power.[3] Despite the fact that natural rights have been regarded with suspicion and natural law was rejected for its defence, in the past, of causes both paltry and iniquitious, as the ideas of 'natural law' and of 'natural rights' were used by the vested interests in the nineteenth century to curb state interference with the rights of private property. The doctrine of natural rights has been recognized as the bulwark and the lever of the idea of the rights of man embodied in the charters of citizens rights at national level as well as in International Bill of Human Rights.[4]

Inalienable Rights : Social contract writers and the individualists spoke of 'inalienable rights' of man and they propounded a theory of limited government and contractual basis of the State. "Inalienable rights" of man are conceived to be those which cannot be alienated or surrundered by the individual, nor can any State or government legitimately take them away, and the people possessing the constituent power have the political right to revolution if these rights are encroached upon by the State. John Locke placed the individual at the centre of all the activities of the universe and invested him with inalienable rights, to protect these rights which he created by means of a mutual contract, a limited government which held the ruling power in trust, with the duty to preserve the individual rights.[5]

Absolute Rights : Later, William Blackstone (1723-80) in his celebrated Commentaries on the Laws of England (1756-69) transplanted this concept from the realm of political philosophy to the domain of jurisprudence. He expostulated the idea of natural liberty of mankind consisting in enjoying rights. He called them as the "absolute rights" of individuals and propounded the theory that the principal aim of a society was to protect individuals in the enjoyment of the "absolute rights." After the Glorious Revolution of 1688, the British Parliament embodied these ideas in the form of a Bill of Rights.

'*Fundamental Rights*' The legal implication of the Blackstonian doctrine and prefixing of the adjective fundamental to the substantive rights of the individual is that 'fundamental rights' are considered the essential feature of a constitution; that they are the rock on which a constitution is built; that they are the extensions, combinations or permutations of inherent rights, inalienable rights or absolute rights. These rights include : life, liberty and equality possessed by people by

3. *The History of Freedom and other Essays*, 1907, 587
4. H. Lautherpacht, *International Law and Human Rights*, 1950, 112-113.
5. John Locke, *Two Treaties on Civil Government* (Book 2) (Everyman's Library Edn.), 548, 599.

virtue of the fact that they are human beings; and that these rights are reserved by the people to themselves when they adopt the constitution and they cannot be unresonably taken away or abridged by any authority of government or by law enacted by them. The fundamental rights are enshrined in the constitution of a country with a view to redressing the balance between the power of the state to impose duties on its citizens and the powerlessness of the citizens to ensure correlative respect for their rights.

The assumption all along was that the state alone was competent to wield power and, therefore, its power must be limited. But it may be argued that imposition of limitations upon state power does not necessarily, and by itself, ensure liberty and equality, especially in the developing countries, which are full of harrowing injustices as a result of accetion and exercise of private power under their socio-economic systems.

The essential problem of liberty and equality is patently one of freedom of individuals from arbitrary restriction and discrimination whenever and however imposed. The State power as well as the growth of private power of the giant corporations, the companies, the labour unions, and the trade associations as well as of religious, tribal, racial and other powerful organizations ought to equally constrained by the rule of law and justice requirements.

The concept of human rights has gradually evolved over the past several centuries. It is immaterial whether we call these rights inherent rights, fundamental rights, or by some other name. These rights by themselves have no fixed content and most of them are empty vessels into which each generation has poured its content in the light of its experience.[6] Indeed, these rights have meaning only when men are alive today and hope to be alive tomorrow, then everyone is entitled to assume that at least an adequate standard of human life will be assured to him, not merely equal opportunities of providing or attaining it but expeditious material satisfaction. Everyone is entitled to assume that at least an adequate standard of human life will be assured to him, not merely equal opportunities of providing or attaining it but expeditious material satisfaction. Further, everyone is entitled to assume that the burden incidental to life in a society will be borne by the society. Thus, the human rights, as conceived in the last few decades of the twentieth

6. Mr Justice K. K. Mathew in *Keshavanand Bharti* v. *State of Kerala*, 1973 Sec. 881, cited from K. K. Mathew, *Democracy, Equality and Freedom*, 1978, LIX-LX.

century, are justifiable claims on behalf of all men to corporate action. They are owed to the individual by the State as well as by the organized social and economic groups which are the centres of power and authority. These rights are so construed as to constrain arbitrary application of power against individuals by the centres of power, and they entail responsibility of the state to the world society in order to ensure both accountability and justice in the acquisition, management, distribution and exercise of power in relation to individuals. In this sense, the concept of human rights has a dynamic nature in reference to time and space.

Human rights have existed, in however nascent a form, ever since man as a gragarious animal has lived in communities; family, clan, tribe, village, town or nation, and now in an interdependent world community. At successive stages of their assertion, formal recognition at various levels, and their culmination as human rights at the international level in our times, these rights of man have all along posed a basic challenge to the human civilization and to the prevalent systems of law because of the inability of the dominant in-groups of human society to include a large number of out-groups within the ambit of their privileges and benefits. The superstious acceptance by the ignorant human masses of their abject poverty, of human miseries, hunger and disease, of callous discrimination and exploitation of man by man, and of the age-old apathy of the elite in power in larger parts of this globe, has further complicated the problem of human rights. In the west, at the national level, the process of mass assertion and formal recognition of rights of man was started off by the Glorious Revolution and by the American (1776) and the French (1789) Revolutions which implied a natural corollary of the right of people to make choices of identity and form of government.[7]

Besides, in Eastern Europe, the October Russian Revolution of 1917 led by Lanin, and the Bolshevik Party's First Declaration of Rights of the Toiling and Exploiting Peoples of January 1918, proclaimed the rights of the workers and the proietoriat and launched entirely a new movement for their liberation from the age-old class-domination and

7. Lord John Somers (1651-1716), English jurist and the statesman presided at the drafting of the Declaration of Rights, 1688, and established the legality of the accession of William and Mary. Benjamin Constant (1767-1830), the French-Swiss writer and political scientist and the champion of constitutional monarchy and civil liberties, and Marquis de Lafayette (1757-1834), French hero of American Revolution and leader of the moderate party of the French Revolution of 1789 and 1830 were the leaders who have the credit of giving national expression to the rights of citizens *vis-a-vis* nation-state.

pursuit of the ideal of a classless society for the enjoyment of true liberty and equality of human society.[8] The world-wide movement of the unity of workers for pursuit of their rights has contributed enormously to their legel protection and improvement in the working conditions of the labour.

In the Third World, another unique revolution of non-violent nature, was led by the great Indian leader Mahatma Gandhi, the prophet of liberation of mankind from colonialism and racialism, who took upon himself the task of awakening the conscience of the human race on behalf of the downtrodden and the oppressed. Mahatma Gandhi did not preach class-conflict and hatred, but was the messenger of love, nonviolence, and of the concept that small is beautiful. He strove successfully to initiate the liquidation of the system of indentured labour in South Africa and of the colonial empires of Asia and Africa. His historical struggle against imperialism, colonial oppression, racialism, untouchability, and religious fanticism entitles him to be called an aposite of peace and love and a relentless crusader for human rights and dignity of the human individual.

International Recognition of Human Rights in the Twentieth Century

The international recognition of human rights did not advance beyond a few isolated and elementary steps until the end of the Second World War.[9] Till then the ideal of the rule of minimum standards had already been recognized by civilized nations in order to ensure that the individual was guaranteed certain basic rights under the municipal law of his own country.

The concept of national state sovereignity as the embodiment of supreme power evolved in Europe over the centuries after the rejection of the supremacy of the Emperor and of the Pope as the universal powers. In contrast, the history of human rights in international law is very recent.[10]

Starting with the International Labour Organisation (ILO) which was established as an autonomous part of the League of Nations by the

8. See for the account of the labour movement, the formation of the ILO and its labour conventions which owe to indirect influence of the working class movement inspired by Marxism-Lenisism and its experiment in Russia, L. Lorwin, *International Labour Movement*, 1953, 45-46 R. P. Dhokalia. *The Codification of Public International Law*, 1970, 30-31.
9. See Lauterpacht and Drost, *Humaman Rights as Legal Rights* (1965).
10. See J. N. Figgis, From *Cerson to Grotious* (1907) (available in Harper paper backs) and G. Post, *Studies in Medieval Legal Thought*, (1964).

Treaty of Versailles, 1919, was based on the idea that labour is not a commodity; freedom of expression and association are essential to sustained progress; and poverty anywhere constitutes a danger to prosperity everywhere. The ILO stands for the protection of labour against exploitation and, for the past sixty nine years, this organization has been producing international labour conventions which have found acceptance throughout the world and cover such matters as working hours, safety regulations, fair wages, abolition of child labour, freedom from discrimination in employment and from forced labour, equal pay for equal works, and allied matters. International standards are jointly drawn by the representatives of governments employers, and workers under the auspicies of the ILO and assume moral and legal authority.[11]

The U. N. Charter a strong reaction, against outrageous behaviour of the Nazi government towards its own citizens and aggression against other nations, led the victorious nations after the Second World War to link the respect for human rights with the maintenance of peace. In the first part of the twentieth century international concern for the protection of human rights against unfettered exercise of national sovereignty found expression in Articles 86 and 93 of the Peace Treaty of Versailles which gave concrete form to the principle of international protection of minorities as to their religion, culture and language against discriminatory treatment by their own state.[12] The Minorities Treaties guaranteed life, liberty and freedom of religion to the minorities inhabiting the territories concerned, equal treatment before the law and the same civil and political rights to all nationals, the same treatment and security in law, and in fact to all linguistic, religious or ethnic minority groups of nationals, the right of such minority groups to establish schools and religious institutions, and to use their own language.

Although the Minority Treaties created rights and duties between the parties only, that fact did not prevent the evolution of a procedure of position and espousal of interests created in favour of individuals.[13]

11. See P. de Azcarte, *League of Nations and National* Minorities, 1945, 123-30 I. F. Walters, *A History of* the League of Nations, 1956.
12. For a report on minority petitions to the League of Nations, see L. Mair, *The Protection of minorities* 1928. See also Satish Chandra, (ed). *Minorities in National and International Laws*, 1985 : Ben Whitaker, (ed), Minorities : *A Question of Human Rights*, 1984.
13. Earnest B. Haas, *Beyond the Nation State*, 33-80 (1964); See also S. C. Srivastava, "The Recognition of the Application of the Principle of Equal Pay for Equal work for Men and Women of India", and D. M. Pestongee. "*The International Labour Organization and Indian Labour*" *in Essays on Human*

This accounts for the reference in the U. N. Charter to human rights in Preamble and in six different articles. The Preamble speaks of the determination of the people of the United Nations to reaffirm its faith in human rights, in the dignity and worth of the human person, and in the equal rights of men and women and of all nations. Articles 1, 13, 62 and 76 refer to one of the purposes of the U. N. as seeking international co-operation in promoting and encouraging respect for human rights and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language and rellgion. Under Arts. 55 and 56, all states parties to the U. N. Charter have pledged to take joint and separate actions and to promote universal respect for and observance of human rights and freedoms. Thus, they have bound themselves by human rights progress, since a pledge imports legal obligation.

The U.N. Charter has thus provided a constitutional basis on which the United Nations can bring about changes in the status of the individual *vis-a-vis* his own state. The United Nations has been deeply involved in the furtherance of the cause of human rights ever since its inception. Its drive for action to promote respect and to protect human rights against the unfettered exercise of national sovereignty has been strong, but in evaluating the results of its efforts towards that end, one should not forget how brief the history of human rights in international law has been in comparison with the history of deeply entrenched sovereignty of states. The U. N. has a number of committees which specifically deal with political, economic, social, cultural and humanitarian human rights. It has several special committees established by the General Assembly, e.g., the Special Committee on the Policies of Apartheid of South Africa and Special Committee on the Situations with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and People and many others have provided to the U. N. an opportunity of being the most effective platform for millions of people of Latin America, Africa, Asia and the Far East for wrenching their political human rights.

The Economic and Social Council (ECOSOC) has set up the Commission of Human Rights with extensive terms of reference to enable

Rights in India, (R. P. Dhokalia, Ed. Varanasi, 1978) 105-07, 186-94. W. Paul Gormely, The Growing Protection of Human Rights and Labour Standards by the International Labour Organization", *Banaras Law Journal*, 1973, for ILO Conventions see Ian Brownlie, (ed), *Basic Documents on Human Rights* 2nd ed., Part III, 1981, 173-231. See for an excellent survey of ILO's achievements, C. W. Jenks, *Law, Freedom and Welfare*, 1963, 101-36.

it to deal with any matter concerning human rights. This Commission makes studies either on its own initiative or at the request of the General Assembly or the ECOSOC, and it submits its reports to each session of the ECOSOC. Similarly, the U. N. Commission on the status of Women prepares its recommendations to the ECOSOC on promoting women's rights in political, economic, civil, social and educational fields. Further, the U. N. Secretariat has a special division dealing with human rights, the administration of the programmes of advisory services in human rights, and the implementation of programmes like International Women's Year celebrated in 1975 and the Decade for Action between 1973 and 1983 to combat racism and racial discrimination. The United Nations has indeed rendered valuable services to the cause of promotion of human rights by setting international standards, defining principles, ensuring international co-operation for observance and respect for human rights and fundamental freedoms, providing advisory services and assisting in promotion of studies of human rights.

Universal Declaration of Human Rights

The adoption by the U. N. General Assembly of the Universal Declaration of Human Rights (Resolution 217 III) on 10th December, 1948 was the first attempt at international level to spell out the individual rights.[14] Mrs. Roosevelt rightly called it the "International Magnacarta of all Mankind", as it constitutes a landmark in the history of human rights for the following reasons :

(i) The Declaration internationalized the concept of human rights;

(ii) It was a declaration of the organized community of nations to recognize inherent dignity, and equal and inalienable rights of all members of human family;

(iii) It gave the most authoritative enumeration of basic rights and fundamental freedoms to which all men and women everywhere in the world were entitled;

(iv) It gave the most authentic expression of the human rights as a common standard of achievement for all people and nations and which in fullness of time eventually became principles of law;

(v) Although the Declaration was merely a statement of principles devoid of any obligatory character, yet it enjoined certain moral

14. UN *GAOR*. 3rd Session (i). UN Doc. A/810, 1948 at 71, also 43 *AJIL*, Supplement, 1949 at 127.

obligations upon the member states to follow them as guidlines for guaranteeing certain fundamental rights to their citizens; and lastly;

(iv) It laid down binding goals for main bodies of the United Nations and, whenever a majority of the member states felt that these rights were being denied to the people in certain countries, they could call attention of the country concerned and, more particularly, appeal to the conscience of the people of the world.

The Preamble of the Declaration runs as follows :

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world... Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women and have determined to promote social progress and better standards of life and larger freedom..."

The Universal Declaration of Human Rights embodied in 30 articles unqualified statement of traditional rights of liberty; for instance, the right to life, liberty and security of person, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of assembly and association, the right to vote to participate in government and periodic and genuine elections, equality before the law, equal protection against discrimination, right to fair trial, and freedom from slavery, servitude, torture and inhuman treatment, etc. these are the rights which are clearly based upon the traditional Bill of Rights.

The Declaration also included economic and social rights like the right to work, free choice of employment; just and favourable conditions of work; and protection against unemployment; the right to equal work; the right to rent and leisure including reasonable limitation of working hours and periodic holidays with pay, the right to marry and round a family and a standard of living adequate for health and wellbeing of oneself and one's family; the right to education; the right to social security; right to participate freely in the cultural life of the community and to enjoy the arts and to share in scientific advancement and its benefits; the right to protection of the moral and material benefits

resulting from any scientific, literary or artistic production of which one is the author, and the right to choose the kind of education that shall be given to one's children; special care and assistance of motherhood and childhood; and social protection of children whether born in or out of wedlock.

These rights were combined with social purpose and social utility. Art. 29 of the Declaration refers to everyone's duties to the community for free and full development of one's personality and recognizes that the exercise of one's rights and freedoms may be subjected only to such limitations as are determined by law, solely for the purpose of securing due recognition and respect for the rights and freedom of others and for meeting the just requirements of morality, public order and general welfare in a democratic state.

The Declaration is indeed the first authoritative statement of human rights at the international level and, though it did not provide for any international measures for protection of these rights, yet it has exercised a profound influence upon the minds of men and the practice of states throughout the world. It has influenced not only the national constitutions but also the legislation and courts as well. The Constitution of countries like Algeria, Burundi, Costa Rica, Benin, Malagasy, Mauritania, Niger, Senegal, Togo and Upper Volta have been influenced in one way or the other by the Universal Declaration of Human Rights. Besides incorporation of fundamental rights in the constitution of many countries, the evidence of its inflnence is found in legislation of others.[15] It has also been cited in judicial decisions and opinions of international and national courts.[16] The provisions of the Declaration have been cited many a times as justification for actions taken by the U. N. and have inspired international conventions both within and without the U. N. To mention only a few, by way of illustration, reference may be made to the Convention for the Supression of the Traffic in Person; the Convention on the Abolition of Slavery; the Convention on the Consent to Marriage; Minimum Age for Marriage, and Registration of Marriages;

15. David P. Forsythni, "The United Nations and Human Rights, 1945-85", 100 *Political Science Quarterly*, 1965, 249-69.

16. For example the Fair Employment Practice Act of Onario in Canada 1951 refers to the Universal Declaration. The Paraguan Decree Law No. 3642 1951 and the Thailand Government's, Proclamation of December 1951 refer to respect for Human Rights, see R. P. Dhokalia, *International Law*, 176 (Central Book Depot, Allahabad, 1963) *Anglo-Iranian Oil Company Case*,, 1950 ICJ Rep. 339, *American Federation of Labour* v. *American Sashod Doas Co.* 335 US 538, id., at note 3.

the Convention on the Elimination of all forms of Racial Discrimination; the Convention on the Abolition of Forced Labour; the Convention on the Status of Refugees, and the Convention on the Status of Stateless Persons, on Reduction of Cases of Multiple Nationality and Military Obligations.[17]

The continuing importance of the Universal Declaration of Human Rights lies in providing a foundation for future experiements and expanding dimensions of human rights and nudging states into permitting their vindication by evolving procedural and institutional changes in the field of human rights which are receiving further reinforcement and implementation at national, regional and global levels.[18]

The historical review of the evolution of human rights, from their first declaration at the national level in Virginia (1776) and in France (1789), by way of the basic rights and obligations in the Constitution of the U. S. S. R. to their proclamation at the international level in the Universal Declaration by the United Nations in 1948, demonstrates a development of these rights from class privileges of man to the rights of all free citizens, then to the rights of all citizens, and finally to the universal human rights underlining an overwhelming tendency towards a state of universal justice.

Outside the U. N. system, reference may be made to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, the Inter-American Convention, and the African Charter of Human Rights. Besides, another important declaration on human rights is the Helsinki Declaration of 1 August, 1975 which emanated from the conference on security and cooperation in Europe. The final Act in its Basket I contains a declaration of principles which refer to human rights and fundamental freedoms.[19]

17. For the texts of the major insturments other than African Charter, refer to Brownlie, *supra note* 13. The full text of the African Charter on Human Rights is reprinted in 27 *Review of the International Commission of Jurists* (December, 1981). During the last two decades and a half, the UN has adopted sixteen multilateral conventions of verying scope in the field of human rights. See M K. Nawaz, the Ratification of Accession to Human Rights Conventions" in *Dhokalia, supre* note 13 at 129.

18 See J Verzil, *Human Rights iu Historical Perspective* 1958 Caseese, "Progressive Transnational Promotion of Human Rights, in *Human Rights : Thirty Years after the Universal* Declaration 1979 249-62, Paul Sleghart *The International Law of Human Rights* 1984

19 Thomas Buergenthal, *Human Rights, Internationl Law and the Helsinki Accord* (1979), Anthony D'Amato, "International Human Rights at the Close of the Twentieth Century", 22 the *Internutional Lawyer*, 1988, 167.

International Covenants on Human Rights

The Universal Declaration of Human Rights indeed constitutes a historic event of profound significance in the evolution of a vital part of international law which has liberated the basic rights of the individual from being the exclusive concern of the separate and independent sovereign states. It elevated them to being the common concern of the states, eventually ratifying the two International Covenants : the one on Civil and Political Rights and the other on Economic, Social and Cultural Rights. These were unanimously approved by the U. N. General Assemly on 16th December, 1966 after a proteacted debate for eighteen years and became effective in 1977 entailing binding treaty obligation on states parties.

The existing comprehensive international instruments on human rights, despite differences in their points of departure, are generally understood to have well defined those human rights and freedoms which the organized world community is endeavouring to protect by limiting the exclusive authority of states and narrowing the sphere of sovereign decision-making. Notwithstanding the fact that national or state sovereignty is a constitutive element of the co-operative system of international legal order, the process of treaty limitations of unfettered exercise of national sovereignty has undoubtedly advanced to an extent that would have been unimaginable to earlier generations. This is particularly noteworthy at the regional level in Europe and America in the field of human rights. The principal comprehensive instruments which have been inspired by the Universal Declaration and have furthered the cause of human rights are the U. N. Convenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966 which purport to guarantee human rights and freedoms to all human beings, irrespective of their nationality and are intended for global application. These two great covenants contain a comprehensive catalogue of human rights and are intended for worldwide application of the guarantee of these rights and freedoms to be legally binding on states parties thereto. Two separate conventions, one on Civil and Political Rights and the other on Economic, Social and Cultural Rights have emerged owing to the division of the world into developed and developing (backward) countries, and diametrically opposed ideological campuses, which in the current terminology are respectively called North-South and East-West encounters. There have been basic differences concerning the concept of human rights. One approach in the tradition of liberal democracy lays emphasis on civil and political rights, and the other stresses the necessity

of creating the prerequisites for the exercise of those rights and freedoms, as in its view political democracy is meaningless without economic democracy. The basic difficulty is that the former approach exalts the freedoms which have a bearing on the political process and by passes the question of other freedoms altogether. Admittedly, it is necessary for any popular government to protect the political process, but it does not follow therefrom that all concern for rights ceases once that protection has been provided. If civil and political rights are to be meaningful for the millions a concerted positive action by the government is necessary, which is ordained by the duty of the government to provide jobs, social security, medical care housing, etc. This is all the more so in the era of complex, economically organized state societies and their interdependence. However, there could be no international consensus on the inextricable link between the two sets of rights and, therefore, two separate covenants were adopted.

The Convenant on Civil and Political Rights contains 53 articles which have reiterated the following rights proclaimed in the Universal Declaration : the right to life, liberty and security of the person; the right to vote and participate in government; the right to equality before the law and to equal protection of the law; the right to a fair trial including the presumption of innocence and non-retroactivity of penal laws; the right to respect for private life, home and correspondence and to marry and found a family; freedom from slavery and servitude, from torture and inhuman treatment, from arbitrary arrest and imprisonment, freedom of conscience and religion, of opinion and expression, of peaceful assembly and association, and of movement and residence. This Covenant has omitted the following rights appearing in the Declaration : the right to nationality including the right to leave any country including one's own and to return to one's country; the right of equal access to the public services; the right to periodic electional; the right to own property; the right to equal pay for equal work; and also special protection for motherhood and childhood. But the additional rights appearing in the Covenant and not in the Declaration are; freedom from coerced or compulsory labour; freedom from imprisonment on the ground of inability to perform a contractual obligation; freedom of an alien from arbitrary expulsion; and the right to compensation for unjust conviction.

As regards the Covenant on Economic, Social and Cultural Rights, it reiterates the right to work, to an adequate standard of living, to safe and healthy conditions, to just and favourable conditions of work and to rest and leisure; the right to social security; and the right to education and participation in the cultural life of the community. The rights further

added, but not mentioned in the Declaration are the right to strike; the right to the highest attainable standard of health, and the right to the protection of interests resulting from scientific, literary or artistic productions.

One common feature of these covenants is that the range of persons to benefit from their provisions is very extensive, as each states parties to these instruments undertake to apply their provisions to everyone within the jurisdiction. But we know that international protection can be achieved only when the state is made responsible to some supranational body or authority for the implementation of its obligations in the field of human rights. Unlike the Declaration which contained no measures of protection, Article 40 of the International Covenant on Civil and Political Rights provides for the states parties undertaking to submit reports on the measures adopted by them to give effect to the right mentioned in the Covenant. Article 28 provides for establishing of a Human Rights Committee, composed of eighteen members nominated by states parties to the Covenant and elected for four years at a special meeting of the states parties to the Covenant convened by the Secretary-General of the U. N. The function of the Committee is to study the reports and submit them along with its own comments thereon to the ECOSOC and to the states parties to the Covenant. The Covenant on Economic, Social and Cultural Rights too provides for a reporting system, but the States parties to the Covenant undertake (art. 16) to submit reports on the measures which they have adopted and the progress the made in achieving the observance of the rights recognized therein, to the U. N. Secretary-General for consideration of the ECOSOC, which in turn may transmit these reports to the Commission on Human Rights for study and general recommendation.

However, the main weaknesses of these Covenants are three : *fiirst*, they have a limited number of contracting parties; *second*, the broad wording of the restrictions imposed on the protected rights and freedoms results in widely varying interpretations and at times arbitrary action by states; and the *third* defect is the lack of an obligatory and effective international machinery for the enforcement of the Covenants. In the absence of an international supervisory and enforcement mechanism, the vague language of the relevant provisions may open the door to abuse of all kinds. The fact remains that a vast majority of countries have so far refrained from accepting the great human rights conventions at all. For instance, the U. N. Covenant on Civil and Political Rights of 1966 did not come into force until August 1976 after the thirty-fifth

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retification (Art. 49), and out of the total of nearly 160 states only 60 have ratified the two covenants.

Admittedly, the International Covenants form the second part of an International Bill of Rights and have registered a major advance in the global human rights movement. It is beyond doubt that the U. N. has succeeded in developing an embryonic international law of human rights and in laying the philosophic foundations of United Nations Law of Human Rrghts. It is in the field of enforcement of these inalienable rights, which every human being possesses and every civilized state must guarantee to its citizens as well as to aliens within its territory, that the U. N. and its specialized agencies have not yet succeeded, largely because of the political climate within the world body and also because of the continued assertion of absolute sovereigntly by all member states.[20] Mere formal decleration of the human rights is not enough, the U. N. must strive to protect and implement existing human rights. But the diffuculty remains that, it cannot move faster than permitted by the multi-civilizational world community and the participating states.

Whilst the U. N. agencies have attempted to develop a new human rights law, considerable progress has been made in the implementation of human rights by the regional organizations, particularly by the European organs and those of Latin America. But in this regard Africa, Asia and the Arab states have lagged far behind the Western Europe. It appears that the development level and the national integration of a country exercise a tremendous influence on bringing about a transition from a negative citizen status to a positive one, This is because the protection of human rights requires not only a degree of private initiative recognized and protected by the state, but also a positive and necessary activity of the state as well as of non-government political and social institutions in the sphere of the economy and social services. The development level and integration of a country govern the whole social and legal system and correspondingly the situation of the protection of basic human rights, which today are not only the global objectives contained in the international declarations and constitutional laws, but also are the means of international public policy for enforcing them. Developing countries in Asia, Africa anp Latin America are societies in upheaval characterized by a common colonial past, underdevelopment and its distorted infrastructure, politicized administration of justice, the

20 See, 213 United Nations Treaty Series 222 also A Robertson, *Human Rights in Europe*, 1977 and *The Yearbook of the European Convention of Human Rights*, 27 vols 1958-1984; J. Fawcett, *The Application of the European Convention on Human Rights*, 1969.

dominant position of the upper classes in stratified societies, the widespread discriminatory practices which expose the constitutional system to manipulation in the social and cultural conflicts. A majority of the countries of Africa, Asia and Latin America are in a state of extreme underdevelopment and true equality in these societies can be achieved only by means of development.

Regional Developmenis

Three geographical regions of the world, Europe, America and Africa, have adopted their own regional statements of human rights, but Europe and America in particular have succeeded in providing their own regional agencies and also have far more effective machineries of enforcement, such as the *European Convention for the Protection of Human Rights and Fundamental Rights and Fundamental Freedoms* (1950) which covers the whole range of civil and political rights and the *European Social Charter* (1961) which sets out most of the rights which are found in the two International Covenants on civil and political rights and on economic, social and cultural rights respectively.[21]

In both of these regional instruments on human rights remedies have been provided for violation by a contracting state in favour of individuals as well of the contracting states. State applications may be lodged against another contracting state without the need to establish a connection of nationality, residence or kinship with the person against whom the violation is alleged. For instance, the application by the Scandinavian countries and the Netherlands against Greece (1969) was for the protection of the Greek people against their own government.[22]

It is indeed a great merit of the European Convention on Human Rights that it has instituted a procedure which permits an individual to complain to the European Commission even against his own government, which really is a landmark in international law.[23]

If a contracting state has accepted, by declaration, the right of the individual to file a petition, everyone within its jurisdiction may benefit

21. See W. Paul Gormely, *The Procedural Status of the Individuul before Internation and Superanational Tribunals*, 1966.

22 See authorities cited in *supra* note 21.

23. See Organization of American States Treaty Series No. 36 at I. O. A. S. Official Records, OEA/Ser L/V/II. 23, Doc 21 L. Le Blance, *The OAS and the Protection of Human Rights* (1977) Ronald Scheman. "*The Inter-American Commission on Human Rights* 59 *AJIL*, (1965); 335-44 Anna Schnelber, *The Inter-Americon Commission on Human Rights*, 1970.

from the remedy. The applications are addressed to the European Commission of Human Rights, which submits its reports to the Committee of Ministers of the Council of Europe and within three months of the transmission of the report declaring a violation, the matter may be brought before the European Court of Human Rights. The implementation of the judgments of the Court is the task of the Committee of Ministers. Europe has reached a high degree of political and economic stability and shares a community of values and reaction against Nazism and Communism which accounts for the success of its regional organization.

Similarly, in America, the American Convention of Human Rights (1969) came into being in 1978. It is largely modelled on the European Convention. The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights are organs of the Organization of American States and they are closely based on the European model.[24] Under both the systems, the individual is emerging as a procedural subjects of the legal order, and a common shortcoming is that the states parties have yet to accept the compulsory jurisdiction of the regional courts of human rights. In view of the cross violations of human rights taking place in the Americas, one may conclude that the Inter-American system remains far from effective owing to the prevailing political climate.

The African countries have been liberated from the ageold colonial rule and find themselves united by a common bond of colour, philosophy of docolonization, pan-Africanism, and unfavourable conditions of economic crisis. The Organisation of African Unity (OAU) has also drawn an African Charter on Human and People's Rights.[25] It was adopted in Nairobi in July, 1981 and comprises 63 Articles. It claims to reflect the virtues of the historical traditions and values of African civilization. It has coupled human rights with the right of people and emphasizes rights as well as duties. In the context of tribal animosities, the problems of postcolonial statehood facing political and economic

24. See for the text, 21 *International Legal Materials* 58-68 (1982); The African Charter also proposes to establish an African Commission on Human Rights and Peoples, Comprising of eleven members The entire document is committed to the total liberation of Africa from colonialism, neo-colonialism, apartheid, zionism and from all forms of discrimination based on race, ethnic group, colour, sex, language, religion or political opinion. It still awaits to be adopted by the summit of the Heads of African States and to be ratified by individual nations numbering 26, Philip Kumin "The Protection of Human Rights by International Law in Africa", 27 *Law and State*, 1983, 7-13.

25. Arab League Council Res 2443 of 5 September 1968.

crisis in succession and the primary concern for political stability, internal security and development, the scale of judgement for African states need not be the degree of democratization, nor the standard of human rights, but the elementary question arises as to how far modern statehood has been attained with the beginnings of a rational exercise of power, acceptance of binding legal principles, and achievement of a minimum of social justice and personal security for the population. The record of African states in respect of human rights has been very dismal. The Anglophone African States have a phenomenon of longerterm seizures of power by the military as development dictators, whereas the Francophone states have moved towards firm political structures of civilian one-party-rule, and the political rulers therefore can best be regarded as civilian dictators. Be that as it may, the African Charter of Human Rights, following generally the model of Western Europe or America, appears to be far in advance of African reality.

The Arab League, formed in 1945 by Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, Syria and Yemen, decided to establish a permanent Arab Regional Commission on Human Rights in 1968.[26] It has a programme to the effect that all matters relating to human rights in the Arab world fall within the competence of the Commission for co-ordination of joint action by the Arab countries. It aims at protection of the human rights of the individual Arabs and promotion of respect for them in Arab countries in general. Its activities are confined to promotion rather than protection of human rights. Arab states are united together by a common religious bond and their constant struggle against Israel.

In contrast to Europe, America and the Arab states, the Asian states have only belatedly come together to probe the possibility of forming a regional organization on the model of European or Inter-American community of states. Asian states are culturally heterogeneous and are plagued by currents of varieties of tensions and age-old political hostilities. However, considering their common need of economic development, regional co-operation in trade and in interconnected economic systems of consumer goods, machines, technology and investment, and security of the regions the Asian states can come together and form an Asian community for co-operation in various fields, including promotion and enforcement of human rights. India can certainly play a leading role in taking an initiative in this direction.

26. V. K Arora, "Prospects of Cooperation", XLII, *India Quarterly* 1986 69-77. For a chronology of events leading to the formation of SAARC and vital documents see, Pramod Kumar Sharma, *Dhaka Summit and SAARC*, 1986.

Recently, on the initiative of Bangladesh regional co-operation was institutionalized in November 1985 at Dhaka by the adoption of a treaty for the establishment of a South Asian Association of Regional Co-operation (SAARC). The establishment of this confederation of seven nations for fruitful cooperation in the region of South Asia, which has a distinct regional identity, is a welcome angary. It is hoped that this association in time to come would also eventually adopt an Asian Convention of Human Rights, permitting individuals to have access to the Asian Court of Human Rights.[27]

Expanding Dimensions of Human Rights and Future Thrusts

An attempt has been made above to give an account of the movement and historical development of human rights at the global level and its impact on regional as well as national levels and providing for institutional and procedural changes in the legal system. The historical evolution has passed through certain stages; elaboration of provisions in the UN Charter for promoting respect for human rights, statement of moral ideals and standards to be pursued by states as civilized entitlies, thereby indirectly encouraging promotional efforts, adoption of an authoritiative catalogue of varieties of these rights entailing a movement for their definition from general and abstract to the specific and concrete; and persistent efforts towards improved supervision of states' policies on human rights through the Human Rights Commission, and ECOSOC functioning as a post office carrying mandates from one body to another and scrutinizing the reports from states. Even though the UN review system is neither streamlined nor effective and mandatory, and the UN core procedures are not developed or impressive, it is undeniable that there has come into existence a formal human rights regime associated with the United Nations with a world-wide public opinion in favour of positive human rights.

The concept of human rights, however, is not a static concept. According to the expectations of the parties and the need of the society, human rights are capable of expending beyond their original definition. In an evolving legal system, not only does the original definition of a right keep expanding, but new rights emerge in response to social necessities : for example, the right to health originally set forth in the Universal Declaration in 1948 has expanded to the economic right to health encom-

27. See Dobbert, "The Right to Food in the Right to Health as a Human Right", in *The Right to Health* 184-213 (R. Dupuy, ed , 1979); A, Eide, *Nutrition, Human Right in World Society*, 24-30 (1977); B. C. T. Ramcharan, ed., *The Right to Life in International Law*, 1985.

passing freedom from hunger and the right to adequate nutrition which is not only different and but also more wider.[28] The right to food has entered the human right arena and the challenge is how to spell out more precisely the normative content and the implications of this right in those countries which have adequate and those having completely inadequate food levels. New terms like "right to subsistence" or "food entitlement" too have been used which might strive to guarantee access to food to those who are below the poverty line or are unable to meet their minimum nutritional requirements so the right of everyone to be free from hunger involves a process of expansion into a right to an adequate food level and it may eventually become enforceable at international level.[29] Furthermore, it can be said to encompass the right to a pure and decent environment. The right to environmental protection has been treated as a civil and political right and also as social and economic right, but it is expanding in its application to such areas as water pollution, air pollution, ocean pollution and outer space pollution.[30] In the context of the Bhopal Gas disaster of 2nd December, 1984, which destroyed hundreds of innocent lives and affected living organisms on a massive scale,[31] one may comprehend the complete and intimate connective relationship of the proteation of human rights, the right to health, the right to life and the right to environmental protection of the individual as well as of the people as a community of group.[32]

Human rights are mostly an amalgam of social economic, political, psychological and even technological problems which are interlinked and so cannot be confined to the traditional classification of civil and political as contrasted to social, economic and cultural rights, which were recognized after the Second World war. Humankind is now witnessing a new generation of human rights which are claimed, in addition to

28. See UN Doc. E/Cn4/Sub. 2/1984/22 and Add 183. See also D'Amato, Internati nal Human Rights at the close of Twentieth Century" op cet note 19.
29. W. Paul Gormley, *Human Rights and Environment : The need for International Cooperation* 1976. See also "The Protection of the Earth Space Environment : the Use of Remote Sensing Satellites to Protect Human Rights", Idem, *Year Book of International Affaris*, 1981.
30. Wil Lepkowski, "Chemical Reaction : Safety After Bhopal", *Business and Society Review*, Summer, 1986. 38-83.
31. Gormley *Supra* note 30.
32. Philip Alston, "A Third Generation of Solidarity Rights; Progressive Development at or Obfuscation of International Human Rights Law" 29 *Netherlands Internation Law Review*, 1980, 7-29,

private individuals, by groups, people, nations and also the inernational community as a collectivity of human beings. These are often referred to as solidarity rights.[33] Such human rights as the right of self-determination of people, the right of environmental protection, the right to peace and security, and the right to development and to the benefits of natural resources stemming from the common heritage of mankind[34] are indicive of the expansive nature of pressing human needs of the entire community requiring new solutions· This expression was first used by the jurist Karel Vasak, then director of the Human Rights and Peace Division of UNESCO. In his theory, the first generation of human rights were broadly the civil and political rights (attributive rights) which the state should refrain from interfering with. The second generation of human rights comprised social, economic and cultural rights whose implementation requires positive involvement of the State according to its resources. The third generation of human rights, in Vasak's view encompasses solidarity rights, like the right to development, the right to peace and the right to clean environment which a people/community as a group is entitled to along with its members individually. For example, the right of self-determination claimed by the people has two aspects, on the one hand the prohibition of colonialism or foreign rule, and, on the other, democracy.[35] Self-determination is a prerequisite for the actual exercise of all other human rights. It is collective right, the denial of which generally results in the denial of individual rights.[36] It is for this reason that the right of people to self-determination finds a place in the basic provision of Article 1 of the International Covenant on Economic, Social and Cultural Rights as well as in Article 1 of the International Covenant on Civil and Political Rights of 1966. By virtue of the rights to independence and complete freedom, every people, even within a nation state, possesses the prereqisite and the ability to form an independent nation by the expressed will of the majority of the people concerned. This emphasises even in non-colonial

33 William A. Kewenig, "The Common Heritage of Mankind. A Politi-cal Slogan or a Key Concept of International Law", 24 *Law and State* 1980, 7-29.

34. R. Emerson, *Self determination Revisited in the Era of Decolonization*, 1964; A Rigo-Sweda, *The Evolution of the Right of Self:Determination A Study of the United Practice*, 1973.

35. See R. P. Dhokalia, "New Norm-Creating Potentialities of Bangladesh Tragedy in the Area of the Right of Self-Determination in Dhokalia, *supra* note 13 at 159-86.

36. See S. K. N. Blay, "Self-Determination versus Territorial Integrity in Decolonization", 18 *New York University Journal of International Law and Politics*, 1986, 441-H

situations, at least from the point of view of a democratic society, that it is of great advantage if as many states as possible have a government based on the active participation of those governed and those, who are in positions of power, respect the life, freedom and physical integrity of individuals. The sustained and frequent violations of individual or group rights, systematic oppression or destruction of a minority and persecution of dissidents, resort to torture, imprisonment without a fair trial, inhuman treatment, suppression of fundamental freedoms, and destruction of the cultural heritage of a people are factors which entitle them to assert the right of self-determination and even of secession which is under the protection of international law. All people are beneficiaries of the right of self-determination whatever the form of their national existence and wherever they may be situated in the world. However, this right clashes with another right of political and territorial integrity of states recognized by the UN Charter. The UN General Assembly resolution have accorded self-determination principle pre-emptive status as against the principle of territorial integrity except in territories in which the residence are not indigenous (e.g. the Falklands Gibralter), or in those which are geographically surrounded by the parent state (colonial enclaves like Goa, Ifni), or the territories whose rights are embodied in treaty or lease agreements.[37]

Similar to the collective right of self-determination of a people, other such rights are also developing which are of vital importance for a collectivity for its survival. Peace and security, economic and social development and human rights are indeed three sides of the triangle of world order, and in the absence of any one of them the triangle is not complete.[38] Without common peace and security in a society, there can be no programme of common welfare. which implies that the law must protect human rights under the umbrella concept of social justice. Hence, the Commission on Human Rights in 1969 adopted a resolution affirming that the ultimate objective of any efforts to promote economic development should be social development of the people, the welfare of every human being and the full development of his personality. The General Assembly too adopted the same year the Declaration on Social Progress and Development and this became the starting signal for a series of UN activities.[39]

37. Richard N. Gardner, *Human Right: The Ultimate Foundation in Pursuit of World Order*, 1964, 246. J. P. Humpherey, *Human Rights and the United Nations : A Great Adventure*, 1984.

38. UNGA Res. 2542 (XXIV) of 11 December 1969.

39. Paul J. I. N. di Waart, *The Right to Development*. Report for the Internationa Committee on Legal Aspects of the New International Economic Order of the International Law Association Paris, 1984.

The right to development is a callective human right of a people which is vitally necessary to eliminate conflict and to achieve true equality. This can be achieved only through the introduction of a new international system. It is indeed illusory to speak of the sovereign equality of states, when the majority of countries are still in a state of extreme underdevelopment. True equality for the Countries of Asia, Africa and Latin America can be achieved only by means of Development. The developing countries cannot guarantee peace and protection of human rights within their territories unless they bridge the gulf at domestic level between the rich and the poor and ensure equitable redistribution of wealth in their economy.[40]

The right to development described by the UN as human right is an evolving principle of international law though precise substance and facets have yet to be specified in any international legal document. The right to development received its first recognition as a human right when the Human Rights Commission asked the Secretary-General in 1977 in resolution 4 (XXXIII) para 4 to study the international dimensions of the right to development as a human right. In January 1979 the Human Rights Commission resolved that the right to development was normally a human right but equal opportunities for development were as much a prerogative of states as of individuals.[41] Since then the right to development as an evolving general principle of law has generated much debate and encompassed two principles : the principle of solidarity reflected in the increasing interdependence in international economic life; and the principle of formal and substantive equality as expressed in international economic relations in such things as the "most favoured nation" clause, the Generalized System of Preferences etc.[42] The resolution affirms the right to development of when it states that equal opportunities for development are as much a right of states as of individuals (CHR/Res. 6 (XXXVI) and A/Res/34/46). While the concept of the right to development awaits full elaboration as a legal

40. GHR, Res, 5 (XXXV). See UN Doc. E/Cn4/1334 The UN General Assembly too adopted A/Res/34/46 reflectiong the views of the Human Rights Commission, of the 150 member states only USA voted against and seven Western countries including the UK abstained

41 Drr E. D Vetwey, *The Establishment of a New International Economic Order and the Realization of the Right to Developmet and Welfare : A Legal Survey*, Geneva, 1980.

42. See, for example, The Convention on International Liablity for Damage Caused by Space Objeets, 9 October 1973, 24 U. S. T. 2889, T. I. A S. No. 7762.

concept, the basic assumption appears to be that the right already exists in international law considered as synthesis of existing human rights rather than as a new human right. Since the human being is recognized as the Central subject of the development process and is at the same time participant and beneficiary of development, the right to development serves to express the right of all people all over the world and of every human being wherever he may be to enjoy all human rights. It is not only a synthesis of civil and political, and economic, social and cultural rights, it also transceneds the dividing line between" individual and "collective" rights. It is an unique individual and collective human right in the contemporary legal order which is all-embracing and which represents will of the third generation of human rights born of the brotherhood of men and of their indispensable solidarity. It entails not only popular participation as a factor in its realization but also the duty of governments to promote development of their people. The Declaration on the Establishment of a New International Economic Order (GA Res. 3201 (S VI) para (4) stressed that there should be "full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries". In view of the existing disparity between the rich and the poor, within the nations and between the countries, the Declaration of the New International Economic Order can be considered as an important step in the right direction. The new generation of human rights embodies the human desire to challenge the existing legal order and tends to change the priority order of existing rights, or even to devaluate them and therefore much caution is required in introducing the new concepts.

Similarly, now human rights continue to emerge for the reason that the discovery and formulation of new human rights is, and will always be, an endless process, in response to social necessities. Science and technology today are acknowledged to be the key to development for solving the problem of pervasive poverty and backwardness. Development, accelerated by biological and technological explosion, has generated cycles of change which have higher amplitudes and greater frequencies than ever before. Hence, unprecedented problems and crises of all kinds tend to affect human rights adversely. Nuclear explosions, exploration of the deep seas and the outer space, dumping of chemicals and other wastes, transfrontier environmental pollution, supersonic flights and sonic booms, earth-probing operations, cybernetic developments and so on, are extrat-ordinary hazardous ventures from which emerges a new collective right of protection of the human society from injury and the right of the victims to financial/aid and expeditious payment of compensation.

The very nature of these activities imposes absolute and strict liability upon the state, multinationals and companies.[43] The human right to compensation and relief for the victims of natural disasters, like floods, cyclones, volcanic eruptions, earthquakes and famines is also proposed in the form of a draft international convention prepared under the auspices of the Office of the United Nations Disaster Relief Co-ordinator (UNDRO), whereunder relief may be granted by a United Nations emergency relief programme designed to protect human society from grave dangers and catastrophies. There is also a proposal advocating the human right to protection against tyranny to be recognized by adopting a convention for the prevention and punishment of tyranny, which would make it an international crime for a ruler to become a despot, and render the tyrants an outlaw.[44] However, it must be recognized that in proposing extensions of dimensions of human rights the reality of the existing political climate within the international community must not be ingnored and the problems of the implementation of the expanding corpus of U. N. Human Rights law must not be minimized. Also, it is to be kept in mind that it is politics, not respect for human person and dignity, which seems to be the order of the day at all levels, local, national, regional, and international. The dignity of the human person requires unremiting efforts at all levels, in particular a conviction and determination in the minds of humankind to get over the irrationality of all prejudices, to strive hard to provide for a legal and constitutional mechanism for guaranteeing equality of opportunities, for redressing wrong, and for protecting the individual from discrimination and oppression of all kinds.

The human rights, embodied in the international covenants and recognized in various degrees in many national constitutions and regional conventions, are indeed expressions of global conscience and objects of enlightened thought of mankind. If Kant's categorical imperative were to be applied to human rights it might be expressed as follows : Act in such a way as to treat humanity, both in yourself and in every other human being, at all times as an end and never merely as a means. Thus the obligatory duty of respect for the human person, prescribed for every human being by human conscience at all times towards all our fellowmen, is founded on the fact that they are entitled to free and responsible self-determination by virtue of their human dignity (which is related to the

43. See Grah-Madsen, "International Law at the Crossroads", 24 *Scandinavian Studies in Law*, 1980, at 77, 186.

44. See Robert Muller, *New Genesis : shapping a Glabal Spirtuality*, 1982; Samuel S. Kin, *The Quest for a Just World Order*, 1984.

totality of living conditions worthy of a human being) and their guarantee as human rights by every society which claims to be civilized.

We are living in an age of revolution in rising as aspirations and expectations of the liberated masses which in the past centuries were oppressed by hierachical relationships. If the Russian revolution heralded the liberation of the working classes all over the world from capitalist oppression, the Gandhian non-violent revolution in the thirties and forties of this century inaugurated a movement for the liberation of the hierarchically largest oppressed population world—the colonial majority of Asia and Africa. There are still residual oppressions to be removed from the societies having cultural, racial, or social hierachies and sanctioning varities of discriminations. When people live in a society where they are indoctrined since childhood to rear prejudices and to discriminate with impunity, and where such things formally and informally sanctioned by the prevailing system, we have a duty to ourselves as human beings to do something about it. It is not enough to have catalogues of human rights and formal laws for their enforcement. What is required is an effective preventive system against infection of discriminatory mind and behaviour of our children properly as members of interdependent human race by imparting global education which may prepare them for an interdependent, safe, friendly, happy and prosperious panetary age, All tensions, conflicts and wars begin in the minds of men. It is education in a wider sense which holds the key to the future to eliminate all kinds of discrimination from our minds. If mental fulfilment is indeed spiritual fulfilment, the process of global education can bring about a veritable mental renaissance by transcending material, scientific and intellectual achievements, reaching deliberately into the moral and sipritual spheres. It is by education that we can stress human virtues, or moral calues like love, compassion, understanding, tolerance and respect for the human person and dignity to build sound defences of peace.[45]

Conclusion

Ever since the adoption of Universal Declaration of Human Rights, the United Nations has been moving forward beyond the protection of of human rights by becoming directly involved with their implementation. The U. N. system is gradually becoming operational, and implementing

45 R. P Dhokalia, "Conflicting Perspectives on Human Rights", *Jabalpur Legal Quarterly*, (October-December 1980, 17-22 S. P. Sinha, "The Missing First Step in Human Rights Movement" Proceedings of American Branch of International Law Association, 1985-86, 17. Idem, "The Anthropocentric Theory of International Law, *lo Case Western Reserve Jl. of Intl. Law*, Human Rights Issue, 1978, 469,

machinery has been created under the authority of existing international and regional conventions, and procedural techniques are gradually being perfected. A new development is now taking place in the form of the emergence of the third generation of human rights, which are called solidarity rights to be made available to the collectivity of human groups as well as to the individual.

It must not be assumed that shortcomings and problems do not exist within the major legal systems. Increasing breaches and violations of human dignity are occurring in every continent and in almost all countries in the form of torture, slavery, child labour, and even hunger and starvation on a mass scale. A majority of states are yet to rectify the relevant human rights conventions. Conflicting versions and perspectives of human rights and sharp differences as to their priorities, mechanism and procedure for their enforcemente have not yet been reconciled. The East-West and the North-South differences have obstructed emergence of a conceptualizatiou of human rights that is more validly universal. We are aware of the great political controversy between liberal democracy and communism which is being pursued under the rubric of human rights and that too in such a way that both sides to the quarrel, along with their fanatic followers, are perpetually reproaching each other for gross violations of human rights. If, for one side contesting aggressively for power, the system of economic exploitation comouflaging behind the facade of liberal democracy is in total contradiction with human rights, for the opposite side, the move for the socalled liberation of the proletariat and the development towards true humanity in the communist sense is really a conspiracy for the establishment of the totalitarian power of monolithic party. Here we come across a conflict between the concept of human rights envisaging unconditional negation of the state (unlimited individualism) and that of unconditional affirmation of the state (unlimited statism).[46] For one, human rights are those fundamental freedoms which the state is forbidden to encroach upon as they have been in distance prior to the state and limit the state action by presupposing a legal remedy in case of infringement. For the other, the human rights are facilitative rather than restrictive of state power and are phrased as a set of goals to which the state is committed. Technically, the law of human rights puts a profound responsibility on every citizen and members of the global village to judge a government by evaluating its claims to be serving human rights. This makes every one of us a potential enemy of the state, for the reason that our legal obligations are not defined by any authoritative decision-making within the state itself.

46. See "Science, Technology and Human Rights-Perspectives", 20 *UN Chronicle*, 1988, 25-41.

Moreover, there is a third great movement, launched by the poor, the destitute, and the backward peoples and nations clamouring for self-determination and seeking to build a new social and economic order by replacing the existing unjust system. Peoples and nations, with low per capita income, non-existent or inadequate health and education services, poor housing, unemployment, fragile social or political systems and a rudimentary economy, have banded together against the rich to demand far-reaching changes which are seen as linked to human rights. Only a fourth of the total population of the Third World countries, on the continents of Africa, Asia and Latin America, have access to safe drinking water. At least 600 million of their citizens live in absolute poverty and are struggling hard for the creation of a new social and economic order. It is not enough merely to proclaim fundamental rights and general freedoms for them. It is more important to create for them the prerequisits of human rights. For them, there exists an inseperable relationship of civil, political, economic, social and cultural rights. Because of basic differences in the systems of institutions, and the concept of human rights and procedures for enforcing them, there does not seem any possibility of the nations of the East, the West, the North and the South meeting any universal standard of compliance with the International Covenants on Human Rights. So each country applies its own standards in levelling the charges of non-compliance against the other, and by the same token consider the allegations made against it as unwarranted interference in its domestic affairs. A plurality of approaches in the contemporary multi-civilizational world pertaining to human rights matters is a result of diverse value systems produced by different civilizations in their own particular historicity.

Most governments do not seem to begenuinely committed to the protection and promotion of human rights of their own subjects at home. Several governments, which are patently authoritarian, or have merely pretensions of democratic form for the perpetuation of personal or group power, consider human rights to be a dangerous pandora's box which, if it was opened, would expose the rulers/to attack. For many a government it is in their vested interest to keep the lid closed lest their failings, lapses and shortcomings at home were exposed, tarnishing their image abroad as champions of human rights. Governments, by and large, are reluctant to accept sovereignty limitation, because obviously, international commitments made by a state to grant fundamrntal rights and freedoms to individuals, impose limitations on its sovereign decision

making power. The more radical the limitations, the weightier must be the reasons for the state to assume international obligations in respect of human rights. In fact, military dictatorships reject outright the concept of human rights and Communist countries do not consider the individual private sphere immune. Human rights are entertained with the quality of the relationship between the government and the internal community and raise the question of legtimacy. Any regime which uses force in order to secure its own position, rather than for the enforcement of legal rights among citizens renders itself illegitimate. In the contemporary international legal system the concept of social and cultural self-determination is a basic assumption and it renders states the bearers of international legal rights and, therefore free from violent interventions. In this context, if the United States appeals to a theory of human rights in justifying its interventions in other countries it does so at its own peril.

Before we conclude this general survey, one another aspect also requires to be highiighted. The question of the impact of recent scientific and technological development on human rights has attracted considerable attention of the United Nations since 1968 as the result of an initiative taken by the International Conference on Human Rights held in Tehran which expressed great concern in connection with grave danger to the rights and freedoms of individual arising from development in science and technology and in particular from the following standpoints : respect for the privacy of individuals and the integrity and sovereignty of nation in the light of advances in recording and other techniques; (ii) protection of the human personality and its physical and intellectual integrity in the light of advances in biology, medicine and biochemistry, (iii) uses of electronics which may affect the rights of the persons and the limits which should be placed on such uses in a democratic society, and (iv) the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity. The new technology makes possible entirely new approaches to surveillance, and which raise the problem of protecting the privacy of the individual, as the products of new technology are to some extent being utilized in a legal vaccum which have potentialities of arbitrary invasions of the privacy of individual. Similarly, the development of computer technology has permitted enormous increase which underline the need for such safeguards to protect human rights which may be classified as physical security measures, technological safeguards and administrative professional and legal safeguards. In the fields of biology, medicine and

biochemistry, some advances tend to pose threat to the physical and intellectual integrity of people. For example, the experiments on human subjects of artificial inscrimination, genetic engineering, organ transplanation, food additives, chemical and bacteriological weapons, etc. pose serious threat to and adversely affect the structure of the society and the human environment. Though many and varied measures have been taken at the national level for the protection of human rights against threats posed by recent scientific and technological developments, yet on the international level, nothing worthwhile has been done except the possibility of setting international standards and floating of some proposals for a general Declaration on Human Rights and Scientific and Technological Developments.[47]

In our times science has become a major factor in industry, development, and war as scientific enterprise has become universal and transnational. The communal spirit of the universal scientific community is today a powerful factor in the humanitarian activities of scientists. But the dependence of the scientists all over the world on their governments exposes them to some rather special pressures to work towards explicit goals which are often mainly patriotic, or commercial, and conflict with those of the world of science as well as of the humankind. Encroachment or violation of human rights of scientists relating to the pursuit of science may seriously prejudice their professional development, achievement, and output if they become thorns in the flesh of their state's authorities. Also linkage between science and war has significant effects on the individual rights of scientists.[48]

However, this should not cause any passimism, nor should the progress made so far be disparaged. If the last four decades can be remembered as a period of definition of human rights to create an ethos favourable to the whole movement, in the decades to come the major thrust seems to be inevitably for further expansion, elaboration and implementation of human rights at local, national and higher levels through devising new instrumentalities of implementation. We come across attempts at further elaboration of particular human rights like right to religious freedom in the form of UN Declaration on the Elemination of All Forms of Intolerance and Discrimination Based on Religion

47 John Siman, Paul Sighart and John Humphrey, *The World of Science and the Rule of Law* 1986. This is a study of the observance and violations of the human rights of scientists in the participating a tests of the Helsinki Accord.

48. See Res 20 (XXXvII) adopted at 1636th meeting of the Human Rights Committee and G. A. Res 36/55 of 25 November 1981. R. P. Dhokalia : The Human Rights to Religious Freedom, Research Report unpublished.

or Belief.[49] In the similar way the rights of the child are being elaborated in an attempt to produce a convention on the Rights of the Child. No ideal in the world is capable of realization fully and in perfect form, but every modest effort made towards attainment of the goal is worthwhile because it constitutes a milestone in the long and unending journey of the human society towards peace and harmony. Man must remember the words of Goethe : "Only he has deserved his freedom who must conquer it every day." The UN movement and programme of positivized human rights can properly be evaluated from a perspective of centuries, and not merely from that contemporary problems and failures.

49. Walter H. Bennett Jr. "A Critique of the Emerging Convention on the Rights of the Child" 20 *Cornell Intl. Law Journal*, 1987, 3-64.

THE 'DECOLONIZATION' OF THE FALKLANDS ISLANDS : PROBLEMS AND PROSPECTS

B. C. NIRMAL*

I Introduction :

With the granting of full independence to Namibia,[1] only a few small territories remain on the decolonization agenda of the United Nations.[2] Even though some of these territories are geographically small they not only raise some intricate legal problems but also have the potentialities of jeopardizing the peace and security of the international community. The Falkland Islands problem falls in this category. Argentina invaded this territory on April 2, 1982, with a view to secure its own version of decolonization of the Islands, and Great Britain, the administering power in turn responded by a military offensive and re-occupied the Islands.

Both Argentina and Britain agree that the Falklands issue is a decolonization problem. However, their perceptions of the proposed decolonization of the territory sharply differ from one another and are mutually exclusive. For Britain, decolonization in the present case means the exercise of the right of self-determination by the Falklanders, which in effect would mean the continuation of the *status quo* because the inhabitants overwhelmingly prefer association with Britain. The British Premier Mrs. Thatcher stated the British position in unequivocal terms when she said[3] :

> That solution must safeguard the principle that the wishes of the islanders shall remain paramount. . . We have a long

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1. For general information on the subject see Issac I. Dore 'Self-Determination of Namibia and the United Nations : Pardigm of a Paradox; 27 *Harvard International Law Journal*, 1986, 159; Richardson, 'Constitutive questions in the Negotiations for Namibian Independence', 78 *A. J. I. L.*, 1984, 76
2. As of October 1985 following 18 territories were on the agenda of the Special Committee on Decolonization : Namibia, Western Sahara, East Timor, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, St. Helena, Turks and Caicos Islands, United States Virgin Island, Gibralter, American Samroa, Guam, Pitcairn, Tokelau, Trust Territory of the Pacific Islands, See *U. N. Chronicle* (1986 Jan.) 79.
3. Quoted in Denzil Dunnett, 'Self-Determination and the Falklands', 59 *International Affairs*, 1983, 41 .

and proud history of recognizing the right of others to determine their own destiny.

The inhabitants of the Islands are of British stock, and have demanded a continued association with the U. K. in the status of a colony. In the view of Britain 'the Falklanders loyalty to Britain is fantastic' and, therefore, if they wish to stay British we must stand by them.'[4] Mrs. Thatcher further said,[5] "Democratic nations believe in the right of self-determination... The people who live there are of British stock. They have been for generations, and their wishes are the most important thing of all, Democracy is about the wishes of the people."

On the contrary, for Argentina the decolonization process 'refers not only to the question of people, but also includes cases having to do with territories illegally occupied by colonial powers (irrespective of whether or not there is a local population).'[6] There is no doubt in Argentina's mind that its historic title to the Islands is valid.[7] It claims territorial incorporation of the Islands regardless of the wishes of the inhabitants on the basis of its historical title to the Falklands.

The events relied upon by both the parties took place long before the recent precipitation of the crisis. It is, therefore very difficult to answer the question of title to the Islands with any certainty. This paper attempts to put in focus the legal aspects of the Falkland/Malnivas Islands legal dispute and examines the diametrically opposed positions of Britain and Argentina on the decolonization issue. It further, suggests, a way to put an end to the stalemate the parties have reached.

II Geography and the History of the Islands

The Falkland Islands lie about three hundred miles of the southern coast of Argentina, about twelve hundred miles from Buenos Aires and almost eight thousand miles from the United Kingdom. They form part of the Patagonian continental shelf. The territory comprises two large islands, East and West Falkland as well as some two hundred smaller islands and Islets. The total land area of the Islands is approximately four thousand and seven hundred square miles. There are about two thousand permanent residents. Ninety seven per cent of the inhabitants

4. *Ibid.*
5. *Ibid.*
6. J. Cardenas, 'Correspondence', 77 *A J. I. L.*, 1983, 606 at 609.
7. See United Nations, Report of the Special Committee (A/31/23/Add. 9 Part III), 18 October 1976, pp. 46-75 in particular 62, 7[illegible], 50, 74.

are of British origin. Their standard of living is, in fact, higher than that of Britain which administers the Islands. Wool produced by 6,50,000 sheep constitutes the strength of their economy. A calcium alignate industry based on seaweed is augmenting the economy. In addition, there is favourable prospect of oil in the large continental shelf which surrounds the Islands. The Islands have coastlines which will entitle the administering Power under the new Law of the Seas, to broad economic zones of upto two hundred miles width.[8]

Early History : Exploration and Discovery

The history of the Islands can be traced back to the Papel Bull of 1493. By this instrument Pope Alexander gave Spain an exclusive right of occupancy and control over a large portion of the Atlantic Ocean, including the area in which the Islands lie. Although the Bull is 'a hopeless root of title[9] and was in the eye of the Roman Law, no more than the donation over which the Pope 'had no right of disposal',[10] Spain considered it a commission 'to conquer the heathen and extend the Christian mission.[11] It is doubtful whether the Treaty of Tordesillas of 1494 whereby Spain and Portugal divided vast regions of the World among themselves bound England or other States.[12]

There are conflicting claims as to who first sighted the Falklands. 'An accurate answer to the question', Metford says, 'is unlikely to be forthcoming.'[13] It is believed that a Spanish navigator Amerigo Vespucci was the first discoverer of the Islands in 1540.[14] The assertion that an English Captain John Davis and Richard Hawkins, an English navigator sighted the Islands in 1592 and 1594 respectively is far from established.[15] Lord Schackelton believed that the Dutch sea Captain, Sebald de Weert made the first reliable sighting of the Falklands on January 16,1600.[16]

8. See Thomas M. Franck and Paul Hoffman, 'The Right of Self-Determination in very Small Places' 8 *New York Journal of International Law and Politics*, 1976, 331 at 334-35
9. Waldock 'Disputed Sovereignty in the Falkland Island Dependencies', *B. Y. B. I L.* 1948, 311 at 321.
10. J. Goebal, *The Struggle for the Falkland Islands* (1927's Photo Reprint), at 61.
11. D. P. O.' Connell, 1 *Iuternational Law*, 1965, 463-69
12. Metford, 'Falklands or Malvinas', 44 *International Affairs*, 1975, 469 (He states that Spain's claim under this treaty was valid 'only in so far she could maintain it by force'.
13. *Ibtd.*
14. Goebal believed that a Spanish ship *Incognitia* discovered the Falklands in 1540 : *supra* note 10, at 23.
15. See Goebal, *supra* note 10, at 44-45.
16. *Id.* at 44-45.

Ninety years later, the Englishman John Strong arrived there and named a passage between one of the Islands and large rock, 'Falkland Sound'.[17] But his expedition was devoid of any conceivable consequence because a bare discovery without some formal act of taking possession or occupation was not deemed to be sufficient to establish an original title in the sixteenth and seventeenth centuries.[18]

The first settlement on the East Falkland took place in 1764 when Louis de Bougainville took formal possession of all the Islands in the name of Louis XV on April 15, 1764. Since the Spanish authority objected to the French settlement, it was ceded in favour of the former by French, perhaps in the recognition of Spanish rights over the Islands.[19]

In 1765 an English explorer clandestinely established Port Egmont on Saunder's Islet. The English finally found the French settlement on December 2, 1766. Since English were not the first to discover and establish the settlement the United Kingdom's claim of title to the Islands on the basis of the English expedition of 1765-66 is at best spurious. As Goebal wrotc[20] :

> (T)he British were on the Falklands without the least color of right and...their act in making settlement was one of aggression, involving not merely a denial of the validity of a previous settlement by another power, but likewise the repudiation of a solemn treaty engagement which had subsisted for over a half-century.

When Captain Hunt of the English settlement ordered the Spanish to leave the Falklands because the islands belonged to England "by right of the first discovery and the first settlement", the English settlement was attacked and occupied by the Spaniards in 1770, but was returned to the British a year later by the Declaration of 1771.[21] This Declaration merely restored *status quo ante.*' The British position that the 1771 Declaration confirmed British title to the Islands is untenable because Spain's action in promising England to their settlement in Port

17. See John M. Lindsey, 'Conquest : A Legal and Historical Analysis of the Root of United Kingdom Title in the Falkland Islands', 18 *Texas International Law Journal*, 1983, 11 at 16
18. Waldock, *supra* note 9, at 323.
19. See Monica Pinto, 'Argentina's Rights to the Falkland/Malvinas Islands', 18 *Texas International Law Journal*, 1 at 2, 1988, 10 to 20.
20. Quoted in W. M. Regisman, 'The Struggle for the Falklands', 93 *Yale Law Journal*, 1983, 287 at 295.
21. See Lindsey, *supra* note 17, at 17-18.

Egmont was most probably prompted by a secret agreement of the same year. Under that secret agreement England had promised to withdraw after a 'brief face saving occupancy.'[22] Another factor that goes against the British assertion of title on the basis of the 1771 Declaration is the fact that Spain had reserved 'the question of prior right of sovereignty' therein.[23] Even assuming that the Declaration did fix the rights of parties "the British were given a right only to Port Egmont and the Spanish claim to Soledad was implied be recognized.'[23a]

In 1774 the British abandoned the Islands leaving inscription on a plate of lead attached to the settlment blockhouse.[24] Although there is no evidence to suggest that England intended to abandon the Islands,[25] it is quite possible to argue that the lack of activity on the part of Britain to undertake any act of occupation for almost sixty years could transform the evacuation of 1774 into a genuine abandonment.[26] In the view of Goebal, the British withdrawal in 1774 became an abandonment as 'a definite presumption of law'[27] by virtue of the Nootka Sound Convention, 1790. Under that agreement Britain agreed not to form in future any establishment on the Islands, already occupied by Spain.[28]

22. See Goebal, *supra* note 10, at 361; Lindsey, *supra* note 17.
23. Goebal at 359, n 10.
23a. J. Goebal, *op. cit.* (reve ed. 1982) at 466.
24. That inscription was :

    Be it known to all nations the Falkland Islands, with this part. the storehouses, wharfs, harbors, bays, and creeks there unto belonging are the sole right and property of His Most Sacred Majesty George the Third, King of Great Britain, France and Ireland, Defender of the Faith, etc. In witness where of this plate is set up, and his Britannic Majesty's colors left flying as a mark of possession by S. W, Clayton, commanding officer at Falkland Islands, A. D. 1774.

    Quoted in Reisman *supra* note 20 at 298, n. 50.
25. It is not a simple matter to infer abondoment from the fact of withdrawal for as Hyde noted, "(c) ircumstances indicating abandonment rarely occur". C. Hyde, '*International Law*, 1922, 191.
26. H. Smith has taken this view. Quoted in Lindsey, *supra* note 17, at 20 n, 59
27. Goebal, *supra* note 10 at 166.
28. The relevant provision runs as follows :

    It is further agreed with respect to the eastern and western coasts of South America and the Islands adjacent, that the respective subjects shall not form in the future any establishment on the parts of the coast situated in south of the parts of the same coast and of the Islands adjacent already occupied by Spain, it being understood that the said respective subjects shall retain the liberty of landing on the coasts and islands so situated for objects connected with their fishing and of erecting thereon huts and other temporary structures serving only those objects.

    Quoted in Reisman, *supra* note 20 at 298-99.

Even assuming that British withdrawal was not an abandonment in legal sense, it extinguished British claim to the title which only arose from adverse possession.[29]

From 1774 until 1811 the Islands remained part of the Vice-Royalty of Buenos Aires and Spain appointed Governors to rule the same. In 1811 Spain withdrew from the Islands and thereafter 'the islands, were once again abandoned.'[30] After the Argentina Government proclaimed its independence from Spain in 1816, it claimed the Islands under the *Uti possidetis* rule.[31] Under this rule 'Spain's former colonies in Latin America upon gaining independence, retained the same boundaries that they had previously enjoyed as vice-royalties.'[32]

Although the proponents of the Argentina's case believe that the *Uti possidetis* rule would sustain Argentina's claim, Lindsey maintains that it would do so 'if the assumption can be made that Spain had not lost sovereigtnty over the Islands through dereliction as a result of the withdrawal of its Falkland Islands colony in 1811.'[33]

On November 6, 1820, the Navy Colonel David Jewett, commander of the vessel Heroina formally claimed the Islands on behalf of Argentina and by 1826 Argentina established a settlement.[34] The United Kingdom recognized Argentina's independence by the treaty of Amity, Commerce and Navigation of 1825.[35] Since this treaty did not contain any reservation concerning the Islands, it is arguable that the United Kingdom could be deemed to have implicitly recognized Argentina's title over the territory.[36] It has also been argued that the treaty 'strengthened Argentina's rights and ought to have estopped Great Britain.'[37]

Between 1825 and 1833 Argentina performed certain possessive acts. Apart from the appointment of three military commanders-David Jewett, Guillermo Mason and Paplo Areguati in succession to rule the

29. Goebal *supra* note 23a, at 425.
30. J. Goebal, *supra* note 10 at 433.
31. For an interesting discussion of the doctrine see Blum *infra* note 57, at 341-42.
32. Lindsey, *supra* note 17 at 21-22.
33. *Id.* at 22.
34. *Id.* at 22-23.
35 Pinto, *supra* note 19, at 3.
36. *Ibid.*
37. Pinto, *supra* note 19, at 3. Further, Schwarzenberger noted : However weak a title may be and irrespective of any other criteron, recognition estops the s ate which has recognized the title from contesting its validity at any staps the state time. Sch-warzenberger, 'Title to Territory', Response to a Challenge, 51 *A. J. I. L.*, 1957, 316-17.

Islands, lands and rights for breeding live-stock were granted.[38] In 1929 Louis Vernett, a beneficiary of these concessions of land in Malvinas, was installed as the Political and Military Commander of the Islands. Vernett alerted the vessels of various nations that he intended to enforce Argentine seal fishing regulations and warned them that violators could be sent to Beunos Aires for trial. It caused the British Charge d' affairs in Beunos Aires to deliver a formal protest against the decree that appointed Vernett the Governor.[39] When an American fishing Vessel 'Harriet' was seized for violating Argentine regulations and sent to Buenos Aires to stand trial, Captain Duncan, the commanding officer of the U. S. S. Lexington attacked the Falklands on December 28, 1831 and destroyed the Argentine settlement.[40] In 1832 a new civil and military commander was appointed and the settlement was again populated.

Duncan's armed intervention helped the British to dispossess the Argentines from the Islands by use of force and occupy them on January 3, 1833. All this took place without bloodshed.[41] Later the British made use of force in order to 'subdue Antonio Rivero and five Argentine convicts who went on rampage.'[42] At that time Argentina lacked means to expel the English from the Falklands[43] but it promptly made diplomatic protests with the British Charged' Affairs on January, 22, 1833. Such protests have been made consistently by Argentina throughout the last one hundred and fifty years.

III Legal Bases of the U. K. Claim of Sovereignty

The U. K. claim of title to the Islands seems to be based primarily on occupation. According to the U. K. 'British sovereignty which was first established in 1765 was 'peaceably re-asserted' in January 1833.[44] Assuming the 'critical date'[45] as 1766, when Port Egmont was founded

38. Pinto, *supra* note 19 at 3.
39. *Ibid.*
40. *Ibid.*
41. Lindsey, *supra* note 17 at 25.
42. *Ibid.*
43. In view of frequent and persistent protests Baty said that '(i) t is impossible to resist the conclusion that their protests were justified," Baty, Abuse of Terms; "Recognition" : "War", 30 *A J. I. L.* 1936, 377, 386-87.
44. *Supra* note 7, at 70.
45. Sir Gerald Fitzmaurice stated the critical date theory in these words :

(T) heory of the critical date involves... that, whatever was the position at the date determined to be critical date such is still the position now. Whatever were the subjects of the Parties then, those are still the rigths of the

by Great Britain, effective occupation was already founded by the French who transferred Port Louis to Spain in 1767 apparently in recognition of of the Spanish rights over the islands. Again, as one scholar argues 'Great Britain was estopped from claiming sovereignty because of the treaties concluded with Spain in 1604, 1670 and 1713 that recognized without reservation Spain's title to the Islands."[46]

The British claim inscribed on the lead plate that was left on the Port Egmont blockhouse in 1774 was a 'dubious one'.[47] It certainly did not justify the British invasion of the Islands in 1833. The British sovereignty could be based on its occupation of the Islands in 1833 if the Falklands were *terra nullius*. Since Argentina's occupation had been manifested in various ways between 1820 and 1832, the United Kingdom will find great difficulty in establishing that fact. Again, forcible expulsion of the Argentines from the Islands by the United States and Britain cannot be considered a voluntary abandonment of the Falklands by Argentina. It is quite possible that both the United States and Great Britain regarded Louis Vernett a 'piratical adventurer' but their opinions could not have affected his authority as the Argentine Governor of the Islands "because only Argentina had the power to disvow Vernet's authority', and this is something the Argentines have never done."[48]

The current claim of the United Kingdom cannot rest on prescription in view of the frequent and persistent Argentine diplomatic protests made throughout the last one hundred and fifty years.[49]

Although strangely the United Kingdom has never asserted that they acquired title to the Falklands through a petty conquest in 1833, Lindsey argues that 'title by conquest remains the simplest foundation

Parties now. If one of them then had sovereignty, it has it now, or is deemed to have it. If neither had it, then neither has it now.. The whole point, the whole *raison detere*, of the critical date rule is, in effect, that time is deemed to stop at the date, nothing that happens afterwards can operate to change the situation that then existed. Whatever, the situation was, it is deemed in law still to exist; and the rights of the Parties are governed by it." "Fitzmau rice, 'The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II," *B. Y-B. I. L.*, 1956, 21-22.

46. Monica Pinto, *supra* note 19 at 5.
47. H. Smith, 2 *Great Britain and the Law of Nations*, 1935, 62.
48. Lindsey, *supra* note 17, at 29
49. Monica Pinto, *supra* note 19 at 4. For general information on acquisitive prescription see I. Brownlie, *Principles of Public Iuternational Lam*, 1966, 143; R. Y Jennings, The *Acquisition of Territory in International Law*, 1963, 20-25. Johnson, 'Acquisitive Prescription in International Law', *B. Y. B. I. L.*, 1950, 332; MacGibbon, 'The Scope of Acquiescence in International Law', *B. Y. B. I. L.*, 1954, 143.

for United Kingdom sovereignty over the Falklands.'[50] Undoubtedly, conquest was a recognized mode of acquiring and losing territory prior to the United Nations Charter. However, the validity of the British title based on conqust is questionable. Pinto, for example, maintains that 'it cannot be argued that Great Britain acquired the Islands[51] by debellatio',[52] because there was no state of war between Argentina and Great Brirain.[53] According to another view a conquest followed by 'subjugation'[54] is adequate to confer a title on the United Kingdom not with standing the absence of a state of war between the competing states.[55] As Lindsey points out, "the requirement of subjugation is certainly satisfied by almost one hundred and fifty years of continuous English rule; no one has ever accused the British of showing serious concern over the fact that the Argentines have in steadcastely refused to accept the legitimacy of the 1833 English conquest."[56]

On the contrary, the Argentine position on January 3, 1833, arguably supports its claim of title to the Islands based on 'historic title'[57] and

50. Lindsey, *supra* note 17 at 32.
51. See generally, H. Lauterpacht, *Private Law Soures and Analogies of International Law*, 1927, 105; John Fischer Williams Seisin and the League', *B Y. B. I. L*, 1926, 24 at 35; D. H N Johnson, *Self Determination within the Community of Nations*, 1957, 246 R. Y. Jennings observed that 'conquest must remain even today a valid title in those cases where the resort to force is not unlawful.' *supra* note 40 at 64. According to Dinstein, 'Even if ihe inittial act of annexation was invalid, the prolonged (and undisturbed) exercise of sovereigntly in the territory will create priscriptive rights, independently of the originally defective title.' Yoram Dinstein, *War, Aggression and Self-Defence*, 1988, 161,
52. Pinto, *supra* note 19 at 4.
53. According to Oppenheim war is an element of conquest, *International Law*, 566 (8th ed H. Lauterpacht 1955). In *Legal Status of Eastern Greenland* (Den. v. Nor.) 1933 *P C. I J*, See A/B No. 53 at 47, the Court said : Conquest only operates as a cause of loss of sovereignty when there is war between the States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State.'
54 According to Hyde, subjugation must be such that "(i) t be taken not only the acquisition of rights of sovereignty by virtue of sheer power, but also unconcern on the part of the conqueror as to the lack of any agreement manifesting aceeptance of the change by its foe." C Hyde, 1 *International Law*, 1922, 197. cited in Lindsey, *supra* note 17, at 31.
55. Jennings, supra note 49, at 53. Williams observed that '(i) t would be a strange law that would give to the author of a homicide advantages which it denies to a mere highway robber" *supra* note 51, at 27.
56. Lindsey, *supra* note 17 at 31.
57. See generally Y. Blum, *Historic Titles in Intrnational Law*, 1965,

'proximity'[58] of the Islands to the mainland. As Pinto observed[59] :

> At that time Argentina as successor to the rights of Spain over the Archipelago based its title on effective occupation and the subsequent display of sovereignty. Furthermore, Great Britain was estopped from contesting Argentina's rights because of British acts of recognition namely, exemplified, *inter alia* by the 1771 reservation acceptance, the San Lorenzo Convention of 1790 and of the Treaty of 1825.

Be that it may, the Argentine occupation of the Islands between 1820 and 1832 and various acts of sovereignty performed by it supported Argentina's position. Similarly, regardless of whether the U. K.'s claim to the Islands is lawful or not, the British occupation subsequent to 1833 is an established fact. Perhaps Deniel did not exaggerate the position when he characterised the Falklands problem as a conflict between the 'occupant sovereign' and the 'legitimate sovereign.'[60] The United Nations also has viewed the problem as a case of sovereignty dispute. The U. K.'s claim of title to the territory in question is further affected by its colonial character. The Friendly Relations Declaration, 1970 declares that—

> The territory of a colony or other non-self-governing territory has, under the Charter—a status separate and distinct from the territory of the State administering it;..[61]

IV. A Special Colonial Situation :

The United Nations Charter recognized the 'Principle of self-determination'[62] in Articles 1 (2) and 55. In addition, Chapter XII

58. The doctrine of contiguity has been repudiated by some schelars like Waldock, *supra* note 9, at 343 However, as Quincy wright observed, 'The fact is unquestionable that on frequent occasions the geographic position of territory has been offered and accepted as a justification for exceptional proceedings, admitted, in some cases, to be otherwise contrary to the requirements of international Law.' Wright, 'Territorial Propinquity', 12 *A. J. I. L.*, 1918, 519. According to Chen and Reisman '(t) he most that can be inferred from these cases in which the notion of contiguity was involved, however, is that an inchoate right may exist but must be perfocted through the usual modalities.' Chen and Reisman 'who owns Taiwan : A Search for International title.' 18 *Yale Law Jl.*, 1972, 599-656.
59. Pinto. *supra* note 19, at 5.
60. Daniels 'Conflict of Sovereignties in the Antarcic', *Year Book of World Affairs*, 1949, 241 at 269.
61. G. A. Res. 2625, 25 U. N. GAOR Supp. (No. 28) at 121, U. N. Doc. A/8028 (1970).
62. For major works on self-determination and the evolution of the principle in the context of decolonization process see generally M. Shukri, *The Concept of Self-Determination in the* United Nations, 1965; R. Sureda, *The Evolution of*

elaborated this obligation by requiring administering powers to promote, "the political..advancement of the inhabitants of the Trust territories.. their progressive development or independence—and the freely expressed wishes of the peoples concerned." Besides, Article 73 (b) obligated the colonial powers, "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institution." Article 73 (e) makes it incumbent on States responsible for the administration of territories whose people have not yet attained a full measure of self-government to regularly transmit to the Secretary-General, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories.

On the basis of these provisions of the Charter, the United Nations developed what Emerson has called 'Emerging higher law of anti-colonialism'[63] which enumerates a set of obligations very similar to those imposed by the international trusteeship system for non-self-govering territories. In Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and People,[64] the right of self-determination of non-self-governing territories has been recognised. A *prima facie* case for non-self-governing territory is one which is "geographically separate and ethnically and/or culturally distinct from the country responsible for its administration."[65] Great Britain clearly is

Self-Determination, 1973; Michla Pomerance, *Self Determination in Law and Practice*, 1982; Higgins, *The Development of International Law through Political Organs of the United Nations*, 196 ; R. Emerson, *From Empire to Nation : The Rise to Self-Assertion of Asian and African Peoples* (1960); L C. Chen, '*Self-Determination as a Human Right*', *Toward World Order and Human Dignity*, 1976 (Reisman and Western ed); R. Emerson, 'The New Higher Law of Anti-Colonailism' in The Relevance of International Law, 1968 (Deutsch and Hoffmann ed.), 153.

63. Rupert Emerson, *supra* note 62, at 153.
64. G. A. Res. 1514, 15 U. N GAOR, Supp (No. 16) 66 U. N. Doc. A/4684 1960 International law has recognized that the principle of self-determination applies to all non-self governing territories. See *Legal Consequences for States of the Continued Presence of South Africa in Nomibia* (South West Africa) notwithstanding Securit/ Council Resolution 276, 1970, (1971) I. C. J. 16, 31.
65. Principle IV of G. A. Res. 1541 (xv), 15 U. N. GAOR Supp. (No. 16) 26 U. N. Doc. A/4684 (1960). This principle is supplemented by Principle V which provides that (o) nce it has been established that such a *prima facie* case of geograpahical and ethnic or cultural distinctness of a territory exists, other elements may then be brought into consideration. The aditional elements may be *inter-alia* of an administrative, political, juridical, economic or historical naiure. If they affect the relationships between the metropolitan State

subject to Article 73 (c) requirement with respect to the Islands and its obligation in this regard will cease when the territory achieves a full measure of self-government.

A non-self-governing territory is considered to have achieved self-government by "(a) Emergence as a sovereign independent state; (b) Free association with an independent state; (c) Integration with an independent state."[66] While no conditions have been laid down for the exercise of the independence option, strict regulations have been set forth for other two options.[67] In addition, the United Nations, on many occasions, supervised self-determination elections and plebiscites in the final stages of the decolonization process in non-self-governing territories particularly in those situations where the options other than independence were to be exercised or where genuine demands for self-determination were believed to be at stake.[68]

Doctrine of territorial integrity as proclaimed in Article 2(4) of the U. N. Charter is another fundamental norm which must guide the decolonization process. As Gunther aptly points out, "Together, the doctrines of self-determination and territorial integrity defined the right of colonies to become independent within their already established colonial boundaries."[69] Franck and Paul Hoffman point out "if a colony, in the process of independence wished to alter its boundaries by joining a neighboring state, it could do so only by the free vote of its inhabitants-never in response to the pressures or claims of others."[70]

While acknowledging the applicability of the Decolonization Declaration, 1514, Argentina maintained that the principle of self-determination should not be applied to the Falklands and claimed their territorial integration. Argentina based her arguments on the historic claim and respect of the principle of territorial integrity. Argentina's other argument is that the inhabitants of the Islands are not entitled to the right of self-determination because they are settler populations.

and the Territory concerned in a manner which arbitrarily places the latter in a positon of status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 (e) of the Charter. *Id.*

66 *Ibid.*

67. See Pomerance, *supra* note 62, at 34

68. See generally, Thomas M Franck, *infra* note 96 at 699, 700.

69. Michael M. Gunther, 'Self-Determination or Territorial Integrity. The United Nations in Confusion.' *World Affairs*, 1979 (141), 203 at 204.

70. Thomas M Franck and Paul Hoffman, *supra* note 8, at 336.

IV Argentina's Arguments against the applicability of the Principle of Self-determination :

(a) *Historical Claim : The Western Sahara Opinion :*

Argentina's arguments against the application of the principle of self-determination in the case of Falklands are articulated and dressed in the language of historical claims. The *Western Sahara* opinion,[71] however, indicates that, 'historical claims should be treated with considerable skepticism and that the burden to show the contrary is upon the proponents of such claims.'[72] The case arose as a result of an attempt made by Morocco and Mauritania to integrate the territory. When the Spanish decision to conduct a U. N. supervised plebiscite in the Western Sahara was announced with a view to prevent such plebiscite Morocco persuaded the United Nations to seek an advisory opinion from the Court on legal issues arising out of the proposed Spanish decolonization. The General Assembly agreed to do so and requested for an Advisory Opinion from the Court.

The International Court of Justice defended the universality of the principle of self-determination. The Court defined the principle of self-determination, as 'the need to pay regard to the freely expressed will of people,'[73] and acknowledged that the exercise of this right could result in a decision for something other than independence viz., free association or even integration with another state.[74] But the choice between these forms of decolonization must always be the "result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informal and democratic processes, impartially conducted and based on universal adult suffrage."[75]

While recognizing the importance of the freely expressed will of people in any exercise of the right of self-determination, the Court noted the fact that :[76]

> in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory.

71. Advisory Opinion on *Western Sahara* (1975) I. C. J. Rep 12.

72. Roger S. Clark 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression', 7 : 2 *The Yale Journal of World Public and Order*, 1980, 2 at 25-26.

73. (1975) I. C. J. 12 at 32.

74. No. 32

75. G. A Res. 1541 (xv) cited by the I. C. J. with approval *Id* at 32-33.

76. *Id.* at 33.

Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.

The Court answered the question whether the Western Sahara was a *terra nullius* at the time of the Spanish colonization in the negative. After examining the historical evidence the Court found that there were legal ties between Western Sahara and Morocco or Mauritania but they were not sufficient to affect the application of resolution 1514 (xx) in the decolonization process.[77] Thus the Court indicated that evidence short of establishing ties of territorial sovereignty was not sufficient to support historic claims.

The Court made this statement in the context of the recognition by the General Assembly of the people of Sahara to self-determination The Court noted that the right of the Saharwi people to self-determination constituted, "a basic assumption of the question put to the Court."[78] Furthermore, the Court's ruling endorsing the universality of the principle of self-determination was made in the context of a situation in which claims to self-determine and claims to decolonize were congruent.[79] The Court did not express itself on the self-determination v. terrorial integrity dilemma, except by indirection.[80] Judge Petren accurately interpreted the Court's statements when he said that such questions as claims to reversion of sovereignty as against present rights to self-determination fall "within an as yet inadequately explored area of contemporary international law and are not yet considered ripe for submission to the Court."[81]

In view of the foregoing, the *Western Sahara* opinion provides scant guidance to the Falkland controversy in so far as the supremacy of the principle of self-determination over that of territorial integrity is concerned.[82] Taking cue from the opinion one may, however, argue that Argentina's attempt to assert historical ties to the Falklands should succeed if the available evidence is sufficient enough to establish pre-colonial Argentine ties of territorial sovereignty to the Islands. As noted earlier, Argentina had been forcibly dispossessed of the Islands by Great Britain and any of the rights the former claimed there had been usurped.

77. *Id.* at 68.
78. *Id.* at 36.
79. Reisman, *supra* note 20, at 308.
80. Pomerance, *supra* note 62, at 70.
81. (1975) I. C J. 112, 110.
82. Reisman, *supra* note 20, at 308.

(b) Paragraph Six of G. A. Resolution 1514 :

Argentina argues that decolonization in the case of the Falklands means territorial incorporation of the Islands by Argentina regardless of the wishes of their inhabitants. The governing principle here, Argentina argues, "is that of the territorial integrity of a country, which is enunciated in paragraph 6 of resolution 1514 (xv)." Paragraph 6 provides :

> Any attempt aimed at the partial disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations.

There is serious controversy as to the intended coverage of this provision. Whose territorial integrity does this paragraph intend to preserve ? Is the injunction addressed only to states administering colonial territories or it also concerns the Special Committee ? There are two divergent interpretations : according to the first interpretation, paragraph 6 was intended to preserve the integrity of pre-colonial nations and empires. In such a case integration without consulting the indigenous population was permissible. During the debates on the General Assembly resolution, the Guatemalan representative proposed an amendment worded as follows[83] :

> the principle of self-determination of peoples may in no case impair the right of territorial integrity of any state or its right to the recovery of territory.

The Indonesian government assured Guatemala that, "the idea expressed in the Guatemalan amendment is already fully expressed in paragraph 6 of our draft resolution, and..that the territories and peoples he had in mind have been taken into consideration in our paragraph 6."[84]

During the debate other delegates made statements supporting the Indonesian interpretation of paragraph 6. Jordan, for example, argued that "the usurpation of a part of Arab territory of Palestine by the joint aggression of colonialism and Zionism constituted a prime example of a situation within the reach of paragraph 6."[84a] Morocco too emphasized its understanding that paragraph 6 covered, *inter alia*, "the regrettable dismemberment and occupation of Palestine..by this new phenomenon of foreign colonialism known as international Zionism and the silent

83. 15 U. N. GAOR Annexes (Agenda item No 87) 7 U. N. Doc. A/L 325 (1960).
84. 15 U. N. GAOR 947th Plen mtg) 1771, U. N. Doc. A/Pv 947 (1960).
84a. 15 U. N. GAGR (946th Plen mtg) 1265, 1268, U. N. Doc. A/Pv 946 (1960).

tactis of the viper-of French colonialism-to partition Morocco and disrupt its national territorial unity, by setting upon artificial State in the area of Southern Morocco which the colonialists call Mauritania."[85] This interpretation has been very often invoked to justify a historic claim to a neighbouring territory.[86]

In contrast to the first interpretation, many states voting for Resolution 1514 paragraph 6—

> probably did so in the belief that they were creating a sort of grand father clause : setting out the right of self-determination for all colonies but not extending it to parts of decolonized states and seeking to ensure that the act of self-determination occurs within the established boundaries of colonies, rather than within sub-regions. The U. N. debates and their juxtaposition with events in the former Belgian, Congo make clear that the desire to prevent self-determination from becoming a justification for Katanga-type secessions was upper most in the minds of most delegates.[87]

The reference to world 'attempt' in paragraph 6 supports this interpretation. As the U. K. representative said[88] :

> the paragraph is clearly aimed at protecting colonial territories or countries which have recently become independent against attempts to divide them... at a time when they are least able to defend themselves.

According to the proponents of this interpretation, any other construction, "would lead to a massive redrawing of the global map, unwarrantedly upsetting the stability of existing boundaries and the eminently sound principle of uti possidetis.[89]'

The United Nations has by and large adhered to the principle of the immutability of colonial boundaries and rejected the historic claims in favour of self-determination. There are, however, few cases in which the General Assembly had determined that the existence of self-determination should yield to the principle of territorial integrity. The

85. 15 U. N. GAOR (947th Plen mtg) 1271, 1284, U. N Doc. A/Pv 947 (1960).
86. Roger S Clark, *supra* note 72, at 29.
87. Franck and Hoffman, *supra* note 8, at 370.
88. A/AC 109/P. V. 284. Quoted in Sureda, *supra* note 62 at 184.
89. Pomerance, *supra* note 62, at 44.

cases of Gibralter[90] and Ifni[91] are relevant ones. The U. N. acquiescence in seizure of Goa. Daman and Diu by India in December, 1961[92] and the acceptance of the Chinese request for omission of Hong Kong and Macau from the list of territories to which the 1960 Decolonization applied[93] also lends support to the territorial integrity argument. Furthermore, the seizure of West Irian[94] and East Timor[95] by Indonesia and of the Western Sahara[96] by Morocco and Mauritania on the basis of historical claims and territorial integrity argument, notwithstanding

90. G. A. Resolutions 2353 (xxii) and 2429 For Ifni see resolutions 2072 (xx), 2229 (xxi), 2354 (xxxi), 2428 (xxiii).
91. The General Assembly's consensus decision took note of the retrocession to Morocco of the Spanish enclave of Ifni, 24 U. N GAOR Supp. (No 30) 75, U. N. Doc. A/7630 (1969) For further discussion see Rigo sureda, *supra* note 62, at 176, 197-98.
92. See generally Wright, 'The Goa Incident', 56 *A. J. I. L.* 1962, 617 United Nations acquiescence in the seizure of the Portuguese enclave of Fort Sao Joao Bapitista de Ajuda by Dahomey in 1961 is another example.
93. The Permanent Representative of China to the United Nations wrote to the Chairman of the Special Committee on Decolonization :

    As is known to all, the questions of Hong Kong and Macau belong to the category of questions resulting from the series of unequal treaties left over by history, treaties which the imperialists impossed in China. Hong Kong and Macau are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macau is entirely within China's sovereign right and does not fall under the ordinary category of 'colonial Territories'. Consequently, they should not be included in the list of colonial territories covered by the Declaration on the Granting of Independence to colonial countries and Peopies, 'with regard to the questions of Hong Kong and Macau, the Chinese Government has consistently held that they should be settled in an appropriate way when conditions are ripe. The United Nations has no right to discuss these questions For the above reasons the Chinese delegation is opposed to including Hong Kong and Macau in the list of colonial territories covered by the Declaration and requests that the erroneous Wording that Hong Kong and Macau fell under the category of so-called 'colonial territories' be immediately removed from the documents of the Special Committee and all other United Nations documents." U. N. Doc. A/AC 109/396 (1972).
94. See Sureda, *supra* note 62, at 143-151; 228-233; Lung-chu chen, *supra* note 62, at 232-235.
95. S e Roger S. Clark, *supra* note 72; "East Timor and self-Determination'. *The Review*, International Commission of Jurists, 1984, 1-6; Elliott, "The East Timor Dispute', 27 *I. C. L. Q* , 1978.
96. Thomas M. Franck, 'The Stealing of Sahara', 70 *A. J. I. L* , 1976, 614; 'The Western Sahara' '*The Review*, 2532 (1984) (Summary of Jony Hodges's article published in Third World Quarterly, January 1984, Vol. 6, No, 1; Shaw, 'The Western Sahara Case, 49 *B. Y. I. L.*, 1978, 118.

disapproved resolutions adopted in the General Assembly,[97] appear to be well on the way of being accepted by the United Nations as *fait accompli*. On the contrary, claims of territorial integrity of Guatemala and Somalia and Ethopia were rejected in favour of self-determination for the people of Belize[98] and Dijibouti,[99] respectively. The United Nations, however, deviated from the established norms in the cases of the Falkland Islands and Gibraltar. A possible explanation of this contradictory behaviour of the General Assembly may be that in these cases, the claimants are part of the majority in the United Nations and their claims are pitted against the military power.[100] Thus, "the specific identity of the claimants-whose territorial integrity is pitted against whose self-determination-remains a crucial, if not the critical facts."[101]

The United Nations' willingness to subordinate the principle of self-determination to the maintenance of world peace and territorial integrity of the neighbouring states explodes the myth that self-determination is universally approved as an imperative for decolonization process. In fact some writers argue that the denial of the right of self-determina-

97. Since 1975, the General Assembly has adopted annual resolution on East Timor, However, the majority in favour of these resolutions has been dwinding. See G A resolutions 31/53 of Dec. 1, 1967; 32/34, 28 Nov. 1977; 33/39, 13 December 1978, 34/40, 21 Nov. 1979, and 35/27, 11 Nov. 1980.

In the beginning the United Nations failed to take unambiguous and effective action against Morocco. It took note of the Madrid Agreement which violated the principle of self-determination (G. A. Res. 3438 B of 1975). Because of the success of the Polisario Front in its military struggle against Morocco and Mauritania (which was forced to withdraw from the part of Western Sahara that it had claimed). General Assembly resolutions are demonstrating more support for the self-determination and independence of the Saharn people. See G A. resolutions 34/37 of 21 Nov. 1979 and 35/19 of 11 December 1980. For recent development see 'Peace Plan for Western Sahara', *U. N. Chronicle* 32 (1988 December).

The U N. Acquiesced in deviation from the 'one man, one vote' rule in the case of self-determination' conducted in West Irian with U. N. participation. The West Irian's act of choice' resulted in integration with Indonesia, See Chen *supra* note 62, at 94.

98. In its Resolution 35/20, 11 November 1980, the Assembly declared that 'Belife should become an independent state before the conclusion of the Thirty Sixth session of the General Assembly.' The earlier resolutions 3432 (xxx); 31/50; 32/32, 28 Nov. 1977; 33/36, 13 December 1978; 34/38, 21 Nov. 1979.

99. See generally Frank and Hoffman, *supra* note 8 at 315-357. The territory exercised the right of self-determination and independence in the summer of 1977.

100. Gunther, *supra* note 69 at 213-214.

101. Pomerance, *supra* note 62, at 27.

tion may be sometimes necessary for the shake of anti-colonial results.[102] As one scholar put it, "the principle of self-determination is an instrument of decolonization and not a vehicle to perpetuate colonial situations which the overwhelming majority of the countries wish and have wished to terminate."[103]

Like any other human rights, the right to self-determination is not an absolute right and its relativity needs to be recognized.[104] There is little doubt that self-determination is a precious value but certainly not the only one in the international society. It is not just a single option in which the local inhabitants are accorded a veto right, but is a more complex "international process" which "involves choosing that option which most nearly approximates all the valid interests involved."[105] In sum, the wishes of the population concerned are not the exclusive deciding factor. In the light of the foregoing one may be tempted to accept Dunnett's view that :[106]

> There is no need for Britain to place itself in the position of France in whose constitution there is a provision that no change in French territory (including overseas territory) can be made without the consent of the population.

Reisman stated the better view when he wrote that the wishes of the inhabitants of the Falklands should be given as much deference as possible but they should not be accorded a veto right in the settlement of the dispute.[107]

3. The Inhabitants of the Islands are not a 'people' :

Another argument used by Argentina against the Falklanders having the right of self-determination is based on the fact that the original population of the Islands were expelled during the occupation of the Falklands by the British.[108] The inhabitants of the Islands are mainly

102. Korwa Gombe Adar, 'The Principles of Self-Determination and Territorirl integrity Make strange litigants in International Relations', 26 *I. J. I. L.*, 1986, 424 at 437

103. C. M. Velazquez quoted in sanchez, 'Self-Determination and the Falklands Dispute', 21 *Columbia Journal of Transnational Law*, 1983, 566.

104. On this point see Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law, 136 *R C.*, 1972-II, 454.

105. Reisman *supra* note 20 at 308.

106. Dunnett, *supra* note 3, at 427.

107. Reisman, *supra* note 20 at 308.

108. See Report of the Special Committee on the situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U. N. Doc, A/5 Pv/Rev. 1, 1964; 436-37.

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settlers claiming allegiance to Britain which is thousands of miles away and as such lack legitimate relationship to the territory.[109] In Argentina's view 'a people' is not necessarily co-extensive with the 'inhabitants.'[110] While the term 'people', refers to a group, the 'inhabitants' indicates a set of individuals,[111] The term 'people', it is argued, presupposes both geographic separation and ethnic individuality.[112] For this reason Argentina argues that the inhabitants are, not a people' entitled to the right of self-determination and, therefore, the territory should be handed over to the former sovereign (Argentina) without their consent.

The argument of the composition of the population of the Islands, raises the difficulty of determining who are the legitimate population of a territory for the purpose of self-determination. As Pomerance put it :[113]

> Which is the critical point in seamless web of history for determining the population to be deemed 'indigenous'. Are 250 years of settlement in Gibralter sufficient to establish the 'indigenous' status of the present population, as Britain claims, or are the current inhabitants to be viewed as a settler non-indigenous population, having no 'roots in the Territory', as contended by Spain ? Is peaceful settlement and non-expulsion of a previous population by force to be the test, as suggested by Spain ? On this basis, taking almost any critical date as the standard, large scale redrawing of the global, demographic and political maps would be required.

The General Assembly, conscious of this reality, seems to accept that the population existing in a territory at the time of exercising the right of self-determination is a legitimate population except in those cases where demographic changes have been effected with the aim of frustrating genuine self-determination.[114] Furthermore, the General Assembly's attitude suggests that the argument of indigenous population may be relevant but is not the sole basis for the reintegration of a colony by the claimant state. This is clear from the General Assembly's resolutions of Ifni, which are similar to those on Gibralter. In the latter case in addition to the arguments of previous possession and contiguity which

109. See Question of Malvinas Islands (Falklands) U. N Doc A/37/ Pv. 5 (20 Oct. 1982), p. 21.
110. Dunnett, *supra* note 3, at 418.
111. *Ibid.*
112. *Ibid.*
113. Pomerance, *supra* note 62, at 21.
114. See Sureda, *supra* note 62, at 220.

were also put forward in the case of Ifni, the argument of the composition of the population was advanced by Spain.[115] On the other hand, the willingness of the General Assembly to uphold the right of the people of Belize to self-determination over Guatemala's demand for reversion to sovereignty may not be unrelated to the indigenous' label of Belize's population (12000) which is much larger than the Falklands' 200 and consists mainly of Creoles, American Indian and Caribs.[116]

4. The U. N. Approach to the Falkland Controversy (1965-1981)

As in the cases of Ifni and Gibralter, the General Assembly resolutions on the Falkland Islands[117] neither includes provisions calling for self-determination of the islanders nor refers to wishes of the local population. The language of these resolutions make it clear that the sovereignty dispute takes precedence over self-determination.[118] Although these resolutions simply recommend negotiations without mentioning any transfer of the territory or paragraph 6 of resolution, there is little doubt that they basically support Argentina's claim to the Islands.

5. Diplomatic Negotiations

It is incumbent on both Argentina and Great Britain in conformity with the General Assembly's resolutions on the Islands not only to enter into negotiations, but also to persue them as far as possible with a view to reach a settlement of the sovereignty dispute concerning the Island.[119] The obligations to negotiate a settlement merely constitutes a special application of a principle which underlies all international relations and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.[120] Negotiations are not merely conversations and, therefore, if a party carries on them with a view to stall any reasonable settlement it can not be said to have acted in good faith.[121] Even if the obligation to negotiate does not mean an obligation to conclude an agreement, the parties are under an obligation to conduct themselves that the negotiations are meaningful, which will not be the case when either of them

115. *Ibid* at 198.
116. Pomerance, *supra* note 62, at 22.
117. G. A. Res. 2065; G. A. Res. 31/49.
118. Sanchez, *supra* note 103, at 571.
119. *The Railway Traffic between Lithuania and Poland*, 1931 *P. C. I. J.* Ser A/B No 42 at 116 (Advisory opinion of Oct. 15, 1931).
120. *North Sea continental Shelf* cases, 1969 I. C. J. 2, 47.
121. For further discussion, see Monica Pinto, *supra* note 19 at 9-10.

insists upon its own position without contemplating any modification of it.[122]

Over the years Argentina made serious and sincere efforts to arrive at the peaceful solution of the Falklands dispute for which it has been deeply appreciated by the United Nations.[123] It appeared amenable to any framework of solution which recognizes Argentina's sovereignty over the Islands. It offered to make the Falklands its 'most pampered region' and to respect the Falklanders' democratic traditions, should sovereignty be relinquished by Britain.[124] Argentina was willing to accept the lease back proposal according to which sovereignty would be surrendered to Argentina and then the Islaands would be leased back to Britain.[125] At one point of time it showed its willingness to accept an arrangement resembling the Aaland Islands settlement.[12126] Argentina, however, rejected the freeze on dispute proposal for which the Falklands Legislative Council indicated preference in January 1981.[127]

On its part, Britain entered into negotiations with Argentina but avoided sovereignty dispute. Instead of coming forward with proposals for the settlement of this issue, it maintained over the years that the wishes of the islanders were paramount and their right to self-determination was not a matter for negotiations. In view of Britain's insistence upon this position without contemplating any modification, its sincerity to reach a reasonable peaceful settlement and to show itself accomodative is doubtful. The failure of negotiations due to absence of good faith on the part of Britain in the recent years obviously prompted Argentina to believe that Britain was not interested in a negotiated settlement of the Buenos Aires' Claim. For this reason in the last round of negotiation that preceded the Argentina's invasion of the Island on April 2, 1982, Argentina stressed that further discussions must presuppose Argentinian sovereignty.[128] Again on March 1982 its Foreign Minister warned in Buenos Aires that if there were no negotiated settlement, Argentina would end the negotiations and seek other means.[129]

VI. Legality of Argentina's Act of April 2, 1982 :

The use of force by Argentina to resolve the sovereignty dispute over the Falklands evoked world wide concern. If the United States

122. *Supra* note 120 at 47.
123. General Assembly Resolution 3160.
124. See Reisman,, *supra* note 20 at 310.
125. *Id.* at 317.
126. *Id.* at 316-17.
127. *Id.* at 310.
128. Reisman, *supra* note 20, at 310-11.
129. Ibid.

and the Western European allies regarded the Argentina's action unpardonable, quite a number of non-aligned countries which had hitherto strongly supported Argentina's claim to the Islands were made nervous. With a view to secure the reoccupation of the Islands the British Government not only imposed unilateral financial and other economic sanctions against Argentina but also undertook military offensives against the Argentine forces. The United States supported the British cause by giving logistical and material assistance to Great Britain and applying a number of coercive economic measures against Argentina[130] Besides the United States, the E. E. C., Australia, Canada, New-Zealand and Hong Kong applied economic sanctions against Argentina. As a result of these measures, the Islands came again under occupation of Britain.[131]

When the news of a imminent invasion of the Falklands by Argentine forces began to circulate, on April 1, 1982, the Security Council met in an informal consultation and its President issued an appeal calling on the Governments of Argentina and the United Kingdom to exercise the utmost restraint and in particular to refrain from the use or threat of force in the region and to continue the search for a diplomatic solution.[131a] On the day Argentine force invaded the Islands the Security Council met to discuss the situations and adopted a resolution at the request of Great Britain. The resolution[131b] advoided characterizing Argentine action as an act of argession and termed the situation as a 'breach of peace', without stating explicitly which party was responsible for it. Moreover, it demanded an immediate cessation of hostilities and immediate withdrawal of all Argentine forces and called on both Argentina and the United Kingdom to seek a diplomatic solution. Argentina welcomed the Security Council resolution and expressed its readiness to continue negotiating as it had done in the past. It stated, however, that sovereignty over the islands was not negotiable. It also kept silence on the question of withdrawal of its forces till April 30, 1982. On that day it requested the U. N. Secretary General to mediate in the Falklands crisis. Subsequently, both the contending States agreed to a peace plan outlined by the Secretary General as tentative framework for future talks.

Western Scholars condemned the entire Argentine operation for the violation of the Charter principal against use of force in the settle-

130. See, Domingo E. Acevedo, 'The U. S. Measures against Argentina Resulting from the Malvinas Conflict, '78 *A. J. I. L* , 1983, 323-44.
131. The text of the Security Council's President's appeal is quoted in Acevedo, *supra* note 130, fn. 1.
131a. For the Text of the Resolution 502, See *Y. U. N.* (1982), p. 1347.

ment of disputes. Thomas Tranck went so far as to assert that the British response was first and foremost based on this Charter principle.[132] In a similar vein Farook Hassan observed :[133]

> If negotiations fail to solve disputes such as the Falklands crisis, one party's aggression on grounds of self-defense cannot be justified, even if based on historic claims. While the speedy realization of justice in the international arena is difficult to accomplish, allowing the use of force to accomplish that end would, in the process destroy whatever peaceful options now exist.

He added further that, 'armed solutions of disputes are illegal under contemporary international law as well as under the law of the United Nations'.

In contrast, Cordenas defended his government's action by advancing a series of a arguments.[134] In the first place, the events of April 2, 1982 were not action but escalated reaction to a concrete British threat to use force and, therefore, to suggest that resort to force by Argentina was purely unilateral was nothing but adding fuel to the fire. Secondly, the setting was a colonial one and, therefore, the struggles of Argentine people whose 'national unity and territorial integrity' have been and are disrupted by alien domination were legitimate in terms of a series of the U. N. resolutions on decolonization. Another argument given by him was the inapplicability of the principle of self-determination in the present case. Moreover, Britain violated Article 2 (4) of the Charter and the U. N. General Assembly resolutions on the Islands, which called for a peaceful solution, by refusing 'systematically to negotiate in good faith'.

In the view of Professor Cardenas provisions of Article 2 (4) of the Charter were not applicable in the present case because it was not a case of acquisition but rather a recovery of its own territory. In support of this argument, he quoted the following observations[18] of R. Y. Jennings with approval :

132. Franck, 'Dulce et Decorum Est : The strategic Role of Legal Principles in the Falklands War, 77 *A. J. I L*, 1983, 103.
133. Hassan, 'The Sovereignty Dispute over the Falkland Islands', 23 *Va. J. Int'l L.*, 1982, 53.
134. Cardenas, 'Correspondence', 77 *A J. I. L.*, 1983, 606-9
134a. Eor a detailed diecussion of the legitimacy of struggle against colonialism see B. C. Nirmal, Wars of National Liberation and International Humanitarian Law', 28 *I J. I. L* 1988, 201; B C. Nirmal, 'Aggression as defined by the General Assembly', 19 *Indian Year Book of International Aflairs*, 1986, 322, 343-49.
135. R. Y. Jennings, *The Acquisition of Territory in International Law*, 1963, 72.

> If in fact its claim is justified, that is to say if it does indeed have the legal title to the sovereignty, then it would seem that this is not an employment of force contrary to the provisions of Article 2 (4) of the Charter. It cannot use a force against the territorial integrity or political independence of another State because the actor State is merely occupying its own territory. The matter is one within its domestic jurisdiction.

The above quoted passage does not go far to support the lawfulness of Argentina's action because it is not entirely certain that Argentina does have a clear legal title.[136] Further there is no evidence showing Argentina's willingness to submit to third party settlement. But if Argentina's legal title to the Islands is not clear, Britain's title is also equally unclear. This brings further the question of the lawfulness of re-capture of the Islands by Britain by force.[137]

It must not be foregotten that use of force to recover the colonial territory on the ground of historical claims is not uncommon. The United Nations as well as the big powers' acquiencence in such actions provided certain degree of legitimacy to such measures. It is strange that the British Government which now claims the right to self-determination for the Falkland Kelper did not identify with the Timorese, some 50,000 of whom died defending the same right.[138] Similarly the United States, which declared that is would not condone the use of unlawful force by Argentina to resolve the Falklands dispute, adopted a quite different attitude vis-a-vis Morocco in the Western Sahara and Indonesia in East Timor. As Franck points out the United States, "has tut-tutted, made a short shadow play of restricting military sales to Morocco and Indonesia, but staunchly supported and supplied both aggressor regimes."[139]

Due to brazen disregard of the Charter prohibition against the use of force[140] by super powers and small powers sheltered by a super power

136. According to Jennings, a clear legal title and willingness to submit to a third party settlement are the necessary prerequisitis of the lawfulness of the use of force to recover a disputed territory, *Id* 72-3.
137. It may be noted that the Organization of American States (OAS) failed to endorse Security Council Resolution 502 and condemned instead, the United Kingdom's attack on the Islands. The OAS resolution has been criticized by Moore in his article 'The Inter-American System Snares in Falklands War', 76 *A. J. I. L.*, 1982, 830, 831.
138. Frank, supra note 132, at 121.
139. *Ibid.*
140. See T. M. Franck, 'Who killed Article 2 (4) ? or : Changing Norms Governing the Use of Force', 64 *A. J. I. L.*, 1970, 809.

with impunity and the failure of the United Nations collective security system, the doctrine of self-help continues to possess relevance in the contemporary international relations. One may, therefore, wonder whether Argentina's action was not justified on the ground of self-help.[141] It may be noted that Argentina's claim to the Islands was not without legal basis. It exhausted all pacific measures to settle the dispute but without any success and thereupon felt compelled to take unilateral action as a measures of last resort because the international legal system provided no remedy. Further, the level of violence employed by Argentina was such that no casuality occured at all.

VIII. Prospects for the Future:

The 1982 conflict ended negotiations. Despite the repeated requests of the United Nations to the two countries to resume negotiations for peaceful and definitive resolution of Falklands issue,[142] no progress has been made in this regard. Both sides have expressed their adherence to the principle of peaceful settlement international disputes and their desire to engage in meaningful dialogue. What has prevented them from initiating steps for negotiations is the impasse on the inclusion of the question of sovereignty over Islands in the agenda of negotiations. For the United Kingdom sovereignty over the Falkland Islands is not negotiable. It also states that the right to self-determination of the Falkland Islanders is not a matter for negotiation. On the other hand, Argentina continues to maintain that although it is desirous of improving its relations with the United Kingdom and holding of dialogues towards that end a dialogue must not exclude the sovereignty dispute relating to the Islands,[143] which is the central issue. Argentina position is that only through a solution of this question could relations between the two countries be built on a solid and stable basis.[144]

The wishes of the Islanders to remain British subjects, failure of Argentina to resolve this dispute by unilateral action, Britain's spectacular success in its military offensives against Argentina, the overwhelming support it received from its allies during the conflict and above all the U. N. inaction in the matter, virtually all these placed the United Kingdom in a strong bargaining position. It is, therefore, not surprising

141. Professor Reisman justifies Argentina's action on this ground, *supra* note 20, at 341.
142. G. A. Resolutions 37/9; 38/12, 39/6, 43/35, 40/21.
142a. See debate on the G. A. Resolution 40/21 U. N. Chronicle, 8-9 (Jan. 1986).
143. *Ibid.*
144. *Ibid.*

that the United Kingdom decided not to participate in the work of the Special Committee on decolonization declaring that as far as the United Kingdom and the territories it administered were concerned the colonial era was over.[145] Due to its inherent limitation the United Nations is obviously not in position to dictate its own rule. Any future meaningful involvement of the United Nations in a settlement of the Islands will depend on the extent to which the United Kingdom is willing to accept the U. N. role in the resolution of the Falklands controversy.

While earlier resolutions of the General Assembly[146] contained references or terms such as 'sovereignty dispute' and 'remaining differences relating to the question of the Falkland Islands', recent resolutions do not include these terms. Thus. General Assembly resolution 34/25 of 1988 reiterates its request to the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to initiate negotiations with a view to finding the means to resolve peacefuily and definitely the problems pending between both countries, including all aspects on the future of the Falkland Islands (Malvinad), in accordance with the Charter of the Unted Nations ![147] Although the comprehensive wordings of such resolutions will indeed include the issue of sovereignty as well, they are certainly not upto the expectations of Argentina.

It is regrettable that due to domestic compulsions both the governments are rigidly sticking to their earlier positions. One hopes that they will bear in mind the overriding advantages of a just and reasonable negotiated settlement. Britain should know that to maintain a colony on the Islands for a long period from a distance of thousands of kilometers will always be beset with considerable difficulties. In addition, Britain has assumed international legal obligations with respect to the territory in question which it cannot discharge without the approval of the United Nations. Given the overwhelming international support which Argentina enjoys for its claim to the Islands, it is unlikely that Britain will get the support of the United Nations for any of its proposals regarding the termination of the non-self governing status in the Falkland Islands without Argentina's assent. Self-determination is certainly an important principle but there are other no less fundamental principles, which are also valid in the international community. To solve the question of Hong Kong, the United Kingdom itself accepted the prevalence of the principle of territorial integrity over that of self-determination.

145. U. N. Chronicle, 51-52 (November 1986).
146. Viz., G. A. Resoluttions 37/9; 38/12: 39/6.
147. GAOR, Forty Third Session Supp. No. 49 (A/43/49), pp. 28-29. See also G. A. Resolution 40/21.

The best course for Britain, therefore, is to give the wishes of the inhabitants of the Falklands as much deference as possible. But there is no need for it to give them a veto right in the settlement of the Falklands controversy.

Realpolitik demands that Argentina changes its position on the Falklands and enters into a meaningful and purposeful dialogue for normalization of its relations with the United Kingdom without prejudice to the question of sovereignty. Re-establishmentof diplomatic relations will certainly pave the way for resumption of negotiations on the substantive issues. Faced with the intransigence of the British attitude and the ineffectiveness of the United Nations, it is perhaps better for Argentina to accept that a less perfact solution is better than no solution. It must be realized that time is running out against Argentina. As Reisman wrote in 1983,

> Each year that passed would weaken its own claim and strengthen the claim for adverse possession by the United Kingdom. Moreover, the Falklands archipelago was Britain's claim to a share of Antarctica. As exploitation of the Continent became more practicable, the British could be expected to be increasingly loather to surrender whatever claim they had to the Falklands.[148]

148. Reisman, *supra* note 20, at 313-314.

THE KILLER AS AN HEIR

P. M. BAKSHI*

Reports of judicial decisions show that there have been cases where a person kills a relative of his own, to whose property he is an heir. This raises the question : should the killer, in such circumstances, be allowed to succeed to the property of the victim of the homicide ? After some debate, it has now been recognised in most of the legal systems that a man should not be allowed to derive a benefit resulting from his own crime. All laws must conform to a higher law. There are certain principles that have their foundation in "universal law administered in all civilised countries."[1] All laws, as well as all contracts, may be controlled in their operation and effect by general fundamental maxims of the common law.

Accordingly, where a person murders another, he is generally not allowed to enjoy the property which he acquires as the result of that crime. "A man shall not slay his benefactor and thereby take his bounty."[2]

Hindu law and Muslim law

This principle is not peculiar to the West. According to Hindu law,[3] no heirship to another person could be claimed by or through one who has been a privy to the murder of that person. This rule was one of public policy and is to be found in many texts given effect to by the Privy Council.[4] Even before the Privy Council decision, substantially the same result had been reached by the High Courts in India. Thus, a Madras case[5] had laid down that no one shall be allowed to benefit by his own wrongful act was of universal application. If the defendant was a party to the murder, her wrongful act, while not preventing the

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1. *Riggs* v *Palmer*, (1889) 115 N. Y. 506; 22 N. E. 188, 190 cited by Youdan in 89 *L. Q. R.* 1973, 235, 251.
2. Youdan, "Acquisition of Property by killing" 89 *L. Q. R.* 1973, 235, 237.
3. *Kenchava* v *Girimallappa*, AIR 1924 P. C. 209.
4. Narada, II-13.21, cited in *Mitakshara*, II-x. 3.
5. *Vedanavaga Mudaliar* v *Vedammal*, (1904) I. L. R. 27 Mad, 591, 598 to 600. (This point was not challenged in appeal—*Vedammal* v *Vedanayaga*, (1908) I. L. R. 31 Mad, 100, 103, 104).

vesting in her of the inheritance, disentitled her to any beneficial interest in it. Such beneficial interest would vest in those who would be entitled to it, if the guilty heir were out of the way.

According to the Privy Council[6], the principles of *equity, justice and good conscience* exclude the murder. The Privy Council also laid down the proposition that "statutes regulating heirship or descent, or giving force to wills, should be read as not intended to affect paramount questions of public policy or to depart from well-settled principles of jurisprudence".

Codifying this rule of Hindu law, the Hindu Succession Act now provides in section 25 that a person who commits a murder[7] or abets the commission of murder, shall be disqualified from inhereiting the property of the person murdered, or any other property in furtherence of the succession to which he or she committed or abetted the commission of the murder.

The rule under Muslim law is also substantially the same. For example, the Chief Court of Punjab held that a Muslim who had murdered his half-brother could not be allowed to claim the property of the deceased as his heir.[8]

England, Continent and U. S. A.

The principle that no criminal can retain a benefit which accrues to him from crime[9], is well accepted in England also. As early as 1892, it was laid down in England that a murderer forfeits all benefits under the will of his victim.[10] In 1914 this principle was extended from murder to manslaughter.[11] In 1935, it was decided that the same rule of public policy applied where there was no will.[12-13]

In many countries of the world, the Legislature has enacted a specific rule preventing a person who kills the intestate from succeeding to his property. For example, the French Civil Code (articles 727-728)

6. For meaning of murder, *see* A. I. R. 1982 Bom 68.
7. For meaning of "murder", *see* AIR 1982 Bom 68.
8. *Shah Khanam* v *Kalahandhar Khan*, Vol. I Punj Rep 455, cited in *Vedanyada Mudaliar* v *Vedammal*, I. L R. 27 Mad. 591, 599.
9. See cases collected in Gareth Miller, Note "Slaying a testator", 35 *Modern Law Rev.* 1972, 426.
10. *Cleaver* v *Mutual Reserve etc,, Association*, (1892) I. Q. B. 14.
11. *Re Hall*, (1914) Probate 1.
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provides that "the heir must not be unworthy". The Code has specified three causes of unworthiness (*indignite*), which may exclude an heir from the succession. These are : (1) if the heir has been condemned for having killed or attempted to kill the deceased; (2) if he has brought a complaint of a capital charge against the deceased; or (3) if he is aware that the deceased has been murdered and does not inform the legal authorities of the murder.[14]

In the Russian Law of inheritance,[15] a citizen disqualifies himself from succession[16] under will or intestacy, if he has promoted his inheritance by unlawful acts directed against the deceased, against any of his successors, or against the carrying out of the wishes of the deceased as expressed in his will, provided such acts are established in judicial proceedings.

Of course, it is not necessary that the motive of the person sought to be disqualified must be to gain the inheritance by *his unlawful action.*[17]

In several States in the U. S. A., the principle had been recognised by statute[18-20] as early as 1936. It is apparent that "the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcemen of legal rights of ownership."[21]

The Restatement on Restitution, of the American Law Institute, provides that a person shall not be allowed to acquire property by murdering another.[22]

Suggestion regarding India

The Indian Succession Act, 1925 which regulates succession under wills, and also (in the case of persons other than Hindus, Budhists, Sikhs

14. Amos and Walton, *Introduction to French Law* 1967, 294.
15. Article 531 of the R. S. F. S. R. Civil Code which came into force on 1st October, 1964.
16. Alice Tay, "The Russian Law of Inheritance" 17 *I. C. L O.* 1968. 472, 482 and footnote 21.
17. *Cf. In re Hall*, (1914) Probate 1 (*Hamilton, L. J.*)
18. Wade, "Acquisition of Property Wilfully killing another statutory solution", 49 *Harard Law Review*, 1939, 715, footnote.
19. See further, "Developments in the law—Trusts" 48 *Harvard Law Review*, 1935, 1162, 1180.
20. Scott on *Trusts* (3rd Ed.) Section 492.
21. Cardozo, *Nature of the Judicial Process*.
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21. Cardozo, *Nature of the Judicial Process*.
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and Jains), succession without will, does not, at present, contain a specific provision disqualifying a murderer from succeeding to the property of the victim.

It is desirable that a new section should be inserted in the Succession Act in the following terms :

"30ɟA. (1) *A person who causes the death of any person by committing culpable homicide, whether amounting to murder or not, or abets the commission of such homicide, shall be disqualified from inheriting, or from taking as a legatee,—*

(a) the property of the person whose death is so caused; or

(b) any other property in furtherance of the succession to which he or she committed or abetted the commission of such homicide.

(c) Noting in this section applies to persons to whom section 25 of the Hindu Succession Act, 1955, applies.

Negligence as a disqualification

An interesting question that arises in this context is : Should a distinction be made between "culpable homicide" on the hand and negligent homicide on the other ? Or should even a person guilty of homicide by negligence be also disqualified for succeeding to the property of the person so killed ?

Some English Judges hold that, to accept it would be to encourage sentimental speculation as to the motives and degrees of the moral guilt of a person who has been justly convicted. An English case holds that "it is sufficient to say that the rule has been established and that the deserving of punishment and *moral culpability* are not necessary ingredients of the type of crime to which this rule applies, that is culpable homicide murder or manslaughter". Consequently, the court held that a person convicted of manslaughter could not benefit under his victim's will, even though he was found guilty through diminished responsibility.

In the English case, one Lilian Myra Giles had struck her husband a single blow on the head with a domestic chamber pot, with the result that the husband died ten days later. The deceased husband had made a will in favour of his wife. It was held that the wife was disqualified from succeeding.[23]

23. *Re Giles* (1971) 3 W. L. R. 640; (1972) Ch. 544, 552.

But the decision referred to above has not escaped criticism[24] A view has been expressed that the principle that a person should not profit from "crime" should have no application if the criminal has no *mens rea*. Recently, the law has been amended in England.[25]

In India, the legislature has not had an opportunity of examining the pros and cons of the matter. In principle, disability in regard to succession should apply to cases of culpable homicide (whether or not amounting to murder), but should not extend to cases showing a lessor degree of *mens rea*—e. g. causing death by rash or negligent act.

The principle that no man should profit by his own "wrong" does not seem to necessitate the imposition of a disqualification, in cases of rashness or neglignence. It is true that for reasons for deterrence, the criminal law in most countries punishes rash or negligent conduct causing death (or causing certain other harm). But such conduct does not attract the doctrine that no man should profit by his own "wrong". Doctrinal demands would be amply met by confining the disability to cases where the mental element is something higher than mere negligence.

Cases of extreme rashness would fall under section 302 (read with section 300, fourth clause), or section 304 of the Indian Penal Code. These two sections, read together, cover every homicide which is culpable in the moral sense. Cases with a lesser degree of mental element that would fall within section 304A of the Penal Code need not be regarded as culpable. On this rationale there is justification for not attaching a disqualification, in regard to succession, to mere rashness or negligence which does not indicate a quality of *mens rea* covered by section 299 or 300 of the Indian Penal Code.

The matter will be more clear by taking some illustrative cases under section 304A Indian Penal Code which show that the range of that section is very wide. In one Allahabad case[26] the accused (a woman) received a powder from an enemy of her relative. She took no precaution to ascertain whether the powder was noxious and mixed it with the relative's food, believing that by so doing she would become rich. It was held that her conduct was wanting in that prudence and circustances which every human being is supposed to exercise, and as, by her rash and thoughtless act, she had caused death, she was guilty of an offence under section 304A, of the Indian Penal Code.

24. Goff and Jones, *Law of Restitution*, 1978, 486.
25. *The Forfeiture Act*, 1982.
26. *Emp* v *Somua*, (1909) I. L. R All 29.

In a Calcutta case[27] the accused operated upon another person for internal piles, by cutting them out with an ordinary knife. The man died from haemorrhage. The Court held that the accused had no intention to cause the death of the patient. In the circumstances of the case, section 304A was applied.

In yet another case,[28] the accused, knowing that a pistol was loaded, was trying to unload it and while doing so, acted so negligently that the pistol went off and, as a result, the complainant's son was killed. It was held that the accused was guilty under section 304A, of the Indian Penal Code.

In a case, which went to the Supreme Court, a factory manufacturing fireworks etc., was situated in close proximity to residential quarters. An explosion in the factory resulted in injuries to, and death of, some persons. The explosives were of a highly hazardous and dangerous nature and their possession was prohibited by law. They were stored in the premises at the time of the occurrence. It was held by the Supreme Court that the appellants, who were licence holders for manufacturing explosives in the factory, were liable to be convicted under sections 304A and 337 of the Penal Code although there was no direct evidence of the immediate cause of the explosion. The manufacturers undoubtedly displayed a high degree of negligence by allowing or causing to be used explosives of sensitive compositions and substances in the manufacturing of fireworks, which must be the efficient cause of the explosion.[29]

In a Bombay case,[30] the accused was out, shooting with the deceased in the jungle. While separate from the deceased, the accused saw something moving in the jungle. Without waiting to see what it was, the accused fired and shot the deceased. It was held that the case fell within section 304A of the Indian Penal Code.

These cases show the very wide scope of section 304A. The acts may be punishable for reasons of deterrence, but it would not be correct to treat the persons guilty of such acts as morally culpable and disqualified for succession.

27. *Sukaroo Kobiraj* v *The Empress*, (1872) I. L. R. 14 Cal 566.
28. *Motan Ram*, (1930) 32 Cr L. J. 463, referred to in Ratanlal, *The Law of Crimes* (22nd Ed.) page 815.
29. *Bhalchandra* v *State of Maharashtra*, AIR 1968 S. C. 1319.
30. *Budhya* (1888) Unreported Cr. C. 398, referred to in Ratanlal, *The of Crimes* (22nd Ed.), page 813.

SELF-INDUCED INTOXICATION AND CRIMINAL RESPONSIBILITY

V. P. MAGOTRA*

The old Common law rule that voluntary drunkenness[1] is never a defence to a criminal charge has undergone much change even in its native land. The Courts in England, during last one hundred years, have gradually veered round to the view that voluntary drunkenness can be presented as a defence in certain cases where it has the effect of negativing the 'specific' intent' necessary for the crime.[2] It might result into mitigation of the crime, if not total exclusion. An accused, however, cannot plead that his actions were influenced by alcohol or drugs he had taken and that he would not have acted that way had he been under its influence. Intoxication might have affected upon his emotions, inhibitions or his power of self control. It might have impaired his knowledge about the thing he is doing and his perception of the consequences of this actions. All this will not afford him any defence till he has the capacity to formulate the 'specific intent' required for a crime. In those crimes which do not require any 'specific intent', self-intoxication can hardly be relied upon as a defence. There does not seem to be any logic in this rule which cannot be justified on any general principle of criminal liability.[3] Logically, whenever intoxication takes away the *mens rea* of the accused necessary for an offence, it should afford him a defence. If the old logic, that a person who voluntarily consumes intoxicating thing should not be benefited by his own folly[4], is accepted,

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1. Drunkenness is used interchangeably with intoxicrtion maning thereby intoxication produced by alcoholic liquours or druges or any other thing.
2. See in particular *D. P. P.* v. *Beard* 1920 All E. R. Rep. 21. For a historical survey of the defence of drunkeness see R. U. Singh, "History of the Defence of Drnnkenness in English Criminal Law" 49 *L. Q. R.*, 1933, 528.
3. See A J Ashoworth, "Reason, Logic and Criminal Liability" 91 *L Q. R.*, 1975, 102, 113.
4. This logic prevailed with classical writers of English Law. Blackstone observed in this connection that law "will not suffer any man thus to privilege one crime by another". 4 *commntaries* 26. See R. U. Singh, supra note 2, at 535. Also Rupert cross, "Blackstone v. Bentham", 92 *L Q. R.*, (176, 516, 524 N. L. A. Barlow, "Drug Inloxication and the Principle of Capacitas Rationalis" 100 *L. Q.* R 1984, 639.

then voluntary intoxication should not be a defence even in crimes of 'specific intent'. But the courts in England, as elsewhere, have approved of the differentiation as a matter of public policy. If the doctrine of *mens rea* is given its full play then it would lead to appalling social consequences. It is to guard against the unlawful behaviour of the drunkard that voluntary drunkenness is no defence in crimes involving general *mens rea*. Lord Salmon observed in *Majewsik*[5] :

> I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This illogicality is, however, acceptable to me because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice. It would be just as rideculous to remove the benevolent part of the rule (which no one suggests) as it would be to adopt the alternative of removing the stricter part of the rule for the sake of preserving absolute logic.[6]

Even in crimes of specific intent, where the defence of intoxication is available, it results into acquittal in very few cases. Generally speaking, in crimes involving serious personal violence, there is an alternate less serious crime not requiring any specific intent. If an accused is found lacking the capacity to formulate specific intent, he can almost always be held liable for less serious crime thereby achieving the object of criminal law of punishing the unlawful behaviour. The purpose of this paper is to explain the meaning given to the term 'Specific intent' under Engltsh Law and further to investigate the extent and the scope of protection given to an accused under self-induced intoxication in Section 86 of the Indidan Penal Code.

Specic Intent :

There has been a certain amount of confusion[7] as to the real import of the term 'Specific intent' as used by Lord Birkenhead in his speech in *Beard*.[8] The learned Lord Chancellor did not explain the term and soon after this judgment, a learned author said that self-induced intoxication would be a defence in those crimes "where an essential ingredient of *mens rea* is that the prisoner must have fully intended a particular con-

5. *D. P. P.* v. *Majowski* (1976) 2 All E R 142 (hereinafter *Majewski*).
6. *Id.* at 158.
7. See D. A. Stroud, "Constructive Murder and Drunkenness" 36 *L. Q. R.* 1920, 268.
8. *D. P. P.* v. *Beard* (1920) All E R Rep. 21, at 27, 29.

sequences."[9] This means that 'specific intent' would require the intention to bring about particular consequences, i. e. for a particular purpose and not merely that he did the act intentionally. Crimes such as murder, theft, criminal treaspass, attempt to commit an offence etc. would be the crimes of specific intent. Murder requires a murderous intent or at least the intention to cause a serious injury and theft requires dishonest intention, i. e. not only that the property be taken out of someone's possession but also that it must be taken with intention to cause unlawful gain for some and unlawful loss to other. Similarly criminal trespass requires that the entry into another's property must be with intention to commit a crime. In attempt also, the act must be done with the intention to commit an offence.

The House of Lords in *Majewski* preferred to call those crimes where self-induced intoxication was not a defence as crimes of 'basic-intent'. Lord Elwyn-Jones, L. C. said that the crimes of 'basic-intent' are those "whose definition expresses (or more often implies) a *mens rea* which does not go beyond the *actus reus*."[11] That will exclude those crimes where the law requires certain consequences to be intended and in a later case Lord Salmon said that the basic intention to do the acts which constitute the crime."[12] Crimes of 'basic intent' are, therefore, "those (crimes) in which the *mens rea* relates only to the bodily movement and its circumstances. *Per contra*, a crime of intent is one in which the *mens rea* relates also to specified consequences."[13] However, this does uot mean that the crimes of specific intent can alwyas be described with some amount of certainty. The Courts adopt 'a Humpty-Dumpty attitude'[14] directed more by public policy than anything else.[15] This uncertainty results from the ad hoc approach of the English Courts towards the requirement of *mens rea* in common law crimes. The mental element in many common law crimes remains within the domain of the Courts Policy considerations will, therefore, naturally guide the decision of the court. Until the crimes are statutorily defined precisely, including of course the mental element, this uncertainty will persist.

9. Stroud, *supra* note 7, at 272.
10. *Supra* note 5.
11. *Id.* at 147 quoting Lord Simon in *D. P. P.* v. *Morgan* (1975) 2 All ER 347 at 363.
12. *Newbary* (1977) A. C. 509.
13. Glanvilla Williams, *Textbook of Crimtnal Law*, 1968, 429.
14. *Id.* at 428.
15. *Id.* at 430. Williams lists murder, wounding with intent, theft, handling stolen goods, obtaining money on forged cheque, attempt to commit an offence etc. being held crimes of 'specific intent'. Assault, rape and taking a conveyance have been held crimes of 'basic intent'. *Id.* at 428.

Criminal Responsibility and Section 86 of I. P. C.

Under the Indian Penal Code, all the offences are clearly defined and the *mens rea* required for an offence is also clearly indicated in the definition itself. The English doctrine of *mens rea* cannot be imposed from adove.[16] Moreover, section 86 of Indian Penal Code which provides defence in case of voluntary drunkenness does not talk in terms of 'specific intent'. It is, therefore, interesting to investigate the working of Section 86 which reads :

> In cases where an act is not an offence unless done with a particular knowledge or intent a person who does the act in a state of intoxication shall be liable to be dealth with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

The section makes it clear that self-induced intoxication can be relevant only in those offences which require a particular knowledge or intent on the part of the accused. And in those offences which require only knowledge as the mental element, the accused is rather in a disadvantaged position because of constructive imputation of knowledge to him. He is presumed to have the same knowledge as that of a sober man, his actual knowledge being irrelevant. The liquor or the drugs might have impaired his foresight of the consequences (and they generally do), but the accused cannot be heard saying "he did not know because of intoxication." Intoxication is his own doing for which he should suffer the consequences.[17] The section does not say that 'intention' be also constructively imputed. While the first part of the section talks of both knowledge and intention, the second part talks only of knowledge. The ommission of word 'intention' from the second part cannot be accidental.[18] In the only case decided by the Supreme Court under Section 86 that of *Basdev* v. *State of Pepsu*[19], it observed :

> So far as knowledge is concerned, we must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, we must gather it from the

16. M C. Setalvad, *Common Law in India* 1960, 139.
17. There is no comparative notion of presumed knowledge in English law. The evidence of intoxication can negative knowledge in English law. See Williams, *supra* note 13 at 413. Also *Durante* (1972) 3 All ER 962.
18. See *Sudhu* v. *the King* 1951 Cri L. J. 1136; *In re Mandru Godaba* 1915 Cri. L. J. 627; J. M. v. *Emperor* 1910 Cri. L. J. 659.
19. 1956 Cri L. J. 919.

> attending general circumstances of the case paying due regard to the degree of intoxication. Was the man beside his mind altogether for the time being ?
>
> If so it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking, and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts.[20]

Thus 'intention' cannot be presumed like 'knowledge' and the circumstance that the accused was intoxicated at the time of the commission of offence has necessarily to be taken into account while deciding the question of intention of the accused. But it does not follow that in those cases where the law requires only intention as an essential element, the knowledge of the accused is not at all relevant. Knowledge of the accused is still indirectly relevant as throwing light on his actual intention. Intention cannot be determined in vaccum but is always assessed in a certain frame of mind. Accused's mental awareness to the act or consequences is the most relevant factor in determining the intent. In case of voluntary intoxicated person, knowledge about the act or consequences is artificially imputed to him as of a sober man. However, this artificial imputation of knowledge cannot be the sole basis for the inference that he intended the natural consequences of his acts. If there are circumstances which are inconsistent with such an inference, then it cannot be said that the accused entertained the particular intent required for the offence. Since the evidential burden is on the accused to show that his case falls under Section 86, he must give some proof of his incapacity[22] to formulate the requisite intent in order to rebut the presumption that a man intends the natural consequences of his acts. If he fails to have the said incapacity and on an over-all assessment of the evidence produced by the prosecution, there is no other circumstance which goes against such an inference, then the inference that a man intends the natural consequences of his acts can be drawn. In *Basdev's case*,[23] the accused had shot at a boy and killed him when they had gone in a village to attend a marriage party. The accused was found "excessively drunk" and

20. *Id.* at 920.
22. Section 86 does not speak of incapacity to form the intent. But that does not, perhaps, make much difference. Intention, being a state of mind has to be ascertained in most cases, by inference. While ascertaining the intent by inference, incapacity of the accused has naturally to be considered. See *Broadhurst* v. *R* (1964) 1 All BR 111,
23. *Supra* note 19,

"almost in an unconscious condition."[24] Still the court found that he had the capacity to form the intent required for the offence of murder. The circumstances such as that he was talking coherently, was capable of moving independently, had realised what he had done and had asked to be forgiven, all led the court to its conclusion that the accused intended to inflict the injury found on the body of the deceased and it was sufficiently grave.

In the ligth of what has been said above, the liability of an accused under self-induced intoxication for those offences which require only a particular knowledge, can be imposed entirely on the basis of constructive imputation of knowledge. For those offences which require knowledge alternatively with intent as the basis of liability, again liability can be imposed on the basis of constructive imputation of knowledge. But in regard to those offences which require a particular intent as a necessary ingredient, proof of intent is essential for liability. In such a case, if the accused, because of self-induced intoxication, is found incapable of forming the intent required to establish liability for the offence in question, he cannot be held liable for that offence. However, if such an incapacity is not found, then the inference that the accused intended the natural consequences of his act can be drawn.

In regard to those offences which require recklessness or negligence as an essential element, voluntary intoxication cannot be a defence in India. This is because of the wordings of section 86 which begin : "In cases where an act is not an offence unless done with a particular knowledge or intent...." This means that voluntary intoxication will be relevant only in offences requiring particular knowledge or intent and it will not be relevant in offences of recklessness or negligence. Recklessness involves assumption of an unjustifiable risk, the consequences of which are foreseen though not desired.[25] The accused might not have contemplated the risk because of his intoxication; although he would have done so had he not been under the influence of intoxication. But his subjective contemplation of risk will not come to his resuce if on objective consideration, a sober man in those circumstances would have apprehended the risk. Therefore, intoxication is irrelevant and there is a liability in this situation. Under English law, self-induced intoxication is not regarded "as necessarily irrelevant to an issue of recklessness."[26]

24. *Id.* at 920.
25. N. L A. Barlow, "Drug Intoxication and the Principle of capacitas Rationalis" 100 *L. Q. R* 1984, 539, at 645.
26. Williams, *supra* note 13, at 431. Also Smith and Hogan, *Criminal Law*, 1969, 133

But after the House of Lords decision in *D. P. P.* v. *Majewski*[27] the position is that intoxication itself is sufficient recklessness justifying punishment of the accused in crimes which can be committed recklessly. Lord Elwyn-Jones, L. C. observed in that case :

> His (accused) course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases....The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness.[28]

In offences of negligence, where there is failure on the part of the accused to conform to the standard of care to which it is his duty to conform, the standard is objective.[29] The law requires reasonable behaviour and the unreasonable nature of the accused's conduct will itself ground liability. Intoxication is irrelevant in this case too. Similar seems to be the position in English law.[30]

Thus under the Indian Penal Code, a person cannot claim exemption from criminal responsibility on the ground that due to self-induced intoxication he did not know what he was doing or that his act was the result of such intoxication. Nor can he plead that because of intoxication he was unable to control himself. Law does not allow the defence of irresistible impulse produced due either to intoxication or insanity. But voluntary intoxication can be pleaded in defence in those cases where the person is charged with an ofference requiring particular intention as an indispensable element. It may result either into acquittal or mitigation. It will result into acquittal where intoxication prevents the formation of intent required for an offence and there is no less grave non-intentional alternative offence of which the accused may be convicted. On the other hand, voluntary intoxication is a ground for mitigation where intoxication negatives the intent required for the graver offence charged, and there is a less grave offence not requiring any intention but only knowledge. The accused can be held liable in this case by constructive imputation of knowledge. In the first category will fall offences

27. (1976) 2 All E. R, 142, See also N. L. A. Barlow, *supra* note 25, at 641-46, stroud, *supra* not 7, at 273,
28. *Id.* at 150.
29. Williams, *supra* note 13, at 43.
30. See Smith and Hogan, *Criminal Law*, 1969, 131.

such as theft[31] and criminal tresspass[32] and in the second category will fall the offence of murder.[33] It must, however, be mentioned that the plea of voluntary intoxication works to the benefit of the accused in rare situations. A random survey of only 14 odd cases[34] reported under section 86 of Indian Penal Code in *Criminal Law Journal* during the last forty-five years (1940-1984) reveals that all of them relate to the offence of murder. The accused had already been held liable for murder in lower court and he had raised the defence under section 86 in High Cout in order to escape capital punishment or life imprisonment.[35] In only two cases,[36] the plea resulted into mitigation of the offence from murder to one of culpable homicide not murder, punishable under Section 304 Part II.[37] In other cases, the courts turned down the plea that intoxication was deep enough to negative the formulation of intention. No case has been reported in the *Criminal Law Journal* during this period where the plea of selfinduced intoxication has been raised in offences other than murder. The scope for the application of section 86 in murder cases is limited by the fact that under Section 300, which defines murder, the intention of the accused is relevant if his case is brought

31. See Section 378 of I. P. C.
32. See Section 441 of I. P. C.
33. See Section 300 and 299 of I. P. C-
34. Out of 14 cases, only one case was decided by the Supreme Court and the rest by diffenent High Courts. See *Basdev* v. *State of Pepsu* 1956 Cr L. J. 919 (S. C) For High Court case see *Sarathi* v. *State of M. P.* 1976 Cr. L. J. 594 (M. P); *Dasa Kandha* v *State* 1976 Cr L J. 2010 (Orissa); *Enrique* v. *State* 1975 Cr L J. 1337 (Goa, J. C.); *Kurshna Singh* v. *Orissa* 1971 Cr. L. J. 1497; *Prabhu Nath* v *State* 1957 Cr. L J 1056 (All); *In re Suruthayyan*, 1954 Cr. L. J. 672 (Mad); *Kanji* v. *State* 1953 Cr L, J 434 (Raj); *In re Balaswamy* 1953 Cr L. J. 1587 (Mad.); *Ajmer Singh* v. *State* 1955 Cr. L J. 305 (Punjab); *Basdev* v *State* 1955 Cr. L. J. 1621 (Pepsu); *Dilmohammad* v *Emperor* 1942 Cr. L J. 883 (Patna); *Samman Singh* v. *Emperor* 1942 Cr. L J. 332 (Lah.); *Sudhu* v *King* 1951 Cr L J. 1136.
35 Section 302 of I. P C prescribed either death punishment or life imprisonment for murder.
36. *Enrique* v. *State* 1975 Cr. L. J 1337 (Goa, J. C.); *Krushna Singh* v. *State of Orissa* 1971 Cr. L. J. 1497 (Orissa). In *Ajmer Singh* v. *State* 1955 Cr. L. J. 305, the court said that the case of the accused fell under section 304 II as it was culpable homicide simplicitor and no question of the application of section 86 arose.
37. For punishment under Part II of Sec. 304, intention on the part of the accused is not required and he can be punished under that part only on the basis of knowledge which in case of intoxicated person is presumed Under Sec. 304 Pt. II, a person is punished "if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

under any one of the first three clauses of that section.[38] Under the fourth clause of section 300, intention on the part of the accused is not required. Culpable homicide is murder under that clause "if the person committing the act knows that it is so immiently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. In at least one case,[39] the Rajasthan High Court said that in those cases where the death has been caused by an inherently dangerous act and where because of intoxication of the accused, it is not clear as to whether he intended to cause to cause death or any serious injury, the case can always be covered by the fourth clause of section 300. Thus the plea of self-induced intoxication will not help where the death is caused by an imminently dangerous act the risk of which is taken without any excuse.[40] Knowledge on the part of voluntary intoxicated accused will be presumed to be the same as that of a sober man in those circumstances.

In conclusion, it may be observed that like English law, section 86 of the Indian Penal Code is a compromise between the general principles of criminal responsibility and the public policy. Public policy necessarily requires that a person who is himself responsible for bringing a condition of irresponsibility should not get undue advantage of it. That explains the doctrine of constructive imputation of knowledge which forms an essential part of the scheme of section 86. At the same time, some con-

38. Section 300 in its first three clause says : "... culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or causing death, or secondly—if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the pers n to whom the harm is caused; or thirdly—if it is done with the intention of causing bodily injury to any person and the bodi'y injury intended to be inflicted is sufficient in the ordinary course of nature to cause death...."
39. *Kanji* v State 1253 Cr. L. J 434 (Raj.)
40. Some High Courts have expressed the view that clause (4) of Section 300 should appropriately apply only in those case where the act by which the death is caused is imminently dangerous act in general directed not towards a particular individual. In those cases where the death has been caused by any bodily harm to a particular person, the question whether such an act is murder has to be decided with reference to the first three clauses of section 300. The fourth clause is designed to provide for rare class of cases like putting in jeopardy, by the act done, the lives of many persons as envisaged Illustration (d) of that section See *Dharan Raut* v. *State of Bihar* 1964 (2) Cri. L J 171; *Manindra Lal* v *Emperor*, A. I. R 1937 Cal. 432. But this view has not found favour with the Supreme Court; See *State of M. P.* v. *Ram Prasad*, 1968 Cr. L. J. 1025.

cession has to be made certain conditions produced by self-induced intoxication if the general principles of criminal responsibility are to be respected. That explains the concession made in respect of formulation intention. But, as we have seen above, even this concession does not work much to the benefit of the accused because of the definition of different offences found in the Indian Penal Code. Knowledge has been made an altenative criterion of liability along with intention in many offences under the Code. Intention as the sole basis of liability is found in very few offences mostly relating to property. It is only in such cases that the self-induced intoxication can successfully be pleaded in defence.

NEHRU ON FEDERAL FINANCE : THEN AND NOW

M. P. SINGH*

I

It is too well known to be stressed that from the very initiation of the Constitution-making process till its culmination in and ultimate adoption of the Constitution, Pandit Jawaharlal Nehru was occupied with the matters of state as Prime Minister of a troubled, distressed, and unstable India. Naturally he and even no body in his position could have found sufficient time to deliberate upon each and every detail of the Constitution. Even then his contribution to the shaping of the Constitution, both in its making as well as operation, has been enormous. 'The Constitution', Brecher has very rightly assessed 'was drafted largely by Ambedkar, but Nehru provided its basic philosophy, and goals in the Objective Resolution.'[1]

In this study, that aspect of the Constitution is undertaken for assessing Nehru's contribution on which personally he has hardly expressed any views. True, in para (3) of the Objective Resolution he conceived of a Union of India consisting of British India, Indian States, and some other territories on the lines of the Cabinet Mission Plan, he did not eleborate it in his speech on the Resolution. Very briefly he spoke only of the Indian States whose feudal structure he disliked as much as British imperialism.[2] It is in relation to these States that he was very critical of the federation proposed under the Government of India Act, 1935. And it is in that context that in his presidential address to the fiftieth session of the Indian National Congress on 27 December 1936 he told the Congressmen that be was not against the concept of federation. 'It is likely', he said 'that a free India may be a federal India, though *in any event there must be a great deal of unitory control*'[3]

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1. M. Brecher, Nehru, (abridged ed.) 1961, 241.
2. See his Presidentia Address to the 50th Session of the Indian National Congress on 27 December 1936 in M. Gwyer and A. Appadorai, *Speeches and Documents on the Indian Constitution* 1921-47, 1957, 387 and *Constituent Assembly Debates* vol. 1, 62-63
3. *Gwyer and Appadorai*, above at 387. For Nehru's views on federalism generally see M. P. Jain, 'Nehru and the Indian Federalism', 19 *J. I. L. I.*, 1977, 392 ff.

Though the compromise that the Cabinent Mission Plan was between the centrists and regionalists envisaged a very loose and week 'unitary control', Nehru in the Objective Resolution did and the notion of the inherent and implied powers and powers resulting from the 'Union' to the three subjects specified in the Plan. He continued to pursue this line of approach in the subsequent exercise of constitution making.

Nehru, as we all know, was the Chairman of the two committees of the Constituent Assembly-the Union Constitution Committee and the Union Powers Committee-which were primarily responsible for structuring the Centre-state relations. He was not just a ceremonial head of these committees; he actively participated in their deliberations. Therefore, whatever these committees did may be largely attributed to him.[4] While the constraints of the Cabinet Mission Plan were still fully operative, the Union Powers Committee, in its very first report drew a very comprehensive list of the Union subjects which could directly or remotely lie within the scope of the three subjects specified in the Plan. The Committee was also of the view that some subjects like insurance, company law, planning, etc. also came within the Union jurisdiction and must be assigned to it by agreement.[5] As soon as the constraints of the Cabinet Mission Plan were removed on the announcement of partition on 3 June, 1947, the Union Constitution Committeee on 6 June, 1947 took the very vital decision :[6]

(i) that the Constitution should be a Federal structure with a strong centre;

(ii) that there should be three 'exhaustive' legislative lists, viz., Federal, Provincial and Concurrent with residuary powers to the Centre; and. . ..

This decision was approved in the joint meeting of the Union and Provincial Constitution Committees next day and finally became the decision of the Constituent Assembly.

Giving effect to this decision the two committees headed by Nehru came up with their reports in less than one month. On 4 July, 1947, Nehru submitted the report of the Union Constitution Committee which, *inter alia*, included the provisions on finance and borrowing which

4 Nehru was also a member of the third committee, the States Committee. See Shiva Rao, below no 5 vol. I at 597. According to S C. Kashyap, *Jawaharlal Nehru And The Constitution*, 1982, 93 he was also Chairman of this Committee.

5. See B. Shiva Rao, *The Framing of India's Constitution*, vol. II, 1967, 743 ff.

6. *Shiva Rao*, above vol. II at 553.

developed into the present chapters I and II of Part XII of the Constitution.[7] Next day he submitted the second report of the Union Powers Committee reiteration that 'the soundest framework of our Constitution is a Federation, with a strong Centre'. The report gave a distribution of legislative subjects, including the tax subjects, on the lines of the Government of India Act 1935 which, with some modifications and adjustments, was finally adopted in the constitution.[8]

Primarily due to the dissatisfaction of the states (then Provinces) with the Centre-state financial arrangements recommended by the two committees and accepted by the Assembly and also because of their technical nature they were referred to an Expert Committee even before Sir B. N. Rau submitted his draft of the Constitution.[9] The Committee, which consisted of non-political members, was asked, among others, to examine the then existing provisions relating to finance and borrowing powers in the Government of India Act 1935 and their working during the preceeding ten years and to make recommendations as to the provisions on the subject to be embodied in the Constitution.[10] It is a recorded fact that the states expressed their dissatisfaction with the existing arrangements and all of them 'asked for substantial transfer of revenues from the Central sources'.[11] The Committee also conceded that if the services assigned to the states 'on which the improvement of human well being and increase of the country's productive capacity so much depend, are to be properly planned and executed, it is necessary to place at the disposal of the Provincial Governments adequate resources of their own, without their having to depend on the variable munificence or affluence of the Centre'[12]. At the same time the Committee did not find it practicable to transfer more revenue heads to the state jurisdiction without 'simultaneously upsetting the equilibrium of the Centre'.[13] Thus except to the extent of recommending the inclusion of a new entry[14] in the Union list and reconsideration at some stage of consolidating agri-

7. *Id.* at 574, 585:

8. *Id* at 776 ff.

9. Rau submitted his draft to the Assembly on 27 October 1947 while the Expert Committee was appointed on 2 October 1947.

10. For the details of the terms of referenee of the Committee see B. Shiva Rao, *The Framing of India's Constitution*, vol. III, 1967. 260 ff. The Committee consisted of V. S. Sundaram and M. V. Rangachari, two civil servants, and N. R. Sarkar primarily a businessman.

11. *Id.* at 267.

12. *Id.* at 268-69.

13. *Id.* 269.

14. 'Stock Exchange and Future Markets'.

cultural income tax and succession and estate duties on agricultural land in the respective Union entries the Committee without disturbing the distribution of tax entries recommended eleborate transfer of revenues from the centre to the states. It clearly specified the divisible taxes, the percentage to be transferred and the basis for such transfer. It is, however, interesting that 'on the crucial question of the distribution of revenues, or more precisely, the allocation of a share of the proceeds of central taxes to the units, the (Drafting) committee plainly recorded its inability to accept the recommendations of the Expert Committee'.[15]

Thus apparently a political rather than an expert decision clinched the issue. The states remained dissatisfied with the constitutional arrangements on financial relations and kept no secrets in expressing their dissatisfaction against them even at the stage of third reading of the Draft Constitution. Visibly Nehru was not in the forefront of these decisions but undoubtedly his thesis of a strong centre on which the Assembly had already reached a concensus was at their base. Besides that, there is some evidence of his personal involvement in crucial and controversial issues.[16]

It may be noted that more than any long term perspective the constitutional background and the contemporary realities and hardships faced by the country guided the decision of the Constituent Assembly on federal system generally and the financial provisions particularly. A unitary system before the Government of India Act 1935, a strong centre under that Act and during the framing of the Constitution, inability of the states to bargain as sovereigns or to quit the Assembly, unstable financial situation, economic inequality among the states and the desire to remove it through central control were some of the major factors that influenced the shaping of these provisions. Even the Expert Committee was influenced by some of these considerations and it had to be modest in its recommendations in view of the fact that during the ten year period from 1937-38 to 1946-47, except Bengal, all other provinces had consistently surplus budgets while during the same period the Central Government had consistently deficit budget. Certainly no serious effort was made by the Assembly or the Drafting Committee to link the sources and amount of revenue to the functions to be performed and the responsibilities to be discharged by the respective governments.

15. B. Shiva Rao, *Framing of India's Consttution A Study*, 1968, 662.
16. See G. Austin, *The Indian Constitution*, 1966, 228. on Nehru's being consulted on article 286 and IX CAD 241 on the question of tax on salt.

II

This takes us to another and much more foundamental approach of Nehru to the constitution. To him the constitution was a basic document and its provisions should be as lasting as possible. At the same time he firmly believed and numerous occassions unambiguously expressed and emphasized that a constitution produced by one generation could not bind another. A constitution maker should concentrate on and provide for solutions to the immediate problems faced by his generation leaving the future generations free to find solutions to their problems. For this reason he never had any hesitation in introducing any amendment to the constitution whenever and wherever he found it not exactly in tune with the aspirations of the people. It is also true that the Centre-state relations, including financial relations, also underwent some amendments during his time mainly as a consequence and in the constext of the reorganization of states. To the reorganization of states he had to agree even much against his wishes.

Following Nehru's this perception of the constitution let us ask whether after nearly two generations of the adoption and operation of the original provision on of the Constitution on finiancial relatations in the peculiar circumstances of that time he would have thought of reviewing and reconsidering them in the context of present day India. Today on the political plain political parties generally confined to one state have emerged and come into power in several states on the main plank of real or imaginary discrimination against and neglect of the states by the party in power at the Centre. They attribute all their inefficiency and inability to effectively improve the well being of the people in their respective states to their dependence on the Centre for finances. From time to time they have made serious demands and persisted on them for revising, among others, the financial relations.

If one goes by experience and statistics the grievances of the states are not totally unfounded. Many studies have established that the percentage of revenue reciepts of the Centre is more than double of the states; the percentage share of the states in the total revenue receipts has a declinining tendency; the states have to depend for more than 40 per cent of their expenditure needs on the Centre; the gap between the rich and poor states has either remained static or widened; the percentage of revenue resources from the Centre to the states has been declining since 1951; the Centre has exploited the non-shareable sources of revenue more effectively than the shareable sources; it has also reduced the area

of shareable taxes by using such tricks as separating the income tax on corporations (non-shareable) from personal income tax (shareable), merging the taxes on railway fares freights with the fares and freights, etc.[17] Although a remarkable job has been performed by the Finance Commissions to keep the federal arrangements moving, the Commission also suffers from certain constitutional limitations as well as its term of reference.

Hopefully we will be paying a tribute to Nehru's notion of flexibility and adaptability of the Constitution if, in the light of some of facts we think of rearranging the financial relations or of improving their administration. Though, of course, almost all federal constitutions have failed to establish a complete correspondence between the sources of revenue of the Centre and the states and their functions and responsibilities an effort is necessary to establish that correspondence in order to assure efficiency and economy. Some constitutions have tried to do it by amending the Constitution while others have tried by creating new institutions within the existing constitutional arrangements.[18] We should also consider which of the different alternatives will suit our demands.

III

Finally, let us pick up one more strand of Nehru's ideas on the Constitution to conclude our discussion on financial relations. Nehru, like many other members of the Constituent Assembly had a firm faith in democracy and democratic process. Existence of democracy is considered to be an essential pre-condition for the existence and maintenance of a federal system.[19] Once after full deliberation it was recognized that 'the soundest framework for our Constitution is a *Federation*' and the argument for having a unitary constitution was rejected, preservation of the federal structure became our constitutional obligation. Since that obligation can be discharged only by strengthening democracy at every

17. For details see J. Mishra, *New Dimensions of Federal Financc in India* (1985).
18. Interestingly the Basic Law of the Federal Republic of Germany by an amendment of that Law lays down this principle in a very specific way in article 104 a (1) in the following words :

    The Federation and the Laender shall meet separately the expenditure resulting from the discharge of their respective tasks in so far as this Basic Law does not provide otherwise.

    The Basic Law also provides for vertical distribution upto the level of communes or local bodies as well as lays down principles of horizontal distribution. See articles 106 and 107.
19. See U. K. Hicks, *Federalism : Failure and Success* (1976).

level there must be an increased democratization of financial relations between the Union and the States. That can be achieved only by greater and more active participation of the Union and the States in that process. Even the local bodies upto the level of village Panchayats should join in that process.

The strength of democracy even in unitary countries such as England is assigned to a great extent to the participation of the local bodies in the national policy planning and implementation.[20] It has been emphasized by many expert bodies and persons including the Administrative Reforms Commission and the Planning Commission that such a participation is absolutely necessary for the efficient working of the system as well as national development. Such participation between the Centre and the States is clearly envisaged in the Constitution and can be extended to the local bodies without necessitating any constitutional change. Certainly a sincere effort in that direction will strengthen both our democracy as well as federalism and remove much of the acrimony between the Centre and the States.[21]

20. M. D. Regan, *The New Federalism*, 1972, 159. At the same place he says that if one defines federalism broadly in the sense 'that the parts have a say in shaping action, as well as the centre that represents the whole' then 'it becomes almost synonymous with democracy'.
21. In support of this view see *Report, Commission on Centre-State Relations*, Pt. I (Govt. of India, 1988), also M. P. Singh, Indian Federalism : Structure and Issues, in P. Leelakrishnan, (ed.), *Neo Horizons of Law*, 1987, 33 ff.

NEHRU AND RURAL DEVELOPMENT

SURESH C. SRIVASTAVA*

I. Introduction

The end of India's struggle for political independence marked the beginning of the struggle for national reconstruction. Said Nehru :

> Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge.... At the strok of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of nation, long suppressed, finds utterance. It is fitting that at this solemn moment we take the pledge of dedication to the service of India and her people.[1]

The content of the new order was supplied by the experience of colonialism; of social, economic and political systems which served individual interests at the expense of the community; of civil servitudes and of discrimination and humiliation.

The postulates of Nehru's Economic ideologies were (i) peace, (ii) freedom, (iii) humanism and welfare of community, (iv) equality and (v) unity. Notwithstanding far reaching political changes as a result of the rapid disintegration of the colonial system and emergence of a craving for development, the economic and social conditions in India have not changed fast enough to meet expectations of rural people.

II. Emphasis on Socio-Economic Objectives

The people of India resolved, on November 26, 1949 to constitute their country "into a Sovereign Democratic Republic and to secure to all its citizens :

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1. Speech in the Constituent Assembly, August 14, 1947. See V. P. Menon : "*The Transfer of Power in India*", Princeton University Press (Princeton) 1957, p 413.

> Justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity, and to promote among them all, fraternity assuring the dignity of the individual and the unity of the nation.[2]

They adopted a Constitution which seeks to provide a legal framework for the achievement of these cherished human values.

The Constitution guaranteed the "right to equality[3] "the right to freedom of speech",[4] "to assemble peaceably".[5] "to from associations",[6] "to acquire, hold and dispose of property"[7] and "to carry on any occupation, trade, or business"[8] and the "right against economic exploitation".[9] Part-IV of the Constitution spells out the socio-economic objectives to the national policy. It declares that States shall strive *inter alia*, to provide "adequate means of livelihood"[10] "right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement",[11] "conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities"[12] and "higher level of nutrition and standard of living".[13] The significance of these provisions in the context of growing importance of agricultural workers in a system of adult franchies cannot be over-emphasised. They marked the beginning of a new era.

Nehru believed the goal of national endeavour to be a new social order under which the basic needs of the common man will be fulfilled, and shall enjoy fundamental human freedoms and have equality of opportunity. The Constituent Assembly and the Constitution framed by it were to be mere parts of the larger national endeavour.[14] He, therefore, emphasised that his first task was :

2. Preamble to the Constitution of India. The Constitution (42nd Amendment) Act, 1976 changed the Republic to Sovereign Socialist Secular Democratic Republic.
3. Article 14.
4. Article 19 (1) (a).
5. Article 19 (1) (b).
6. Article 19 (1) (c).
7. Article 19 (1) (f). (This was omitted by Constitution (44th Amendment, Act, 1978).
8. Article 19 (1) (g).
9. Articles 23 and 24.
10. Article 39 (a).
11. Article 41.
12. Article 43.
13. Article 47.
14. Subhash C. Kashyap, '*Jawahar Lal Nehru and the Constitution*, 1982.

to free India through a new Constitution, to feed the starving people, and to clothe the naked masses, and give to every Indian fullest opportunity to develop himself according to his capacity.

In other words Constitution was relevant to him only as an instrument of social change. Nehru said :

> The Constitution itself will lead us to the real freedom that we have clamoused for and that real freedom in turn will bring food to our starving peaple, clothing for them, housing for them and all manner of opportunities of progress.

He said in the Constituent Assembly :

> At present the greatest and most important question in India is how to solve the problem of the poor and the starving. Wherever we turn, we are confronted with this problem. If we cannot solve this problem soon, all our paper constitution will become useless and purposeless.[15]

Be that as it may, by the end of 1960's, it was more than evident that in a system, which offered unequal access to the means of production and sources of income, automatic trickle down of the effects of economic growth was unlikely. It was also discovered that during these two decades there was neither any decline in rural population nor any appreciable rise in rural incomes. Further equal income distribution did not follow the rising inequalities. There was on the contrary accentuation of inequalities on account of growing rural poverty and rise of islands of affluence.[16]

III. The Struggle for Economic Emanicipation

The central objective of public policy and national endeavour, since independence, has been the promotion of rapid integrated economic development. Independent India had inherited an under-developed and stagnant economy. Although wide disparities of income and wealth existed, a mere redistribution of resources, with national per capita income of Rupees 246.3 in 1950, would have been tentamount to "the distribution of poverty."[17] The immediate need of the hour, according

15. *C. A. D.* Vol II, pp. 319 17, 299-302, 322.
16. Mohd Ghouse, 'Rural Development and Ceiling Reforms", a paper read in All India Seminar on Law as an Instrument of Rural Development, Kurukshetra University (1986) (unpublished).
17. 1948-Resolution on Industrial Policy, 2nd para. The figure for the national per capita income has been taken from India-1957, Table BIII at p. 187.

to Nehru, was to expand employment opportunities, raise national income and reduce inequalities in income and wealth.

The First Five Year Plan (1951-1956), while aiming at certain urgent problems arising out of World-War II and 1947 partition of India, was calculated to strengthen the economy at the base and to initiate institutional changes which would foster more rapid progress in the future. Referring to the First Five-Year Plan, Nehru declared in the Lok Sabha :

> This is the first attempt in India to integrate the agricultural, industrial, social, economic and other aspects of the country into a single framework of thinking..... It has made the whole country planning conscious. It has made people think of this country as a whole.[18]

He expressed the hope that "planning will help us in having an emotional awareness of our problems as a whole."[19]

The Second Five Year Plan also (1956-61) sought to carry forward the processes initiated during the first plan period. It provided for a larger increase in production investment and employment. The task was not merely of raising living standards but of generating a dynamism in the economy which, while meeting the demands of increasing population, would lift it to higher levels of material well-being and of intellectual and cultural achievements.[20]

The Third Five Year Plan (1961-1966) conceded that "the growth of agriculture and the development of human resources alike hing upon the advances made by industry" and, therefore, emphasised that "the growth of industry has to be speeded and economic progress accelerated."

The Fourth Five Year Plan drew attention to the problems of the sub-marginal cultivators, and agricultural labourers by two sets of measures viz. (i) land reforms and (ii) generation of employment oriented activities.

The Fifth Plan was intended to make substantial reduction in the magnitude of poverty.

The Sixth Five Year Plan brought new era during which the major goal was the realisation of an economic and social order based on princi-

18. *Nehru's Speeches*, Vol. II, Speech in the House of the People, Dec. 15, 1952, p 87.
19. *Ibid.*, p. 87.
20. Second Plan : pp. 1 and 9.

ple of socialism, secularism and self-reliance. The Plan used the poverty line of Rs. 65/- per month at 1977-78 prices for rural areas. In order to remove rural poverty the Plan has allocated Rs. 1500 crore for the Integrated Rural Development Programme (I. R. D. P.) which seeks to create productive assets in rural areas. The National Rural Employment Programme (N. R. E. P.) envisages the creation of 300 million man-hours in rural projects at an outlay of Rs. 1,620 crore. And then there are Minimum Needs Programme (M. N. P.), the Training Youth for Self-Employment (TRYSEM) plan and others.

The Seventh-Plan did not lay down any new policy for rural development and land reforms but laid stress on the implementation of the already adopted policies and programmes for rural development.

During the seventh Plan, it is proposed to implement a centrally sponsored scheme on the basis of matching contributions by the states and centre, for updating of land records. The already started special programmes for income generation for the poor through assets endowment and wage employment for them, such as Integrated Rural Development Programme, National Rural Employment and Rural Landless Employment Guarantee Programme etc., are to be continued at an accelerated pace during the seventh Five Year Plan. It is proposed to involve volutntary agencies in various development programmes, particularly in the planning and implementation of programmes of rural development.

Thus, like the Sixth Plan, the Seventh Plan also does not lay down any new policy but emphasises the implementation of already adopted measures for rural development. The Special programmes initiated under the Sixth Plan are to be continued. The Plan, however, lays stress on the involvement of the people in the implementation of various programmes of rural development.

IV. The Limitations of the Agricultural Sector of Economy

India has been, and will remain in the foreseable future, a predominantly agricultural nation. Agriculture in its broad connotation accounts for approximately fifty per cent[22] of our national income and engages 73.8 per cent[23] of the working population. But, inspite of this "agriculture labour occupies the lowest rung of the rural ladder. Social stratification in a village is linked with land and caste which govern status,

21. *Ibid.*
22. See the *Report of the National Commission on Labour*, 1969, 394.
23. See Draft Five Year Plan 1978-83, Table 4.11 (1978).

economic power and political influence as much as the level of living which is their consequence. Owner-cultivators with large holdings are at the apex."[24] Agricultural labour is provided mostly by economically and socially backward sections of people viz., scheduled caste and scheduled tribes.[25] The very fact that they have continued deficit budgets[26] prove that they are not gainfully employed. They do not spend lavishly; rather they spend in Bihar, nearly 90 percent of their income on food.[27] Indeed, most of them are below poverty line.

Low productivity was as much due to the archaic methods of agriculture and the lack of irrigation facilities as due to the seasonal character of the industry and the over-crowding of farms. On the one hand, majority of economically active persons, with work available for only 3-4 months, remain economically inactive for 9-8 months every year. On the other hand, the available work does not require the efforts of 103.6 million. A good many of them are tied to the land merely because there are no other outlets. They share in the income but make no more than a nominal contribution to the production. It is knieve to mention that the annual addition of a working force to agriculture tends to further lower the per capita contribution to the national income.[28]

Nehru, no doubt, emphasised improvements in the methods of agriculture and adequate irrigation facilities so as to increase the much needed agricultural production but he conceded that they would only marginally, if at all, reduce the "enormous volume of under-employment and disguised unemployment that exists in Indian agriculture."[29] Expansion of the area of land under cultivation according to Nehru would help to increase production as well as utilization of agricultural labour force.

24. *Supra* note 22.
25. *Ibid.*
26. See the Report, First Agricultural Labour Enquiry, Vol. III Ministry of Labour, Govt. of India 1955, p 27; Rao, V. K. R. V. (ed), *Agriculture Labour in India*, Asia, (1962) pp 11, 72, 187, 190; and Thakur, S. N., "*Unemployment in Indian Rural Sector*", *Indian Journal of Labour Economics*, Vol, XIV, p. 8).
27. See the Report, First Agricultural Labour Enquiry, Vol. III, 1955, p. 28, *See* also Thakur, S. N., *op. cit.*
28. This is a rough estimation. According to the Planning Commission, the natural increase in the labour force is two millions per annum—about 1.2 million in rural areas and 0 8 million in urban areas. See, Second Plan, p. 39. He has assumed that economically active persons in rural areas enter agricultural.
29. *Ibid.*

Agriculture according to Nehru was more important than anything else because agricultural production sets the tone to all economic progress. He, therefore, said :

> If our food front cracks up, everything else will crack up, too. Therefore, we dare not weaken our food front. If our agriculture becomes strongly entrenched, as we hope it will, then it will be relatively easy for us to progress more rapidly on the industrial front, whereas if we concentrate only on industrial development and leave agriculture in a weak condition we shall ultimately be weakening industry. That is why primary attention has been given to agriculture and food and that, I think, is essential in a country like India at the present moment.[30]

A slight increase in agricultural production, said Nehru, would bring a direct impact on our per capita-income. He said that some states which are full of big plants were in the scale of low per capita income inspite of the development of industry, because agriculture was not developing. He, therefore, suggested a great deal more about developing agriculture and, as a part of that programme, of land reform.[31]

V. Land Reforms

With the attainment of India's independence, Nehru placed a great deal of emphasis on land reforms for achieving a thorough reorganization and radical transformation of India's agrarian economy in course of the developmental planning. His idea in this regard was two fold :

> "(i) to remove such impediments in agricultural production which arise from the agrarian structure inherited from the past; and
>
> (ii) to eliminate all elements to exploitation and social injustice within the agrarian system, to provide security for the tiller of the soil and equality of status and opportunities to all sections of the rural population."

The first step taken by Nehru's Government in land reform was the abolition of all intermidiary interests by whatever name they were known to vest proprietorship in the cultivating peasants. Under the agrarian structure existing before the post-independence reforms, as the Land Lords and intermediaries grew richer, the State in consequence was deprived of considerable amount of revenue and the actual cultivators

30. 'Address at the University of Chicago', Oct. 27, 1949, p. 99.
31. From a Speech at the National Development Council Meeting, New Delhi, Nov. 8, 1963, p. 112.

could hardly make the both ends meet. Serious evils of system led to legislations for their abolition after independence. The basic idea of the intended agrarian reform was to bring the *ryots* and actual occupants into direct contact with the state. Also, the proprietory rights of the Zamindars were acquired by the State on payment of compensation. Nehru wanted to transform his ideas through various Five Year Plans. Thus, the Five Year Plans, in addition to emphasizing the abolition of intermediaries, also directed the Government to enact radical tenancy reforms in order to provide greater security of tenure to the tenants. The Five Year Plans noted the necessity of the resumption of personal cultivation based upon peasant-proprietorship; regulation of rent and consolidation of holdings and creation of cooperative village management. The idea of cooperative village management was to establish an integrated socio-economic rural structure in which agricultural production, village industries, processing industries, marketing and rural trade are all organized on cooperative lines. The Third Five Year Plan, therefore, laid down a pattern of land reform aiming at *Panchayat*, based on joint cooperative farms, preceded by the development of a net work of service cooperatives. State Governments were required to enact legislations relating to ceilings on holdings.

To achieve the aforesaid policy targets the Indian State Legislatures passed various legislations affecting land reform and ceiling limit. These laws have obviousiy affected citizens' right to property and equality before the law. When laws were enacted in States like Uttar Pradesh, Madhya Pradesh and Bihar with a view to bringing about agrarian reform, their validity was challenged befere the courts of law. In Madhya Pradesh and Uttar Pradesh the challenged could not be sustained, but in Bihar the Patna High Court struck down the Bihar Land Reforms Act, 1951 in *Kameshwar Singh* v. *State of Bihar*[32] on the ground that it contravened Article 14 of the Indian Constitution in asmuch as the legislation in qnestion accorded differential treatment to land owners in compensation. Nehru was rather disturbed over such developments and he made it clear that "if the Constitution is interpreted by the Courts in a way which comes in the way of the wishes of the legislature in regard to basic social matters, then it is for the legislatures to consider how to amend the constitution, so that the will of the people as represented in the legislatures should prevail."[33] Since this problem was of great significance to the pursuit of the economic

32. A. I. R. 1962 S. C. 1166.
33. See Neeraj, *Nehru and Democracy in India*, 1972, p. 118.

policies of the Government, the Indian Parliament substantially modified the provisions of Article 31. Nehru again made it clear that this was another attempt to save land reform legislation from further judicial obstruction, 'to take away the question of zamindari and land reform from the purview of the courts.'[34] He pointed out that the thing to which 'we, as a party, have been committed in the past generation,.... is the agrarian reform and the abolition of the zamindari system.'[35] The Constitutional amendment became part of the provisions contained in the Constitution (First Amendment) Act 1951 which was enacted with a view to eliminating all litigation challenging the validity of legislation for the abolition of proprietory and intermediary interests in land on grounds of contravention of the fundamental rights. The object of the First Constitutional Amendment, which introduced two explanatory Articles (Article 31-A and 31-B) was to fully secure the constitutional validity of Zamindari abolition and other agrarian reforms.

Article 31 was again amended in 1955 during Nehru's time to protect certain other legislative measures against judicial invalidation. During the discussion in Parliament over the proposed amendment, Nehru advanced the same arguments as he used earlier and made it clear that there would be neither confiscation nor expropriation of property except by law and except on payment of compensation. This was meant to clarify the intentions of the Constitution so that the courts might interpret it in the correct way. Nehru lashed out at those who held property as a sacred right because and idea of sanctity being attached to property was completely out of date. But ultimately "the quantum of compensation will be determined by the legislature.... it is the legislature's will that is bound to prevail in such matters.'[36] This was necessitated because in spite of clarification introduced in earlier amendments, legislative measures adopted by different States for the purpose of giving effect to the agrarian policy were successfuily challenged.

Article 31 has been taken away from the Part III of the Constitution by Constitution 44th Amendment Act. Be that as it may, it is indicative of the Hegal's delectics of thesis and ante-thesis between legislative and judiciary process and thereafter culminating on synthesis, grund norm, of Kelson. It poses an issue : Did the judiciary really create hurdle in the implementation of land reform ?

34. *Ibid.*
35. *Ibid.*
36. *Id.* at 119.

VI. Community Development Programmes

Pandit Jawahar Lal Nehru brought into reality Mahatma Gandhi's dream of rural development programme specially for the weaker sections of the rural society. He gave a concrete shape to the rural reconstruction programmes.

Thus the first ever comprehensive National Programme launched on an extensive scale for the upliftment of the rural masses in this country, commenced on October 2, 1952. Known as Community Development Programme, it *inter alia* included schemes for providing drinking water supply, drainage, health and rural sanitation education, housing, community centres, cultural and recreational programmes, youth clubs, mahila mandals etc. These programmes directly concerned welfare of rural masses. The overall Community Development Programme, however, included family planning, applied nutrition programme and settlement of landless labour as well as the rural works programme. The rural works programme supplemented the efforts through creation of employment opportunity in selected areas which suffered from acute employment or under-employment.

Community Development Programmes apart, special programmes have been undertaken for Scheduled Castes, Scheduled Tribes and backward classes for the upliftment. The 1961 census revealed that out of the total working population of about 188 million, 1/4th belonged to Scheduled Castes and Scheduled Tribes. About 18% of the total scheduled castes, living in rural areas, were working as agricultural labourers. The total expenditure on this scheme during the first three plans, amounted to Rs. 211 crores. The programme included provisions of educational and health facilities, housing and other schemes as also programmes aimed at economic upliftment.

The concept of Community Development Programme seems to be in a state of disarrary. The process of development set in by the Community Development Programme has not caught up with the expected momentum which the movement in general was required to generate. There has also been a shift on the role of officials from the State level downwards to adopt to the changing situation brought by the process of democratic decentralisation. Attaainment of effective coordination amongst technical and administrative services at block level is still lacking. Unless an integrated approach is made towards economic cultural and social problems of the rural population, it is difficult to give the desired magnitude of welfare amenities to rural and agricultural labour. Thus the nexus between economic, cultural and social factors, has still

to be established. The technical services in rural areas and the agencies controlling these services have also to be adequately strengthened and their functioning streamlined.

In spite of huge expenditure on these projects results were not quite satisfactory and, according to Nehru and others, the reason was the very business-like approach of the government officials.[37] Nehru was however, satisfied that it was one of the biggest things that the country had undertaken. 'It is an amazing thing how we are building it up from the grass-roots and not imposing it from above'.[37a] At Alipore, near Delhi, Nehru addressed a crowd of peasants and emphasized the importance of these projects :

> The work which has started here to-day spells the revolution about which some people have been shouting for so long. This is not a revolution based on chaos and the breaking of heads, but on a sustained effort to eradicate poverty.[38]

VII. Village Panchayat

Nehru introduced the idea of village Panchayat. He wanted that the panchayats should be given greater administrative and judicial powers. A villager must be given the opportunity of self-administration and to have a real *Swaraj* in his own village. He should have power and not have to refer everything to big officials. Nehru did not like the officials to interfere too much in the life of the village. He wanted to build Swaraj right from the village set up. Thus, he considered Panchayat more as an administrative unit, rather than an economic unit. Thus the whole object behind the Panchayati Raj, according to Nehru, was to create opportunities for human beings to grow so that they may be able to think, act and co-operate with each other and act together.[38a]

VIII. Village Co-Operative

Nehru said in the Nagpur Congress that every village should have a co-operative and that groups of villages should form unions of co-operatives, so that people of the village should know each other. The co-operative should encourage cohesion and the coming together of village people. The village should be like a large family.

37. *Supra* note 33 at 123.
37a. *Ibid.*
38. *Ibid.*
38a. *Jawahar Lal Nehru's Speech*, Vol. V (March 1963-1964), 1968, p. 95.

Co-operatives according to Nehru should represent the economic side of village life. The peasantry and others will, through the co-operatives, perform together many of the economic functions which they performed separately as the peasant in India was very weak. According to Nehru, the peasant can make good only if he joins others through a co-operative. By forming co-operatives the peasants can pool their resources for providing credit and for getting supplies of seeds, implements, fertilizers, etc. and can organize the sale of their produce. The co-operative removes the moneylender and the middle-man.[38b]

Nehru hoped that service co-operatives in the villages will raise the standard of living in the village in many ways. If the co-operatives function properly they will help in introducing cottage and small industries and other auxiliary activities in the villages. Indeed it would represent a higher level of work and existence for the people of the villages.

Joint Cultivation : Nehru pleaded for joint cultivation. According to him it does not mean that people should lose their ownership of land. The right of ownership will continue. Joint cultivation according to him would be another step to earn more profit from the land. People, having their share of land, should jointly cultivate it and should take their share out of what is jointly produced. This will enable the peasant to employ scientific methods of cultivation which are difficult to apply on small holdings. What is visualized in the Nagpur resolution is service co-operatives leading ultimately to joint cultivation with the ownership of the land remaining with the peasant.[39]

IX. Village School

Nehru believed in the development of education because he knew the magnitude of illiteracy in the rural areas. He believed that a little amount of education could change the outlook of the villager and he would be in position to adopt latest techniques for agricultural operations. As such he suggested that every village should have a school because he considered it a basic necessity.

X. Social Welfare

Nehru was concerned as to how to give the villagers the basic necessities of life, and how to make them self-reliant and capable of

38b. *Ibid*
39. *See* Nehru's Speech at Madurai, April 15. 1959.

looking after themselves. According to him, the problem of social welfare might be looked at in many ways. He viewed from the point of view of the villages and the towns. He said that even if a small advance was made per capita in a village, in the totality it would amount to a big advance. According to him, if we put up big factories, they help in in our production, but they do not affect too much the per capita income. If the village farmer increases his yield a bit, the per capita income immediately goes up and everything else goes up.[40]

XI. Hurdles in Rural Development

A. Unemployment and Under-employment as a Barrier to Minimum Standards of Employment : Unemployment and underemployment according to Nehru was the most important economic evils in India. They were phenomena of Indian agriculture. The extent of unemployment and underemployment in the agricultural sector was worked out in 1955 at 5.8 million and 1971-72 to be about 13 to 16 million.[41] The exact figure for 1980-81 is not available but it must have been substantially increased. Indced, in the Indian agricultural sector the intensity of the problem lies in the fact that agricultural labourers are unemployed for 168 days in a year.[42]

One of the reasons which may be accounted for unemployment according to Nehru was the decline of Indian handicraft. Millions of people were thrown out of gainful employment. Emphasising this aspect Nehru observed :

> The liquidation of the artisan class led to unemployment on a prodigious scale. What were, all these score of millions, who had so far been engaged in industry and manufacture, to do now ? Their old profession was no longer open to them, the way to a new one was barred. They could die, of course, that way of scape from an intolerable situation is always open. They did die in tens of millions. The English Governor General of India Lord Bantick, reported in 1834, that the misery hardly finds a parallel in the

40, Speech at a Seminar on Social Welfare in a Developing Economy, New Delhi, Sept. 22, 1963.

41. Rao, V. K, R. V., "The Second Five Year Plan : Employment Pattern and Policies", in papers relating to the formulation of the Second Five Year Plan, New Delhi, pp. 241-42.

42. Thakur, S. N., "*Unemployment in Indian Rural Sector*", Indian lournal of Labour Economics, Vol. XIV, p. 89.

> history of commerce, the bones of the cotton weavers are bleaching the plains of India.[43]

This led to an unprecedented shift of population from industry to agriculture :

> But still vast numbers of them remained and these increased from year to year as British Policy affected remoter areas of the country and created more unemployment. All these hordes of artisans and craftsman had no job, no work and all their ancient skill was useless. They drifted to ihe land, for the land was still there. But the land was fully occupied and could not possibly absorb them profitably. So they become a burden on the land. Ane the burden grew and with it grew the poverty of the country.... India became progressively ruralised. In every progressive country there has been during the past century, a shift of population from agriculture to industry, from village to town, in India this process was reversed, as a aesult of British pol icy.[44]

These skilled workers thus, created problems of unemployment and underemployment both in industrial as well as in the subsistence sector of economy.

The main solution of the problem of unemployment and underemployment amongst the vast numbers of landless labour has to be some sort of industrial employment. Nehru's planning commission decided that village industries should be encouraged, expanded and made to flourish. With this object the Khadi and Village Industries Board was established and Nehru himself inaugurated it. Later, he agreed to convert it into an autonomous commission. In the Second Five-Year Plan a large financial provision was made for the promotion of village industries and of these, khadi got the top priority. Nehru's own faith in Gandhi's teaching about hand-spinning was limited to a demonstrative spinning of a little cotton on the anniversary of Gandhi's death in the full blaze of publicity. He wore khadi not because he believed in it but mainly to demonstrate his political descent from Gandhi. Khadi had stood him well, for it had taken him straight to Gandhi's heart.[45]

43. Jawahar Lal Nehru, *The Discovery of India*, p. 247.

44. *Id* at 248.

45. Gandhi wrote to Nehru in 1937, "Your calling khadi, 'livery of freedom' will live as long as we speak the English language in India. It needs a first class poet to translate into Hindi the whole of the thought behind the enchanting phrase. For me it is not merely poetry but it enunciate the great truth.

B. Migratory Character : One of the significant features of Indian labour is their migratory character. Industries such as construction, sugar, cotton ginning and plantation abound in migrant workers. The migrant generally come from the villages join industries and do not severe their village connections. They aspire for village life. Employment in the industrial establishments for them is just a temporary phase. In case of dissatisfaction with the industrial life they prefer to return to their respective villages. There are several causes of migration.

Nehru was fully aware of this situation when he said that the villages are being deprived of their bright persons who go to the cities, leaving the villages rather weak and without any educated or trained persons to help them. He, therefore, proposed "to urbanize the village, not to take away the people from the villages to the towns that are growing up, but to bring certain urban standards to the village, and keep the bright persons of the village in the village itself." The picture of migratory character of labour has undergone radical change since the early days. Migrant workers have changed their orientation and attitudes in course of time.

C. Poverty : Over 80 per cent of our people live in the villages. India is poor because the villages of India are poor. India will be rich if the villages of India are rich. Therefore, the basic problem of India is to remove poverty from the Indian villages. Nehru pointed out that some years ago, we abolished the zamindari and the 'jagirdari systems in various parts of India, because the villages of India could not prosper under a semi-fuedal system of landownership. This is not enough. Nehru was alive of the problem of extreme poverty in certain large regions, apart from the general poverty of the country. He, therefore, pointed out that "we have always a difficult choice before us; whether to concentrate on production by itself in selected and favourable areas, and thus for the moment rather ignoring the poor areas, or try to develop the backward areas at the same time so as to lesson the inequalities between regions. A balance has to be struck and an integrated national plan evolved."

XII. Conclusions

The above contribution of Nehru has sought to establish that Indian concept of a democratic welfare state is based on the philosophy of modern liberalism. Nevertheless, in pursuit of enriching individual life, liberalism does not hesitate to embark upon newer and newer socio-economic experiments. Following the philosophy, the role of Nehru

in India is directed toward socio-economic justice consistent with the liberty and freedom of the individual. It is true that in spite of the new legislations, the social and economic reforms have not yet gone deep into the root of the problems and people do not yet habitually adopt them. For instance, the social inequality e. g. practice of untouchability is not completely removed. the Panchayat Samities have proved defective in many instance because of the local politics the speedy justice at local and district level is still a distant possibility. Further Nehru's idea of Joint Co-operative farming was imaginative. Moreover, the community development programme could not become "real lamp". Indeed the factors which has defeated implementation of agrarian reform through legislation were :

1. Lack of political will at the policy making level which in turn is responsible for defective legislation.
2. Cumbersome judicial procedure.
3. Non-cooperative and inefficient bureaucracy.
4. A class of beneficiaries which is unable to take advantage of the legislation because of various socio-economic reasons.[46]

In general, the picture is dismal in many ways, and the crucial point is that poverty has increased. Until recently, more than half of our rural population were below the poverty line. By the end of the Sixth Five-Year Plan, the population below the poverty line has been reduced by 10 per cent—from around 41 per cent to 31 per cent, and that the Seventh Five-Year Plan proposes to bring it down to 25 per cent. But let us ask ourselves ; what is this poverty line ? The poverty line is defined as the level corresponding to a consumer expenditure of Rs. 76 per month per capita in the rural areas and Rs. 88 in the urban areas at 1977-78 prices. It is obvious that the poverty line is in fact the barest subsistence level, and as time passes, as our development proceeds, the poverty line has to go up considerably to include other basic needs as health care, shelter, clothing, education, etc. and to rflect the goals of rising standards of living.

Nevertheless there has, as well all know, been considerable rural development in Indla, judged by any criteria—increase in agricultural production, extension of irrigation facilities, increased production of fertilisers and other agricultural inputs, incomes in the country, as in

46. *Ibid.*

Haryana and Punjab, are experiencing level of prosperity never before realised. Further there is a marked change in political sphere also. In pre-independence India the control over the political system by upper castes such a Brahmins, Rajputas and Kaystha was well known. Today, at the village taluka and district levels, power resides in the hands of well-to-do people who often belong to the numerically preponderant peasant class.

In short, the legal and ritual sanctions which supported social inequalities have been withdrawn and the new normative order provides a favourable environment in which new changes can establish themselves through the changing attitude of the people. For instance, the attitude towards untouchability and caste has clearly changed by higher education. Similarly, several years ago after the enactment of law on ceilings, landowners continued in possession of large holdings and this was not disapproved in the villages, but today this is no longer true in view of fast changes in relations between large landowners and landless persons. The community development progamme has also played a vital part in bringing about social and economic changes in villages. It has atrengthened the foundations of the development efforts in society. It has helped in carrying the message of modernism to the village people. Thus Nehru's ideas and philosophy, in long run, would help gradually in the transition of the Indian society from traditionslism to modernism.

AGRICULTURAL HOLDING TAX : AN ALTERNATIVE TO THE LAND REVENUE

A. H. ANSARI*

In developing countries, agriculture, being the largest economic sector, plays an important role in their economic and social development. As it is the largest economic section, it is impossible to raise adequate revenue without taking it into account, directly or indirectly.[1] The poverty and dispersion of most farmers and the indeterminate and seasonal nature of their income make equitable and sufficient taxation acutely difficult, both politically and mechanically; yet such levy may well be necessary both to stimulate production of marketed farm surpluses for supplying other sectors[2] and to finance the inputs of research, extension work irrigation, fertilizers, seeds pesticides, marketing facilities and credit which the "green revolutions" require.[3] It is for these reasons that agriculture is subject to taxation. The present day agricultural taxation is also supposed to be an instrument of proper resource mobilization.[4]

In India, in the olden days land revenue had been a direct tax on agricultural holdings, collected by the rulers. According to Manu, it was 1/6th of the gross produce. In Akbar's reign Raja Todar Mal brought about a reform where the king's share was raised to 1/3. This continued for a very long period. Later on direct contact between farmers and the emperor was gradually lost in the matter of tax collections. The intermediaries then were collecting tax from the peasants and were paying a fixed sum to the rulers. This intermidiary system continued even in the British rule, although in some areas *mahalwar* system and *ryotwari* system were in practice. After independence the

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1. There are two types of taxes, commonly known as direct taxes and indirect taxes Income, property and capital transaction generally fall in the previous one, and production, sales and purchases fall in the later one
2. U. K. Hicks, *Development from Below* 1961, 3-22.
3. *Pearson Report*, pp. 61-62.
4. Haskell P. Wald and J. N Froomkin, *Papers and Proceedings of the Conference on Agricultural Taxation and Economic Development*, Harvard Law School, International Tax Programme, 1954.

Zamindari system was abolished, this way the States came in direct contact with the farmers again.[5]

After Independence, the agricultural sector did not make its due contribution towards the public revenue.[6] This resulted in inequality as to the tax burden on rural and urban sectors. Efforts, were therefore, being made to reform the existing land revenue system so as to infuse all the characteristics of the modern tax system and to make it practicable. The Committee on Taxation of Agricultural Wealth and Income, commonly known as Raj Committee, proposed Agricultural Holding Tax to replace the existing land revenue. In this paper an humble attempt is made to critically evaluate the Agricultural Holding Tax[7] and to find the possibility for adopting it in place of the existing Land Revenue.

Defects in the Land Revenue

The existing land revenue has many shortcomings. These are :

(1) The agricultural sector does not make its due contribution towards public revenue. This is evident from the fact that taxes like land revenue and agricultural income tax have, instead of showing any increase resulted in a decline in their proceeds. The land revenue is inelastic. It has no bearing to the decrease or increase of the agricultural yield. For land revenue, after a few years settlement is required, which is nothing done. In U. P. a study reveals that in 1960-61 land revenue, agricultural income-tax and the lump sum amounts deposited by sirdars for acquisition of Bhumidhari rights yielded Rs. 23 crores. These fetched almost the same revenue (Rs., 22 crores) in 1970-71, whereafter the receipts fell due to the exemptions granted to holdings up to 6½ acres from the liability to pay land revenue. As a percentage of income from agribultural sectors direct agricultural taxation showed a steep decline from more than 2 per cent in 1950-61 to 9.83 per cent in 1972-73. As a percentage of total tax revenue, land revenue and agricultural income taxation declined from 40 per cent in 1960-61 to 14 per cent in 1970-71[8]

5. See entry 45 in the State List of the Seventh Schedule of the Indian Constitution.
6. Due to this inadequacy, States are deriving additional revenue either by way of surcharge or Cess or agricultural income-tax or *brihat jot kar* or any other suitable levy.
7. Here-in-after referred to as *AHT*. The Raj Committee Report is referred as *The Report* (1972).
8. See U. P. Taxation Enquiry Committee Report, 1974, pp. 103-104 (Annexure 14 of the Report) The same trend is still perpetuating.

(2) The incidence of direct taxation should be broadly the same on comparable income and wealth groups, irrespective of the sources of such income and the forms in which wealth is held. It is because equity is one of the major considerations of any tax structure. The land revenue does not conform to the equitable principle. Moreover, the rate schedule of land revenue is neither graduated nor progressive.[9]

Agricultural Holding Tax (AHT)

The economists have suggested for the replacement of the existing land revenue system with more scientific and productive system. Several schemes have been suggested, but more or less they are improvement over the land revenue system. Agricultural Holding Tax was suggested by the Committee on Taxation of Agricultural Wealth and Income 1973, popularly known as Raj Committee. The principal features of the suggested proposed tax are :

(i) The whole country should be divided into a sufficiently large number of soil—climatically homogeneous tracts so that most of the soil climatic difference may be taken into account. Some districts or tracts may not have soil climatically homogeneous. Such districts could be sub-divided into two, three or even more tracts.[10]

(ii) The gross value of different crops per hectare for each year is to be estimated. Following steps have been prescribed :

(a) For each district/tract the norms of output of different crops per hectare for each year should be worked out on the basis of estimates of yield for the previous ten years, the crop yield estimates being arrived at with the help of a large number of crop cutting experiments.[11]

(b) The norms of output per hectare of different crops in different districts/tracts be evaluated at the average harvest prices of the preceding three years prevailing in the markets notified.[12]

9 A degree of progressiveness has been achieved by surcharge on the land revenue, but it is lamb technique. Scope for progressive taxation in agriculture has been reduced by the ceiling laws, but still its utlity can not be ruled out.
10. The Report (1973), 26-27.
11. According to the Committee there are two reasons for prescribing ten years average yield. Firstly, it will include good and bad years. Secondly, there will be available sufficiently large number of crop cutting experiments to give estimates of yields of crops even for a small homogeneous tract. See *Id.* at 27.
12. According to the Committee the State Govts should notify the market and publish the prices on regular basis. See, *Id.* at 27

(c) The norms of output mentioned in (a) above, valued at prices mentioned in (b), will constitute the norms of the value of output per hectare of different crops in districts/tracts.[13]

(d) In working out the norms, as mentioned above, the fodder, which is a by-product of a grain-crop, is not taken into account. When fodder is grown as an independent crop, it is taken into account. When the fodder crop is grown for market, the total value is taken into account. When a part of it is intended for sale, if the fodder is grown under irrigated conditions the value of its output might taken at 1/4 the value of output of the lowestvalued irrigated crop; and since the value of irrigated crops is in general higher than of the un-irrigated, the value imputed of fodder crops in the irrigated areas would be higher than to those grown in the unirrigated areas.[14]

(iii) The cost cultivation, irrigation expenses and depreciation of assets qualify for deduction from the gross value of the output of the crops. Therefore, the Committee suggested for the following deductions—

(a) The deductions for the cost of cultivation have been suggested to be made according to some norms based on average.[15] Therefore, deduction at the rate of 40 per cent of the value of gross output may be allowed on account of costs of cultivation (other than expenses on irrigation). In exceptional cases for specified irrigated or unirrigated crops in particular districts/tracts, the deductable cost may be raised to 45 or even 50 per cent.[16]

(b) Irrigation expenses are to be allowed for deduction in the following manner :

1. For crops irrigated from public sources of irrigation such as canals, tanks, public tubewells, where specified water rates or charges are paid, the actual rates or charges paid would be deductable.

13. *Id.* at p. 28.
14. *Id.* at 28.
15 The Committee does not favour for deducting the actual cost of cultivation for two reasons. Firstly, it will be difficult to collect information on costs every years from each assessable holdings. Secondly, it will lead to undue harassment on the one hand, and ever-statement of costs and conseqnent tax evasion on the other. *Id.* at 29.
16. *Id.* at 30.

2. For crops irrigated from private sources such as tubewells, lifts, etc. or deduction at the rate of 20 per cent of net output of the crops thus irrigated would be deductable.[17]

(iv) Each district/tract will have a schedule of ratable value of land per hectare under different crops/crops-groups. The schedule will have to be revised every year taking into account (i) the crop yields of the preceding 10 years, (ii) the harvest prices of the preceding 39 years, and (iii) Any revision, that may be made from time to time, in the scale of deductions to be made on account of the costs of cultivation (other than expenses on irrigation) of different crops. The schedule of rateable values thus revised and brought upto-date will constitute the schedule of rateable values for a given year of assessment.[18]

(v) The rateable value of an assessable land holding will be computed from the schedule so prepared, taking into account the actual crops grown on it during the previous year, and the costs of cultivation and expenses on irrigation.[19]

(vi) Development allowance should be allowed, according to the Committee, to all agricultural holdings at the rate of 20 per cent of the rateable value subject to the maximum of Rs. 1,000.[20]

(vii) Relief will be provided for crop failures. If due to crop failure the average output of a crop in a district/tract was less than the half of the norm established on the basis of the average output of earlier ten years, the rateable value of the land shown under such a crop in that year should be taken to be zero. In less severe cases of crop failure the Committee suggested that it should be investigated by a competent authority and relief should be granted accordingly.[21]

(viii) The actual tax liability is calculated on the basis of the under mentioned formula—

$$R = \frac{x}{2} \text{ per cent}$$

17. *Id* at 30, 31.
18. The assessment year will be the financial year. See, *Id.* at 37.
19 *Id.* at p. 39.
20. The Committee provides it for the reason that the deduction for cost of cultivation including irrigation charges does not include development costs. Such as of digging of wells, soil conservation, purchase of animals and implements and machinery, *etc.* See *Id* at 40.
21. *Id.* at 34.

(c) The norms of output mentioned in (a) above, valued at prices mentioned in (b), will constitute the norms of the value of output per hectare of different crops in districts/tracts.[13]

(d) In working out the norms, as mentioned above, the fodder, which is a by-product of a grain-crop, is not taken into account. When fodder is grown as an independent crop, it is taken into account. When the fodder crop is grown for market, the total value is taken into account. When a part of it is intended for sale, if the fodder is grown under irrigated conditions the value of its output might taken at 1/4 the value of output of the lowestvalued irrigated crop; and since the value of irrigated crops is in general higher than of the un-irrigated, the value imputed of fodder crops in the irrigated areas would be higher than to those grown in the unirrigated areas.[14]

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21. *Id.* at 34.

(Here R is for tax rate, and x is thousands of rupees arrived at after deducting the development allowance from the rateable value of a holding). The $x/2$ per cent of rateable value of the holding (minus the development allowance) would the tax.[22]

(ix) The Committee suggested the operational holding as basis for levying the AHT.[23]

(x) The unit of assessment of AHT will be the family consisting of husband, wife and minor children.[24]

(xi) The Committee further suggested for implementing the scheme first on the operational holdings with rateable value of Rs. 5000 or more.[25] The Committee left to the States to extend it further on holding having reteable value be low Rs. 5000 but upto Rs. 600 only, as it suggested for holdings having rateable value below Rs. 600 for taking Re 1 as a token of tax.[26]

(xii) The Committee has not exempted the trusts and Co-operative Societies from the AHT. Likewise, the AHT will also be impossiable on the companies.[27]

(xiii) Lastly, the Committee suggested for an All India Committee on AHT for the guidance of States. Committee should be appointed by the Planning Commission having three members : (i) a non-official economist; (ii) an official with experience of revenue administration at the state level; and (iii) a technical officer who is or has been a Director of Agriculture.

No State, except Haryana, has yet brought the *AHT* in practice. Even Haryana has not implemented it in its original form.[28] There might be following reasons for the States being hesitant in implementing it :

(1) The big size of Agricultural sector creates a strong presumption that the substantial portion of the required revenue should be raised from this sector. Furthermore, a strengthened land tax could provide

22. *Id* at 40-41.
23. The operational holding will include land owned plus the land leased in minus the land leased out by the farm operator. See *Id.* at 44.
24. *Id.* at 43-44.
25. The Committee has provided step by step the process which should be followed by the implementing state. See *Id*, at 46-49.
26. *Id.* at 51.
27. *Id.* at 52-54.
28. See infra at 12

desirable support for local government in a federal structure. The Raj Committee took into account these aud proposed AHT for better revenue yield. But for political reasons the scheme has not been implemented. The majority of Indian population comes from villages and ruling party does not want to annoy them. There is need to launch an educative campaign to convince the rural masses that they are less burdened and for better and rapid economic development they should also come forward. This job can better be done by politicians and intellectuals.

(2) Probably the States are hesitant in adopting it for a mistaken belief that AHT. is a new system entirely different than the present land revenue system.

The idea of basing the quantum of land revenue on potential productivity factors, like soil, climatic conditions and the crops grown, is not new. In Akbar's time Raja Todar Mal laid the foundation of it. Under his scheme all the average produce of bigha of land was ascertaied. Land was classified into four categories according to soil and fertility and the gross produce was calculated on the basis of the crops grown during the preceding ten years. The average gross produce thus obtained for any particular piece of land was then commuted into cash on the basis of prices prevailing in the previous ninteen years.[29] The assessment so made was to continue for few years.[30] Even in the *ryotwari* system these things were taken into account.[31] It has also given a similar method for assessment of land revenue.[32] It would not be proper, therefore, to say that AHT. is entirely a new system to replace the existing land revenue.[33] It is nothing but a well-designed and reformed shape of land revenue. The user of the word 'replacement' to the land revenue is scaring the State politicians.[34]

(3) It is said that the scheme of A. H. T. is not simple. The complexity of the scheme of the proposed A. H. T. cannot be entirely ruled out. Likewise, it would not be improper to say that the scheme would increase the burden on administration.[35] But no scheme can be

29. Nineteen years were taken because prices were less fluctuating.
30. *The Report of the Taxation Enquiry Commission*, vol. III, pp. 181-182.
31. A. C Angrish, *Direct Taxation of Agriculture in India*, 1972, 20-2.1.
32. A. K. Dutta, *Pathways to Reform*, 183 191.
33. Committee has considered *AHT* replacement of the existing land revenue. *The Report* 5.1, 1973.
34. V. P. Gandhi holds similar view See Taxation of Farm Holdings—A Comment, *The Economic Times* 13.1 Annual, 1, 1974.
35. M. L. Dantwala has highlighted the complexity part of the scheme See Agricultural Taxation : Travils of Tax Designers, *Economic and Political Weekly*, 154-15.5, 1979.

set aside for these two reasons provided it is feasible from other points of view. In every scheme there is scope for further reform and it can be done when the practice shows difficulty or deficiency.[36]

(4) The proposed A. H. T. as such is not in practice in any country. Had it been in practice in the same form in any other developing country, there would have been less hesitation in adopting it.

(5) The Committee pleaded for uniformity in respect to tax base and tax-rate both, in the whole of India. It also suggested for a Central Committee for guidance. It seems that this has scared the state politicians. Revenue yield in every state has direct link and is directly proportional to the revenue need of the state. Therefore, it would certainly vary from state to state and there can not be uniformity in these matters. So much so, states have power to impose land revenue. It would be better to leave these two things to the states. For instance Haryana has made law for imposing A. H. T. but has adopted its own rate schedule based on soil classification. We are of the opinion that the States should adopt the scheme in full, with autonomy in altering the rates according to their revenue needs.[37]

(6) According to the Committee, when the scheme is implemented on holdings with a rateable value in excess of Rs. 5000, the yield would be about Rs. 200 crores per annum against the yield of about Rs. 100 crores (the then).[38] But the Committee has not told us as to how this has been estimated. The absence of calculation has created a doubt. There is no doubt in it that there would certainly be increase in the revenue yield. It is for the reason that the scheme would increase the burden of tax, and it is elastic and progressive, too.

It is clear now that the reasons for which the states are not accepting the A. H. T. have no substance.

Modifications

The recommendations made by the Raj Committee regarding A. H. T. were considered by the Planning Commission in 1983. The consensus of opinion was that the scheme of A. H. T. involved administrative complexities and might be difficult to implement. The Ministry of Agriculture did not favour immediate introduction of it but referred a simpler system of raising resources from agriculture till such time as the states had built up elaborate administrative arragements necessary for levying A. H. T.[39] There is no doubt in it that the scheme of A. H. T. would put more burden on the adimnistrative machinery of the States. The drawing up of Schedule of rateable value of land for land for each homogeneous Districts/tracts, revision of the schedule every year, annual assessment of each holding on the basis of crops grown calculation and giving various deductions and aggregation of holdings on operational basis, etc. are certainly going to increase the burden of the adminstrative machinery; on the other hand, the legal and procedural complexities have also been pointed out.[40]

The burden on the administrative machinery is not of much significance and one must not be scared about it because of two reasons. Firstly, an efficient machinery can do it very efficiently, we have examples of the Income-tax, Sales tax and the Excise Duty, which are efficiently operative. Secondly, some spade work is needed to be done in classification of the country into homogeneous districts/tracts and in making schedule, etc.; after this assessment, collection of duty and revision of schedule is left, which do not seem to be a difficult task.

It is clear that the reasons for which the states are not accepting the A. H. T. carry no substance. The deterrent factor is the complexity of the scheme and the increase in the administrative burden. Dr. Lakdawala and Dr. Chelliah have appreciated the merits of the scheme but do not recommend its implementation for these reasons.[41] Dr. K. N. Raj has accepted this and some other difficiencies in the scheme. To mention his comments in his own words :[42]

> Various administrative problems have been mentioned as reasons why it might be difficult in practice to organize and operate effectively the Agricultural Holding Tax. Among them are the non-availability of records relating to operational holdings, the difficulties

36. Effort has been made by Amaresh Bagchi See Agricultural Holding Tax : A modified Scheme, *Economic and Political Weekly*, 1631-4 8, 1978.
37. For above mentioned reasons states are not ready to abolish Sales-tax for Additional Excise Duty
38. The revenue yield itself by now has increased up to 200 crores. The yield from the A. H. T. would also go up. See the Budget of 1981.

39. Govt. of India, 147th Report of the Public Accounts Committee, 1978-79 (6th Lok Sabha).
40. M. L. Dantwala, Agricultural Taxation : Travails of Tax Design's, *Economic and political weekly*, A—154; C. H. Hannumantha Rao, "Agricultural Taxation : Raj Committee Report", *Economic and Political Weekly*, 1972, p. 2345.
41. Report of the U. P. Taxation Enquiry Committee (1974) 120; Gujarat Taxation Enquiry Committee (1980) 31
42. Cf. K. N. Raj, Direct Taxation of Agriculture (mimeograph) Ramaswami Memorial Lecture, March 12, 1973), *Indian Economic Review*, 1973.

in demarcating tracts and areas that are broadly homogeneous in respect of soil and climate, the burden that would be imposed on the administrative machinery if the assessments have to be made annually, the difficulties posed by the existence of 'benami' holdings, etc. These are indeed genuine problems, but none of a nature that precludes its adoption.[43]

He has given solution to the administrative problems. According to him, if annual assessments are found difficult, triennial or quinquennial assessments might do. If need be, he is of the opinion that 10 year period suggested for averaging to determine the norms of productivity for different crops can be altered.[44] He says that problems associated with identification of "benami" holdings, incorrect reporting of aggregate holdings of families, of those arising out of deliberate misreporting of the cropping pattern are of a category that is common to any form of direct taxation. He further says that even the lack of records relating to occupational holdings is the kind of problem that most forms of direct taxation have to contend with in the initial stages.[45]

He admits that, even if care is taken to demarcate as tracts only these areas that are broadly homogeneous in respect of soil and climate, the use of estimates of average productivity of land under each crop (or Crop-group) in a tract as norms for assessing the protential productivity of land under the different crops in all holdings within the tract might be inequitous and therefore, objected to on legal grounds.[46] He gives an answer to this question that the state has the power to make a reasonable classification.[47] But here still one will have to ensure that they attain the objectives sought to be achieved.[48]

Another objection, which he finds valid, is that since the proposed tax is on operational holdings, it leaves out rental income from agricultural income. He justifies its exclusion by saying that this is not an agricultural

43. *Id* at 8.
44. *Id*, at 9.
45. *ibid.*
46. It may be violative of equality clause of the Constitution of India.
47. Cf. K. N. Raj supra note 42 at 10.
48. The Supreme Court has given two tests : (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question. Cases in this connection are *Chiranjit Lal* v. *Union of India*, A. I. R. 1951 S C. 4110; *Anant Mills Co.* v. *State of* Gujrat (1975) 2 S. C. C. 175 can be referred.

Legal and procedural complexities thus cannot be ruled out. But when we compare it with the Income-tax and the Estate Duty we find that the scheme is less complicated. We have already pointed out that the difficiencies can be removed by suitable amendments, provided once the States implement it.

Some changes can be brought about even before its implementation. They are the following :

1. Basis

The Committee has recommended that the family consisting of father-mother and minor children, should be the unit for assessment, and the family should be identified on the basis of operational holding, not the ownership holding.[49] The Committee gives reasons—(i) the assessment of the A. H. T. requires information on the crops grown and harvested on the agricultural holding; (ii) the responsibility and decision to grow one crop or another, and how intensively to cultivate the land, are that of the farm operator—whether or not he is owner, and (iii) it will discourage illegal or concealed leases [50]. It has been suggested by some writers that the basis should be ownership holding rather than operational holding for—

(i) the consideration that collection of information regarding the crops grown would be easier, because operational holdings would then lose relevance, and it would not involve collection of any information regarding crops grown on individual holdings;[51]

(ii) that it is difficult to keep correct records of leasing and to whom;[52]

(iii) that such a system is inequitable and would leave a gap in the tax scheme as there would be no liability on the landowners in respect of leased out lands although they could continue to derive some benefit from such lands in the form of a share of the produce.[53]

49. An operational holding has been defined by the Committee as landowned *minus* land leased out *plus* land leased in. See *The Report* at 44.
50. *Id.* at 44-45.
51. Amaresh Bagchi, *supra* note 36.
52. *The Report* at 45.
53. Hanumantha Rao, *supra* note 40.

The operational holding view is upheld by us and supported for the reason that the taxes based upon the ownership are difficult to administer in areas where land rights are not recorded, where no established rights in land are recognized, where cultivation is done by nomadic tribes, where the areas are sparsely settled which have not been adequately surveyed and land is worked by squatters, and where the ownership of lands are in dispute.[54] These possibilities are there in India to a certain degree. Besides, the number of totally 'absentee' or even partially 'absentee' landlords would be small, consequent to the abolition of Zamindari and other land reforms since independence so that the problem could not be major one;[55] the precise terms of reference of the Committee being taxation of "agricultural incomes" the Committee had every right to ignore incomes which were in the nature of rentals from the leasing of capital.[56] But it is true that in the operational holding case there are chances of tax-avoidance. For instance, a person 'A' who has land of rateable value of Rs. 50,000 would be required to pay Rs. 12,500 as A. H. T. He lets out half of his lands to another person 'B', who has no land. Now the tax payable by both of them will be Rs. 3125 each. The revenue is reduced by Rs. 62 50 which would be a loss to the state. It is suggested, therefore, that rent received by the lessor (landlord) should be included in the rateable value of his land. If he does not have any land, the rent should be subject to charge in the same manner.[57]

2. Rateable Value of Agricultural Land

The most valuable and efficient tool for a successful reconstruction of land taxation, giving particular importance to rationalizing the tax base, is a system of soil classification and rating according to indeces of productive capacity and relative income potential. A country able to carry out that basic step-or else to adopt other land classification methods which though less satisfactory than the more advanced techniques, will still give reasonable recognition to differences in the productive capacity of land-can then apply an appropriate taxing formula and, if desired,

54. H. P. Wald, 'Taxation of Agricultural Land in underdeveloped Country" 18.3, 1959.
55. Cf. Sothixa, "Agricultural Taxation : A Comment" *Economic and Political Weekly* 1973, 82.
56. *Supra* note 42.
57. Restriction on let out of lease may also be put In such case one may be permitted to let out in certain circumstances. But to put restriction on letting out is not proper. It is a basic principle of jurisprudence and demand of justice that there should be less restriction on alienation of property by the owner.

introduce adjustments for personal exemptions and allowances.[58] It is for this reason that one can confidently support the scheme of A. H. T. as proposed by the Raj Committee. Under this scheme after classification of lands in such district/tract, a schedule containing the rateable value of lands determined on the basis of different crops grown per hectare worked out on the basis of the estimates of yield for the previous ten years, valued at the relevant average harvest prices of the preceding three years. This will have the following effects :

(i) Any individual peasant, who puts comparatively more labour and applies scientific means and produces more crops would not be required to pay more, because the basis of taxation is average yield and not his actual annual income. This will, therefore, act as an incentive to the peasants which would encourage higher production.

(ii) There is a class of persons which, for one or the other reason, does not give adequate attention towards agriculture. The result is that the productivity goes below the average. They would, under this scheme, act properly.

It has been agreed by Bagchi that the incentive effect would be further reinforced if the rateable value of land in a particular district/tract is determined with reference to the average value of output of one or two crops commonly grown in the area instead of for each crop individually.[59] The idea apparently seems to be good, and rather would make the scheme a bit simple. But it would be hypothication on the hypothication. Besides, it would affect the relatively balanced production of different crops. This will also not be equitable.

According to the scheme of the proposed A. H. T. the gross output is to be valued at the relevant average harvest prices. This can easily be practiced, as in present day, it is not difficult to find out harvest prices. The task becomes easy when the state governments recognize the *mandies* for this purpose. In this case the prices prevailing in the nearest *mandi* may be taken into account. We should not be *scared much* about this provision for the reason that in the Customs Act, etc. provisions are for *valuating* each and every property and the basis is the prevailing market price. There, the job is much more difficult but it is being practiced successfully. Another method may be to adopt the gross value of output as the norm or basis and to give up the attempt to assess the cost.[60]

58. *Supra* note 54 at 186-87.
59. Amaresh Bagchi, *supra* note 36 at 1634.
60. *Ibid.*

This is a good method, but, it would invite further complications in giving allowances and deductions and in calculating the tax.

The Raj Committee suggested that ten years average yield for determining the average rateable value of lands should be taken into account. The price which is to be taken into account is of three years. The Committee further suggested revising the schedule every year and making the assessment of agricultural holdings each year on the basis of crops actually grown on them in each previous year.[61] We feel that five years will be enough for determining the average rateable value, ten year is too long a period to be adopted.[62] To revise the schedule every year is not proper, because it would put a heavy load on the administrative machinery. Therefore, we suggest that the schedule should be revised every third year. This would make the scheme less elastic, but still there would be quick settlement. The revenue yield will not be substantially effected. We favour the proposed yearly assessment. This way justice and equity is adhered to.

Miscellaneous

To facilitate the farmers to feed their live-stock, it is necessary to provide them some incentive. A complicated scheme has been provided by the Committee.[63] It is submitted, therefore, that a certain fixed percentage should be deducted from the average rateable value per hectare.

One of the two possible methods for deducting the costs of cultivation is to allow deduction for paid out costs. It apparently seems to be proper. It will act as an incentive which will result in a better yield, but the negative part of it is that it would always encourage over-statement. It will also be difficult for the administration to find out the actual paid-out costs for each holding. It would be proper, therefore, to provide a deduction on fixed percentage basis, The need is to estimate the average production costs district/tract wise and to fix a percentage on this basis. The Committee has prescribed percentage but has not given justification to it.[64] Moreover, there are different percentages. We

61 The Committee has used due word assessment year. It is submitted that technically it would be proper to use previous year, because assessment year is that in which assessment is done

62. Reasons which the Committee has given in favouring adoption of ten years are not erroded even when we take up five years instead of ten years.

63. See *The Report* at 28.

64. *Id.* at 30-31.

suggest that there should be only two types of percentages one for irrigated crops and another one for unirrigated crops.

The situation that the land has not been used for growing crop for one year or more than one years, must be taken into account in determining the rateable value of that land holding. The Committee has taken up this matter in detailed manner. The suggestions, in this regards, are not objectionable.[65] But for the simplicity and for the purposes of leaving no scope for the persons having blackmoney with the intention to camouflage it into white, the deductions may be granted in the following manner :

(a) Any land which has been declared *banjar* (on which crops cannot be grown) should have zero rateable value;

(b) Any land which remains fallow for a reasonable period as natural consequences of drought, either prior to the harvesting or after the harvesting, the rateable value should be zero.[66]

(c) When the period is exceeded without a reasonable cause, the land should bear full rateable value. This would be a disincentive but would encourage the peasant to cultivate the land.

It will be grave injustice towards the peasants who have suffered a severe loss due to vis major, e. g., deluge drought, cyclone etc. if the rateable value of such lands are not appropriately reduced. We feel that the deduction in rateable value should be given only after inspection by an appropriate authority. It has been rightly suggested that the rateable value should be zero, when the loss is half or more than half.[67] It should be kept in mind that no concession should be allowed where the loss is due to negligence of the peasant.

The Committee suggested development allowance to be allowed to all agricultural holdings at the rate of 20 per cent of the rateable value subject to a maximum of Rs. 1000. To give development allowance on adhoc basis is not proper. Development allowance should be allowed only in respect of machinery, plant, etc., as decided by the state, which is owned by the assessee and is wholly used for his own agricultural purposes. They should be subject to the following restrictions :

65. *Id.* at 32-33.

66. The term 'natural consequences' may suitably be defined. Likewise 'reasonable period' may also be defined.

67. *The Report* at 34.

(i) They should not be used in any office premises or any residential accommodation, including any accommodation in the nature of a guest house.

(ii) It should not be allowed in respect to transport vehicles.

(iii) It should not be given to others on rental basis.

The allowance should be equal to 25% of the actual cost of the macinery or plant, etc. to be allowed in the previous year in which they started functioning.

The Committee has suggested allowances only for depreciation and development investments. Deduction to certain extent should also be provided for rents, taxes repairs and insurance for buildings; likewise, allowance should be provided for repairs and insurance of machinery and plant etc.

Constitutional Validity

Since agriculture is a state subject, every Act should be passed by the State Legislature, but under its legislative competence, viz., the Act must fall either in the state list or the concurrent list of the Seventh Schedule of the Constitution. A. H. T. would fall in entry 45 of list II which reads "Land revenue, including the assement and collection of revenue, the maintenance of land records, survey of revenue purposes and records of rights, and alienation of revenues, because in substance it is nothing but an improvement over the existing land revenue.[68] A new Act for A. H. T. thus can be made by the States under entry 45 of list II of the Seventh Schedule of the Constitution.

Even if A. H. T. is taken as purely a land tax, there is entry 49 in the same list of the Seventh Schedule which reads "Taxes on lands and building." Before the Supreme Court in *Assistant Commissioner* v. *Buckingham and Carnatic Co. Limited*[69], contention was brought that entry 49 will cover only those taxes which at the same time impose tax on building and land. This argument was not approved by the Court. The Court ruled that the entry must be read as 'taxes on land and taxes on buildings.' This decision of the Supreme Court gives as the correct position of the entry. Therefore, any tax on the capital value of the land will very well be covered by this entry of the List II of the Seventh Schedule of the Constitution.[70]

68. Land Revenue is a tax and not a rent : *Collector of Bombay* v. *N. R. Mistri* (1955) 1 S. C. R. 1311.

69 (1970) 1 S. C. R. 268; A. I. R. 1970 S. C. 169. Decision was based on legislative history of the entry 49.

70. Fof detail see *supra* under head agricultural tax on capital value.

The Supreme Court in *Raja Jagannath Baksh Singh* v. *U. P.* and *H. R. S. Murthy* v. *Collector of Chittor*,[71] has supported this contention. In the *Bukingham and Carnatic Co.* case the Supreme Court has also said that land revenue under entry 45 and land under entry 49 are indistinguishable. It is submitted that this statement of the Supreme Court is not free from doubt. We feel that both the entries in spirit are distinct and separate from each-other, entry 45 deals with land taxes relating to agricultural activities, whereas entry 49 covers taxation of lands other than agricultural land. If we take up the word meaning of the phrase "land revenue" it would mean "income of a government from taxation of land", which will be nothing but "taxes on lands", the first part of the entry 49 of the list II of the Seventh schedule. Probably, the Supreme Court has relied upon this contention. Article 13 of the Constitution says that no law should violate part III of the constitution, which contains fundamental rights. Originally taxing states were mainly tested on equality clause and the Articles guaranteeing right to property. Article 14 is equality clause, which guarantees equal protection of law and ensures equality before law, viz., it guarantees for non-discrimination. Article 19 (1) (f) and 19 (1) (g) were guaranteeing freedom to acquire, hold and dispose off property and freedom to practice any profession or to carry on any occupation, trade or business. Article 19 (1) (f) has now been deleted from the constitution.[72] The question here arises as to whether the right to property is still there in any form in the part III of the Constitution. If this question is answered in the affirmative, then another question related to it will be whether taxing statutes (here AHT) can violate this right; if so, in what manner ? A similar question also arises in connection with Art. 14 of the Constitution, as to whether taxing states can violate this Article, if so, in what manner ?

Article 14

The right to equality is one of the most precious fundamental rights guaranteed by the Constitution. As mentioned above, it has been guaranteed by the Constitution in Art. 14 of the Constitution.[73] Art. 14 outlaws discrimination and guarantees equality before law to all persons. There are two concepts involved in it—

71. A. I. R. 1962 S. C 1563 and A. I. R 1965 S. C. 177 respectively.

72 Omitted by the Constitution (Fortp-fourth Amendment) Act, 1978, vide section 2 of the Act (w e f. 20.6.1979.).

73 There are separate provisions also to cover specific discriminatory situations. See, Articles 15, 16, 17 and 18.

(i) "equality before law"—It is a negative concept which ensured that there is no special priviledge in favour of any one, that all are equal subject to the ordinary law of the land,

(ii) "equal protection of laws"—It is a positive concept which ensures that laws would apply alike and without discrimination to all persons similarly situated. It denotes that equals should be treated equally. There would be discrimination, if equals are treated unequally and vise-versa.[74]

Socially and economically, different classes of persons require differential and separate treatment. Therefore, for this reason, the legislature is entitled to make a classification of people so as to make classes of people of equal circumstances, but the classification should be reasonable. The tests of reasonability are two—

(i) It should not be arbitrary. It should be based on an intelligible differentia which distinquishes persons or things grouped together in the class from others left out of it;

(ii) There should be rationale relationship of the differencia adopted as the basis of classification to the object sought to be achieved by the Adt.

Both the tests are cumulative in application.[75] But in respect to the tax laws, the courts have, however, asserted that in view of the inherent complexity of fiscal adjustment of diverse elements, a legislature would be permitted a large discretion in the matter of classification.[76] It may select the persons or objects it will tax and a statute shall not be discriminatory. The Supreme Court has, thus, rightly said that the legislature is competent to levy a tax must inevitably be given full freedom to determine which articles should be taxed, in what manner and at what rate.[77] This is a practical approach given by the Supreme Court. If this is not done, every tax-legislation, big or small, will be brought to nulfity under Art. 14 of the Constitution and since finance and resource mobilization are important to every state, in the absence of such an attitude, resource mobilization will either be defeated or delayed. In giving such a verdic

74. *Jagannath Prasad* v. *Uttar Pradesh*, A I. R. 1961 S. C. 1245.
75. *Jail Singh* v *Rajasthan*, A. I. R. 1975 S. C. 1436.
76. *Karnataka* v. *D P. Singh*, A. I. R. 1975 S. C 594; *Anant Mills* v. *Gujarat* A, I. R. 1975 S. C. 1234; *Avinder Singh* v. *State* of Punjab, (1979) 1 S. C. C 137.
77. *Khyerbari Tea Co.* v. *State of Assam*, A. I. R. 1964 S. C. 975.

the court has probably followed the Supreme Court of the United States of America, where the Court has given almost a free hand to the legislature in classification for taxation.[78] But in doing so the legislature will have to exercise its power not arbitrarily, but reasonably.

In *Andhra Pradesh* v. *Raja Reddy*,[79] the supreme Court disapproved land revenue imposed at a flat rate on land without taking into account the quality or productivity of soil. There were other defects in the Act—there was no procedure to assess land revenue, and however grevious the bluder made in assessment, there was no way for the aggrieved party to get it corrected; no notice was prescribed and no opportunity was given to the assessee to question the assessment on his land.

In *Twyford Tea Co.* v. *Kerala*[80] where the tax was levied at the rate of Rs. 50 per hectare in seven types of plantations, the Supreme Court held that the Act was valid, for it equalised the different plantations for the purposes of taxation. However, the minority (3:2) on the other hand, held that the tax was discriminatory as it was not related to productivity of land—the average yield of lands varied from 359 Kg. to 1850 Kg. of tea and so a uniform tax must result in inequality among teagrowers. Similar to *Raja Reddy* case, in *K. T. Moopil Nair* v. *Kerala*[81] a land tax at a flat rate of Rs. 2 per acre was declared discriminatory, as it made no reference to income either actual or potential, from the land taxed.

A classification to levy a higher tax on those who are economically stronger than those who are weaker is a reasonable classification, because the object of a tax is not onlv to raise revenue but also to remove the economic in equality.[82] Therefore, a progressive rate schedule, made on reasonable criteria, will not be hit by Article 14 of the Constitution.

Now, when we look at the scheme of proposed AHT, we find that in the classification of lands there are average yield of the different soils, as basis. Thus the classification of lands for determining their rateable value has rationale basis. Further, the scheme is equitous, as it has taken into account the irrigated and unirrigated lands, permanent fallow

78. *East India Tobacco Co.* v. *A. P.*, A I. R. 1962 S. C. 1733. In this case Supreme Court has said "the U. S. Supreme Court has been practical and has permitted very wide latitude in classification for taxation.
79. A I. R. 1967 S. C. 1458.
80. A. I. R. 1970 S. C. 1133.
81. A. I. R. 1961 S. C. 552.
82. In *Kadar* v. *Kerala*, A. I. R. 1974 S. C. 2272. In this case classification on the basis of capacity to pay for purposes of taxation was held valid.

and temporary fallow and crop failures, etc. in addition to soil, climate and actual crops grown in a year.

As we have mentioned above, a progressive rate schedule is a reasonable classification, because in this type of schedule, those who have a higher potentiality to pay are required to pay more. The proposed AHT has progressive rates.

Right to property

It had been held by the Supreme Court in respect to Art. 19 (1) (f), which guaranteed right to acquire, hold and dispose of any property, that any tax having consficatory nature would be a colourable piece of legislation; it would be violative to Art. 19 (1) (f). The effect of the verdict will have same bearing in Article 19 (1) (g), which guarantees freedom of business and profession.

Thus in *K. T. Moopil Nair* v. *Kerala*[83] the petitioner was required to pay a tax of Rs. 50,000 per year on his property from which is secured an income only Rs. 3,100 per year. This was held by the Supreme Court as consficatory. The proposed AHT in no respect can be regarded as confiscatory in nature, became on relates to the productivity of the lands, and the rates are also reasonable. Apart from these, the proposed AHT also adheres to the principle of natural justice. The parties have an opportunity to go in appeal, and if their protest to the concerned officer has failed, to the courts of law. The scheme discourages arbitrariness in working, making schedule and determining norms of the lands on the basis of rateable value.

The scheme is a refined land tax, which is an improvement over the existing land revenue. The scheme will be covered by Entry 45 of the State List of the VII schedule of the Constitution. It does not go against Art. 14 of the Constitution; and does not violate the right to property. It has some administrative complexities, which in term would increase administrative burden, but it can be reduced by the proposed changes mentioned above. There are some difficulties, regarding maintaining records, making classifications and revising the schedule prepared on the basis of rateable value of lands, are bound to remain with this scheme or any other scheme, where the basis of tax is average yield of lands-real or gross. The scheme deserves implementation. The states should, therefore, opt for this scheme, with the changes we have suggested, or with these changes and the additional changes they would

83 A. I. R. 1961 S, C. 552.

like to make. The states should not be hesitant for this reason also that the scheme is not entirely new; it has been in practice in one or the other form in Todarmal scheme, in *Ryotwari* system of Madras and Land Tax system of Assam. To make a sample survey for testing efficiency of this scheme is not a good choice. Prior to the implementation of AHT there is a need to make sufficient administrative exercise. We feel that after sufficient survey work the scheme should be implemented, and if any practical difficulty appears, that can be removed by suitable change afterwards.

Scheme of Dr. Amaresh Bagchi (Modified Scheme of AHT)

Dr. Amaresh Bagchi has given considerable thought over the AHT of Dr. Raj and has made useful suggestions for simplifying the scheme.[84] The main ingredients of his modified scheme are—[85]

(i) the assessments once made must remain for five years. It must be revised after expiry of this period;

(ii) the schedules of reteable value of land per hectare be revised once every five years or so;

(iii) the rateable value of land in a given homogeneous area/tract be determined as the basis of the average gross value of output of only one or two crops, irrespective of the crops actually grown by a farmer, the crops commonly grown in that area and no attempt need be made to fix norms of net return per hectare seperately for each crop from year to year which would be required under the Raj's scheme. Also, the norms would, under the modified scheme, be fixed on the basis of averages of output for 5 years instead of 10 years as suggested by Raj, while prices to be used will be the average of three or four years A further measure suggested for simplification suggested is to assess the tax on the basis of ownership holding, i. e., land owned by a family instead of on the operational holdings basis.

Though it is possible in a system of AHT to construct the tax schedule to achieve a high degree of progression, since under the modified scheme of AHT of Dr. Bagachi tax would be levied on the gross value of output, and enforcement might be difficult if progression is made too

84. Bagchi, *supra* note 36 at 1631-1648.

85. *Id* at 1633-1636. Quoted here from the Report of the Gujarat Taxation Enquiry Committee, 1980, 31.

steep. It has been suggested, therefore, that the degree of progression should be somewhat milder than what was envisaged in the Dr. Raj's recommendations. To afford relief to small holders, the scheme has provided that no tax need be payable unless the size of the holding is more than one hectare, that is, 2.5 acres (5 acres if the land is unirrigated) and the progressive rate schedule may apply to holdings whose aggregate rateable value exceeds Rs. 5000. For holdings whose area is more than 2.5 acres, but whose average rateable value is less than Rs, 5,000, the tax, it is suggested, may be charged at a flat rate, say Rs. 7 per acre of unirrigated land Rs. 10 for irrigated land. On holdings with rateable value exceeding Rs. 5,000 the tax may be levied at the rates having mild progression.

The object of the modified scheme of Dr. Bagchi is to make the scheme of AHT simpler. He has very successfully done it. The scheme with the proposed changes has become more practicable. The main administrative difficulty in the AHT scheme was that tax was to be assessed on operational holdings basis. In this system the land which have been let out (leased out) could not be taken into account which in effect would create ample chances to avoid tax.[86] But even now Dr. Raj sticks to his suggestion, and moreover he suggests deleting the rental income" from the definition of "agricultural income" elsewhere also.[87] But Dr. Bagchi strongly favours the ownership basis in the following words :

> As the tax would be levied on the basis of ownership, it may be argued that there should be some differentiation in the treatment of favoured and self-cultivated land, since in respect of leased out land, the owner is entitled only to a fixed proportion of the produce. Ownership basis for land taxation cannot, however, be regarded as a fatal infirmity.

He has given valid arguments. In case of existing land revenue the basis is ownership. The modified scheme thus does not seek to change it. Moreover, like land revenue, in case the owner is unable to give revenue, it can be realised from the tenant. We are also of the opinion that ownership should be the basis of assessment.

Conclusion

Land revenue has failed in mobilising the resources properly. It has also failed to provide sufficient revenue to the States. It is because

86. See, *supra* note 36.
87. K. N. Raj, *supra* note 42 at 10-11.

of many defects it carries. Some states have tried to rationalise it and to make it elastic through graduated surcharge realised alongwith the normal charges. But even these have not given feasible results. It is, therefore, high time to reject the whole scheme of land revenue and to substitute it with the A. H. T. proposed by the Raj Committee.

The reasons levelled against the A. H. T. are not justified and have been falsified A. H. T. is also not entirely a new scheme. The similar scheme has been in practice during King Akbar's time commonly known as Todarmal Scheme. A. H. T. is an improved form of the Todarmal scheme. Its elements were present in the ryotwari system. If we compare it with the existing land revenue system, we find that A. H. T. is refined and improved form of it. Therefore, the States should not be scared by its new name.

The proposed A. H. T. will increase the burden on the administrative machinery. But once the charts of rateable value of the lands are prepared the assessment process and division of the charts will not consume much time. The A. H. T. is also not very complex one. It has been further simplified by various economists and jurists[88] their views and suggestions can also be taken into account while making a legislation for it.

The scheme of A. H. T. is neither violative of Art. 14 of the constitution nor does it go against Art. 19 (1). Basically there is no need of adding any new entry in the State list of the Seventh Schedule of the constitution, but it would be better if a new entry entitled "Tax on Agricultural Holdings" is added to it.

88. Author has also made useful efforts towards this See, *supra*.

PRISON : A FALSE PROMISE*

M. P. SINGH**

The vilest deeds, like poison weeds,
Bloom well in prison air;
It is only what is good in Man,
That wastes and withers there.
OSCAR WILDE

'Incarceration' is a human situation with distinct attributes of human experience and institutional setting. The present paper has the aim to analyse the development of prison administration in India and dehumanizing consequences of prisonization in general. We have also discussed the social cost—benefit basis of prisons in developing societies with a view to highlight the functional significance and viability of the extra-mural alternative modes of treatment of deviants.

Prisons in India

In ancient India, intra-mural confinement of criminals had been rarely resorted to.[1] Jails in India, in the comparatively modern sense, may be said to be a creation of the 19th century. The East India Company believed only in keeping in custody the prisoners as economically as possible and with the maximum profit to the Government. It was not surprising, therefore, that utmost neglect and cruelty were associated with the administration of jails. Lord Macaulay in 1835 drew the attention of the Directors of East India Company to tho terrible conditions prevailing in the British Indian Jails. A Committee was

* This paper is based on author's Ph. D. Thesis on 'Socio-Legal Dimensions of Probation of Offenders : A Criminologcal Study.

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1. ....Under the Hindu system, we do not come across any large department of prisons Prisons were maintained mainly for securing in safe custody political criminals and others of similar variety. Offenders convicted of other offences either heinous or simple and required to pay off their fines by doing manual work were not imprisoned during the period of work They were free to reside In their own homes but were required to attend to their work at the prescribed hour. This method of dealing with offenders is more or less similar to the parole or probation.
V. V. Deshpande, "Crime and Correction of Criminals in Dharma Shastra" *Lucknow Law Journal* Vol. xiii and xiv, 1967-68, 133. See also, A La., *Prachin Hindu Vidhi*, 1981, 249.

appointed and its report came out in 1838. Pursuant to its recommendations, the first Inspector General of Prisons was appointed in 1844 in the then North Western Province (partly the present Uttar Pradesh), and the first Central Prison came into existence in Agra in 1846. In Bengal the post of Inspector General of Prisons was created in 1854, and the first Central Jail was established in 1864.

The Prisons Act came in to force the year 1894. This Act is mainly based on the Act XXVI of 1870 applicable to North-Western provinces. The Prisons Act, 1894 consolidates four related enactments in British India and some of the recommendations of the Jail Committee of 1889. Numerous expert groups' reports appeared and Jail Reform Committees have recommended reform and innovation in prison administration since independence. The Last being the A. N. Mulla Committee on Jail Reforms, but the dominant features of Indian prisons are not much different from those in British India.[2]

Inspite of the infra-structural hostility to change the justification of incarceration in India reveals now an increasing emphasis on treatment and correction.[3] The view which is being formally expressed by most prison leaders is that the prison should make every possible effort to treat and correct prisoners within the framework of a system of security. It is obvious that practically all prisoners return to free society sooner or later and it is important, therefore, to examine the extent to which

2. Upendra Baxi, *The Crisis of the Indian Legal System*, 1982, p. 153.
3. "Government of India, specially since the independence of the country, have taken some interest in the direction of developing a progressive thinking and policy of handling adult and juvenile offenders, although the administration of jails was wholly a state subject under the provincial autonomy. In the year 1951, Government of India requested the Technical Assistance Administration of the United Nations to lend an expert for imparting a training course to the selected jail officers and to suggest progressive programmes for scientific care and treatment of offenders. In the recommendations Dr. Walter C. Reckless chose to call the department of Government which undertakes the treatment af offenders a department of correctional administration and remarked, "It is not accurate to call it jail or prison administration. It should deal with probation and after care as well as institutional treatment. It is also not appropriate to call it a department of penal affairs or penal administration because penal often implies merely punishment rather than social rehabilitation and extra-mural treatment such as probation and after care." Realising the importance and value of effecting the suggested changes in the nomenclature and the penal programmes, Government of India in consonance with the recommendations of Dr. Reckless established the Central Bureau of Correctional Services with its Head quarter at Delhi."
See, A. S. Raj, "Correctional Treatment of Offenders" *Lucknow Law Journal*, Vol. XIII and XIV, 1967-68, 226-227.

imprisonment makes them fit to live in that society as a free, self reliant and law-abiding citizen and also to assess its impact on reformation and rehabilitation of the offenders.

The Sociology

(i) Prisons : Training Schools in Crime

The value of prisons as intra-mural correctional institutions have been doubted by eminent criminologists.[4] The reasons are numerous and complex. The prisoner is a victim of the psychology of primitive taboo transferred to our times and social surroundings. In ancient times, the violator of the law was regarded as one who had broken the rules made by God. Today he is the violator of the rules of the herd or society, framed, in fact, by a dominant elite minority. The position now is hardly different. Imprisonment is only another mode of exiling an offender from the group. The convicted man bears the burden of our own sins and in his punishment expiates our own sense of guilt.

Imprisonment supplies the methods of carrying out the revengeful spirit of outraged society, which, thus, secures satisfaction for the wrongs real or alleged, that are brought upon it by the offender. Contemporary imprisonment offers a vicarious release of the sadistic traits of human beings under approved and seemingly respectable circumstances whereas relatively few individuals would personally and individually find themselves able to carry out or to admit themselves subject to such obviously cruel impulses.

The "convict bogey" logically leads to the jailing psychosis and to the idea that the prime purpose of prison is to lock up and punish criminals.[5] Prisoners are socially branded exiles who must be safely kept from contact with society. It is dangerous to unlock them too soon and let them out until they have atoned for their crime; when that time arrives is not known, of course. And when they are released, they are shunned and avoided with the sense of approbrium still attached to them.

Even earnest administrators who sincerely believe in rehabilitation are reluctant to introduce a whole-hearted programme that might improve

4. See, David P. Stang, "The Inability of Corrections of Correct", *Law and Order reconsidered*: A Staff Report to the National Commission on the causes and prevention of violence, prepared by James S. Campbell, Joseph R. Sahid, and David P. Stand (Washington, D. C. : U. S. Government Printing Office), pp. 572-85, as quoted in *Prisons, Protests and Politics*, Edited by Atkings B. M. and Glick N. R., 1972.
5. Barnes and Teeters, *New Horizons in Criminology*, 1966, 348-86.

treatment procedures. Such rehabilitative treatment requires flexibility and experimentation, but they increase the risk of escape and even the most enlightened prison administrator realises that his work will be judged by newspapers, politicians and public on the basis of how successful he is in preventing escapes. Since he makes his living out of his job, he does not relish the idea of losing it by any bold adventure in rehabilitation. In this manner, humane treatment programmes are frustrated and a prison routine, wholly incompatible with the formally repudiated aim of punishment, survives and dominates the prison scene. Even in the most enlightened system of prison administration, the officials live in constant fear least their constructive daring be discovered.

(ii) Prison Personnel

It is axiomatic that most prison posts fall to a rather inferior grade of men largely due to poor salaries and unattractive nature of work.[6] The primary function of the warden is to act as an efficient jailor. To achieve this result, he naturally resorts to the most rudimentary discipline and regimentation. He relies almost entirely upon rules and coercive procedures. This prevents nearly all sympathetic human contact with inmates of the prison, developes a purely mechanical spirit that brutalises both the officials and the prisoners and creates a fatal antipathy between them. The poorly trained prison personnel, however, is the central evil in prison, observes Justice Iyer :

> Prisoners often have their privilege revoked, are denied the right of access to counsel, sit in solitory or maximum security or less accrued 'good time' on the basis of a single, unreviewed report of a guard...This is the central evil in prison...the unreviewed discretion granted to the poorly trained personnel who deal directly with prisoners,[7]

This severe regimentation, so different from the life of freedom to which the prisoner will ultimately go back is the worst possible preparation for freedom and the responsibilities of citizenship.

6. Bhattacharyas, *Prisous*, 1958, 8-9.
   The author says : "But the greatest indictment even now against the system in force is that prison service is not yet a career service. Prison service is highly specialized social service, which is beyond the competence of an outside officer howsoever competent he may be in his ordinary sphere...Mainly because most prison posts fall to a rather inferior type of people, prisons in India still cling to such outmoded theory as "treat them rough."
7. *Sunil Batra* v. *Delhi Administration*, A. I. R. 1978 S. C. 1675 at 1682.

(iii) Prison Regulations

Numbering, counting, checking and locking up, constitutes the routine of prison personnel. The mental habits of the custodial staff revolve round the mania to keep prisoners either locked up or scrupulously accounted for. The prison tends to warp the personalities of staff members because of the unnatural life they lead. They are scarcely more free than the prisoners they guard. The prison code inspires the jailors to make interminable rules in order to regiment and control. Anything more than a casual contact between two or more inmates is looked upon with suspicion. The guard is almost as much a prisoner as the inmate. Often he has little status outside the prison. His job within the institution is to extract as much out of that status as possible and thus to feed upon an abnormal situation.

(iv) Prison Monotony and Routine

The monotony and routine of prison life brings into play a large number of disastrous influences that constitute a vicious circle. It would put the most severe strain even upon a throughly normal person not to say of those who are physically and mentally abnormal or subnormnl. The emotio ally unstable persons are denied the fulfilment of the most important basic human urges and impulses.

(v) Sexual Perversions

The natural outlet for the sex drive is totally denied even in the modern prisons in India, though sex cravings are abnormally strong because there is blocking of the forms of emotional and intellectual expression that mlght drain off or sublimate such desires. Deprived of all sexual relationships for a long time, it is almost axiomatic that men and women will develop abnormal liaisons in self-defence.

(vi) Prisonization

The prison community passes through the same social processes that exists on the onside-competition, conflikt, accommodation and assimilation.[8] The new inmate enters into the prison milleu in the same way as an immigrant in a different community. There is an initial period of early unsettledness, a time of transitional groupings for redefinition, time of provisional acquiescence to prison norms, and a period of preparation for return to the free community.[9] This process is called "prisonization."

8. Donald Clemmer, *The Prison Community* (Boston : Christopher) 1940. See James T Carey, *Introduction to Criminology* (Prentice-Hall, Inc), 1978, 228.
9. James T. Carey, *Introduction to Criminology*, 1978, 228.

Due to the circumstances of deprivation of liberty, deprivation of goods and services, deprivation of heterosexual relationship, deprivation of autonomy deprivation of security lead to the adaptation of a prison sub-culture by the inmate i. e. the convict with a distinctive set of values. The values of the inmate sub-culture might be functional for survival within the walls of prison but may be less so on the outside. The extent of internalization of prison values affects adversely the extent of social reinstatement into the society out. The process of prisonization is significant in status degradation and it may be responsible for secondary deviations also. In the 'interactionist' perspective, institutionalization of deviants may play a substantial role in the process by which a person comes to accept a criminal self-image or a secondary deviation. Secondary deviatioa involves commitment to the deviant behaviour *per se*, so that the deviance no longer arises out of the situations and circumstances of the person's life (what Lemert calls "primary deviation"), but is generated by the person's definition of himself. The redefinition of self opens the door to the full participation in deviant life, and a commitment to a deviant career.[10]

The process of criminalization applies to female inmate also but the female adaptations to the deprivation take different forms due to differential socialzation of men and women. Deprivation of husband, home and family have got more significant jeopardizing effects on women prisoners as these factors are sources of great emotional support for women than men in the normal process of socialization. As the number of female inmates is quite less therefore they seem to be the forgotten group in corrections. They are treated to be 'fallen women' and treated more severely and thus, little attention is paid to their reintegration in correctional programmes. In this context probation, the therapeutic alternative of prison, assumes considerable significance. Hetero-sexual as the vast majority of people are, most of them try desparately to remain so even inside the prisons, There is little doubt, however, that practice of masturbation is rife in prisons. Sublimation of the sex drive is difficult even under ideal conditions outside in the free community; it is much more difficult, if not impossible, in the unnatural surroundings of a prison. Homosexual tendency among the prisoners is another most challenging problem that confronts our prison administrators.

(vii) Loss of Status

The irreparable loss of status sustained by a prisoner when he is thrown back into the community makes all the hopes of social solidarity and reinstatement remote. When the prisoner returns to free society he

10. George B. Vold, *Theoretical Criminology*, 1978, 263-264.

is suspected, scorned, called an 'ex-convict'. The difficulty faced by exprisoners in securing jobs, in marrying and rearing children, and for that matter in accomplishing anything are too well known to be mentioned. The prisoner has a desirable status only in the criminal sub-culture. Migration to a new community does not help if he makes known his record; while if he conceals it, he is in constant fear that someone else will reveal it. In the quest of social reinstatement he always finds himself in the midst of alarm. Consequently many of them seek recognition in the way they can find it—by the development of an efficient technique of crime and an attitude of hatred towards the suspicious, unkind and inhuman society. No feeling of obligation to society or ambition to reform can develop under the circumstances.

(viii) Civil Rights and the Constitutionality of Prison Life

Many of the civil rights guaranteed by democratic constitutions, inclusive of the constitution of India, are obviously curtailed in the prison[11] and

> Human rights in the administration of criminal justice has not been perceived as an important issue. We have so far been pre-occupied with human rights at the level only of constitutional rhetoric and politics; it is consistent with this kind of solicitude for human rights to allow Indian jails to remain the "ultimate ghetto of the criminal justice system.[12]

a. Freedom of Religion—In a secular democracy not only is freedom of religion enshrined as one of the fundamental freedom guaranteed by the constitution, but religion in prison is thought to serve rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.[13] Even if this freedom exists in our prisons, regimentation and control deprives much of its worth. Then again a prisoner is not allowed to attend a place of worships or pilgrimage outside the prison.

b. Freedom of Expression—Today, despite progress in other areas, the law regarding free expression in prisons remains virtually unchangd. Prison aulhorities are free to censor communications and screen out

11. For example right to practice religion, to be free from racial discrimination, to communicate freely, to vote, to enjoy privacy, and to have the same rights as others when they are accused of crimes.
12. Upendra Baxi, *Crisis of the Indian Legal System*, 1982, p. 145.
13. See, Ronald L Goldfarb and Linda R. Singer, "Redressing Prisoners' Grievances", *Prisoners, Protest and Politics*, (Prentice-Hall), 1972, 79-88.

"reasonably objectionable", "informatory" or "subversive" articles or publications blocking important outlet for prisoner's feelings of frustration as well as their constructive and creative ideas.[14]

c. Privacy—Within the prison, inmates have no right to claim constitutiunal immunity from searches of their persons or their personal property. It is obvious that a jail shares none of the attributes of privacy of a home, an office, or a hotel room. In prison, official serveillance has traditionally been the order of the day. But denial of privacy has gone beyond these physical aspects that ostensibly are connected to prison security. Not only are all consensual sexual relations forbidden, whether they be heterosexual or homosexual, but prisoners are forbidden to contract marriages. No court has yet ruled that this complete control over every aspect of a prisoner's existence is impermissible, no matter how it relates to his criminal career, or his security in custody, and regardless of the propriety criteria imposed.

ix. Prisons : Fundamental Rights in India

In *A. K, Gopalan* v. *State of Madras*,[15] regarding the fuudamental rights of prison inmates, this view was propounded that prisoners are non-persons and that assured fundamental rights are not available to them by their being incarcerated. The majority in this case held that when a person is totally deprived of his personal liberty under a procedure established by law, the fundamental rights are not available. This ratio was diluted to some extent in *State of Maharashtra* v. *Prabhakar*[16] where the court held, in effect, that conditions of detention cannot be extended to deprivation of other fundamental rights consistent with the fact of detention.[17] In *D. B. M. Patnaik* v. *State of Andhra Pradesh*,[18] the Supreme Court categorically asserted that convicts are not by the mere reason of their detention, denuded of all the fundamental rights they possess.[19]

14. *Ibid*, p. 81.
15. A. I. R 1950 S. C. 27.
16. A. I. R. 1966 S. C. 424.
17. Upendra Baxi, *The Crisis of the Indian Legal System*, 1982, 209-210.
18. A. I. R. 1974 S. C. 2093.
19. *Ibid*, p. 2094.
See also, *Mohd. Giasuddin* v. *State of A. P.*, A. I. R. 1977 S. C. 1926 at 1978; *Hira Lal* v. *State oj Bihar*, A. I. R. 1977 S. C. 2226; *M N. Naskot* v. *State of Maharashtra*, 1978 S C C. 544; *Inder Singh* v. *Delhi Administration* (1978) 4 S. C. C. 161; *Lingala Vijaya Kumar* v. *Public Prosecutor* (1978) 4 S. C. C. 196; *Sunil Batra* v. *Delhi Administration*, A. I. R. 1978 S. C. 1675.

x. Imprisonment : Frustrated Economy

Besides the doubtful reformative value of imprisonment; it frustrates the economic life of offender's dependents making them and also the offender a social liability and also making the possibility of compensation to the victim remote. This becomes more significant in view of the empiricism that the bulk of prison population in India comprises low income group[20] with little or no education belonging to the poor strata of soeiety.[21]

The percentage distribution of convict population during 1961 to 1965 in jails of twelve states and two union territories was as follows :

Percentage Distribution of Convict Population, 1961-65

Year	Persons in service	Persons in Pro-fession	Persons in agricui-ture	Persons in com-merce & trade	Persons engaged in Mech-nical arts manufac-ture & Engg. operations	Misc. Persons not classi-fied	Total
1	2	3	4	5	6	7	8
1961	5.0	5.7	41.3	3.1	2.3	40.6	100.00
1962	6·0	7.1	34.9	5.0	2.8	44.2	100.00
1963	5.0	7.5	41.4	5.6	2.7	37.8	100.00
1964	4.4	5.4	43.5	6.1	3.9	36.7	100.00
1965	6.1	6.3	44.6	6.0	2.6	34.4	100.00

Source : Bureau of Correctional Services, Government of India, 1971-77.

20 See Generally, Upendra Baxi, *The Crisis of the Indiad Legal System*, 1982, 143-52.

21. "S. P. Srivastava's study of Prison population in the State of Uttar Pradesh has revealed that 63 per cent of the prison population came from the low-income group (defined as mpnthly income of Rs. 40 to 80), 36.50 per cent from the middle income group (entailing income in the range of Rs. 85 to 225 per month) whereas only 1.50 per cent of the total prison population comprised an "upper middle income group", operationalized as income ranges from Rs. 333 to Rs. 416 per month (Srivastava, 1977 : Deflning "law", "middle" and "upper" income groups somewhat generously as respectively entailing monthly income ranges of below Rs. 301-1.000 and Rs. 1.000 and above, she found that in Rajasthan a large number of prisoners are from law-income groups. Indeed, "it is found that a large number (48.7 per cent) of criminals are from lower-income groups in comparision with middle income groups

This trend is borne out by empirical studies. *Srivastava's* data on Uttar Pradesh indicate the following composition of prison population.

CLASS	PERCENTAGE
Farmers, agriculturists, horticulturists	56.
Service (Governmental/private)	15
Business 'classes'	8.50
Artisans	9.50
School and college going 'youths'	4

(*Srivastava*, 1977 : 39-44)

Educational status of convicts

Year	Men			Women		
	Literate	Illiterate	Total	Literate	Illiteate	Total
1	2	3	4	5	6	7
1961	30.1	69.9	100.00	11.8	88.2	100.00
1962	32.5	67.5	100.00	10.1	89.9	100 00
1963	33.0	67.0	100.00	11.0	89.0	100.00
1964	32.5	67.5	100.00	14.4	85.6	100.00
1965	30.8	69.2	100.00	11.4	88.6	100.00

Source : Bureau of Correctional Services, Government of India, 1971-77.

Incarceration of such poor persons shatters the personal and family economy of the offender to such an extent that social reinstatement, after release from the prison, becomes a distant promise rather an impossibility and resulting financial problems, from imprisonment, for the total family may operate more heavily against successful rehabilitation than the deterrence aimed at the offender himself.[22]

Compared with a viable alternative of probation, on the basis of per capita cost, imprisonment appears to be an expensive disposition.

(43-6 per cent)" Adwani is somewhat less interested in ascertataing the precise extent of low income groups in Rajasthan prison population and more Interested in proving the hypothesis that "poverty alone is rarely a cause of crime" (p. 45). But it is fair to assume that had she employed less generous operationalization of "low" and "middle" income groups, her conclusions as to the high incidence of low-income groups in prison population would have been closer to Srivastava's."

Upendra Baxi, *The Crisis af the Indian Legal System*, 1982, 146.

22. Mark Monger, *Casework in Probation*, 112.

A prison sentence costs much more to the public exchequer, and it is difficult for a country like ours to maintain prisons in a condition congenial to reformation or treatment. Regarding the financial aspects of imprisonment Negley K. Teeters writes :

> The practically universal adoption of imprisonment as the basis for correctional policy should be understood, in part at least, as a reflection of the great increase in material prosperity characteristic of modern times. Prisons are extremely expensive institutions to build, to maintain, and to operate. Only a world enjoying at least some relative measure of material abundance can be expected to tax itself to maintain those convicted of crime in modern prisons. The economically less comfortable or less well to do countries therefore naturally maintain much less elaborate and costly prison establishments than those found in the United States and throughout Western Europe.[23]

It is clear on a very rough estimate of the comparative cost involved in prisons and probation, leaving other alternative modes of treatment aside, that the probation programme will be more economical.[24] In addition to this aspect, increasing use of probation has vast advantages in terms of rehabilitation of the offenders.[25]

Comparative cost on Prison and Probation[26]

Cost of Prisons :

(i) Average daily population in jails of young offenders below 21 years	20,000 persons approx.
(ii) Approximate daily expenditure @ Rs. 3/- per head per day, on a conservatic basis	Rs. 60,000.00
(iii) Annual expenditure in prisons on young offenders	Rs. 219 lakhs

Cost of Probation :

(i) No. of districts in the country	340
(ii) No. of additional Probation Officers required in each district, to be available at all sub-divisional courts	6 approx.

23. Negley K. Teeters, *World Penal System*, 1944, as quoted in George B. Vold, *Theoretical Criminology*, 1979, 399.
24. Criminality is social in nature and therefore, can be modified in individual cases only if the criminal's relations with social groups are modified.
25. See, Comparative cost on Prison and Probation, above.
26. Jyotsna, H. Shah, *Probation Services in India*, 63-64.

(iii) Total number of probation Officers required	2040
(iv) Annual average salary of a Probation Officer at the rate of Rs. 300/- p. m. (in lump sum)	Rs. 3,600/- approx.
(v) Annual expenditure on the salaries of the Probation Officer	Rs. 73,44,000.00
(vi) Material assistance to probationers and other expenditure on services @ 10% of the annual salary	Rs. 7,34,000.00
(vii) Total expenditure say Rs. 80 lakhs.	Rs. 80,78,000.00

Sl. No.	Year	Average No. of Probationers handled	Average expenditure per probationer during the year	Average expenditure per prisoner in jail during the year
1.	1947	239	149.19 p	237.10 p
2.	1948	367	149.19 p	327.50 p
3.	1949	546	149.19 p	327.50 p
4.	1950	631	149.19 p	327.50 p
5.	1951	773	149.19 p	327.50 p
6.	1952	923	149.19 p	327.50 p
7.	1953	958	139.75 p	331.28 p
8.	1954	1000	145.06 p	323.26 p
9.	1955	1314	123.31 p	287.44 p
10.	1956	1669	126.62 p	307.59 p
11.	1957	1693	138.00 p	311.00 p
12.	1958	1728	150.00 p	325.00 p
13.	1959	2208	132.00 p	347.00 p
14.	1960	2670	130.00 p	336.00 p
15.	1961-62	2819	124.02 p	378.96 p
16.	1962-63	3098	121.98 p	356.01 p
17.	1963-64	3411	118.33 p	358.80 p
18.	1964-65	3533	131.62 p	379.83 p
19.	1965-66	3449	152.43 p	417.26 p
20.	1966-67	3348	172.39 p	509.79 p
21.	1968	2935	156.01 p	681.77 p
22.	1969	2352	195.11 p	(Figures not
23.	1970	2135	219.67 p	available)

27. Extract of the Article of the Director published in *Social Defence*, November, 1971.

Do Prisons Reform ?[28]

The chances of reformation in prisons are only our wishful thinking if we consider it with reference to various classes of convicts who are generally incarcerated. Broadly, four characteristically different types of inmates form the ordinary prison population. First, there is a group of psychologically disturbed, for whom it may be assumed that the criminal behaviour is outcome of some deep seated mental conflict. For such type of prisoners, treatment in mental hospital than in prison would appear to be in order.

Second, there is a group of unskilled, relatively uneducated, low level of ability persons who are psychologically normal and who require sufficient skill to survive successfully and honestly in a competitive society. The inmates have crisis of expectation with reference to their ability which leads to a sense of frustration, defeat and social maladjustment. Since the prison environment is monotonous and non-competitive, sometimes such low level of ability make them good and abiding prisoners but it proves to be illusory when he is released and faces the ruthless competition beyond the walls of prison in the society. Such prisoners are not likely to be able to solve their expectational crisis and thus least prone to reformation.

Third, there is a type[29] of psychologically normal and educationally average persons who are *convictionally non law abiding persons* and who endorse a pattern of behaviour not acceptable to the political majority. Treatment programme including vocational training and education is insignificant to such offenders as usually they do not approach the central problem. Nor they can be coerced to change their social psychology and consequent conviction in a democratic political set-up.

28. See generally, George B. Vold, *Theoretical Criminology*, 1979, Oxford, 407 410.
29. There are several sub-groups of this type :
    (i) The political offender whose views are considered subversive and whose theory of government and the organization of the state is in sharp variance with that in effect;
    (ii) The religious or philosophical sectarian whose behaviour may be contrary to law and deemed dangerous and criminal;
    (iii) the white collar and public welfare offenders;
    (iv) the non-conformist intellectual or professional person who, on the basis of convication, persists in outlawed or criminal behaviour e. g artistic and literary intellectuals and doctors.

    George B. Vold, *Theoretical Criminology*, 1979, 409.

Fourth, there is a group of psychologically normal and educationally average persons whose commitment to crime is that of any professional person in his chosen field of activity. For this type of person crime is viewed as a business managed and organized accordingly. If the individual fails in running his own crime enterprise, he usually does not reform and quit crime, instead, he starts to work for a more successful syndicate. There is no chance that imprisonment will rehabilitate such criminals of organized syndicate. For such type of criminals effective rehabilitation must come from influences and forces in the community that shape and mould general life orientation and by controlling crime opportunity.

Conclusion

To conclude, though the prisons in India grew mostely under the colonial design of the British Raj to seclude people as economically as possible under dehumanizing conditions within the high walls, yet the dominant features of prison administration in independent India are not much dissimilar to those in British India.[30] Indian prisons are characteristically associated with loss of civil rights; spiritually dehumanizing and physically brutalizing prison milieu, status degradation and deculturization, sexual perversions, sabotage of the offender's economy and secondary criminalization which make the reformation of the convict a false promise. As the Indian prisons are largely packed with poor people, neither its improvement is a concern of the governing elites of the country nor could we genuinely afford it in near future with our existing wealth. These aside, the preceding analysis suggests that most of the convicts due either to nature of their crimes or their personalized social situations cannot be helped through such institutions.

This is not to suggest, however that Indian prisons are totally to be bulldozed. Although prison is fundamentally a detrimental influence, some forms of behaviour are so pathological and beyond redemption that community based therapeutic treatment is contraindicated. Treatment implies many things. One is the ability to recognize that point at which the individual's behaviour menaces himself or the community to an unacceptable degree. In these instances incarceration is indicated and may be obligatory. Without doing much damage to the values state seeks to sustain by incarcerating such 'beyond correction' deviants, for

30. Upendra Baxi, *Crisis of the Indian Legal System*, 1982, 153.

most of the convicts[31] probation and other viable alternative modes of treatment become economic, criminological and victimological imperatives in furtherance of social defense.

31 About 85 per cent of men-convicts undergo a prison sentence note exceeding 6 months. The next largest group is about 10 per cent which go through imprisonment above 6 months but not exceeding 2 years. Just about 1 per cent are accorded life sentence, while 0.2 per cent are given death sentence. Among women convicts, a large majority of 95 per cent undergo prison sentence for less than 6 months. Life sentence is given to only 0.8 per cent of women.

Bureau of Correctional Services, 1971 : 6.

BOOK REVIEW

Political Theory And Organization (For law Students), L. L. RATHORE AND S. A. H. HAQQI, Eastern Book Company, Lucknow 1989, pp.+424; Price Rs. 50.00.

This book has been written specially for the prospective first-year law students of five-year law degree course. It is a project of the National Law School of India in association with the Bar Council of India Trust. As one would expect in a text, various topics of political theory and organization are approached in the spirit of basic openness and objectivity; and consequently the book is both thought provoking and useful. In the Perface, it is stated that the book intends to be a narration "in a clear and lucid style, so that the readers my understand theme easily." That it is, as a lucid *tour d' horizon* of political theories and principles of political organization, it will be of immense value for the last year Law students struggling to come to grip with the descipline.

In fact, the subject matter of political science falls into two categories-normative, prescriptive and value oriented and descriptive-analytical, fact-oriented and empirical. In its former aspect it builds theories and lays down different values norms, rules, etc. of political behaviour (both of men and institutions); and in the latter, it analyses those institutions and organizations that give effect to or, aspire to give effect to-those norms and values. One is political theory, and the other is political organization. Law is related to both.

Law is a code of conduct without it there is no order. A system of ordered relationship is the primary condition of human life at every level. Law, therefore, is the central theme both of political theory and political organization. Derived from the Greek world 'polis' (meaning city-state), politics or political science[1] means the knowledge or the science of the state. It is a systematic study of the political institutions and political activity/process; and, thus, deals with rules and norms of behaviour in an organized political life.

To gauge the nexus of political science and law, we can take a hurried tour through the history of the western and eastern political theory.

We may start the tour with Plato. His philosopher-king in *The Republic* was supposed to rule by his knowledge of the 'Eternal Good',

1. I am takiug Politics and Political Science as synonymous.

and, law was outlawed. However, law does make a recovery in *The Laws*, but only as a concession to human frality. For Aristotle, the state comes into existence for the sake of life and continues to exist for the sake of *good life*. This moral function of the state is attained through the rule of law. Aristotle defines law as "reason, unaffected by desire. Both Plato and Aristitle treat 'polity' as a unique institution having moral connotations, and values, rules or law served the need of an organized moral community.

In the middle ages the concept of moral values were replaced by such metaphysical and theological norms as Divine Law, Natural law and eternal law. This is because in the early centuries of medieval Europe the sacred aspect of life was deemed to be superior to anything earthly. The speculation was primarily deductive; It was a system of thought that required 'belief' rather than 'reason'.

Soon changes began to appear by the end of the middle ages. The new direction was carried to a great extent by Marsiglio of Padua in as much as he was the first to view political activity from a secular angle. The end of Middle Ages saw the emergence of the twin movements; the Renaissance and the Reformation, and the western would ushered in the modern age with its attributes of scientific spirit and insistence on individualism and sovereign state.

It was during the transitional period (end of the middle Age and the beginning of the modern Age) that Machiavelli, known as the child of Renaissance, appeared on the scene. His thinking had a bearing on the emergence of modern politics. He felt the urgency of a strong political system (and a strong Prince) to maintain stability and persistence of political power. Thus, the ethical-moral and the theological-metaphysical political science was converted into power-oriented policy-science.

The Machiavellian idea of power grew into the concept of sovereignty in Bodin, Hobbes and later on in Bentham and Austin. With the conceptual clarity of 'sovereignty', the idea of identifying politics *only with the State* began. As a result, law no more remained a metaphysical (ethical, theological, normative) concept; but became something positive the command of the sovereign power.

As the centuries advanced, the concept of sovereignty was widened to include the concept of absolute sovereignty (as enunciated by Bodin, Hobbes and Austin, and in its metaphysical form by Hegel and in its metaphysical form by Hegel) and popular sovereignty. The idea of popular sovereignty was based on the assumption that it is the people who are the sovereign and the ruler/government is only their representa-

tive. This liberal view of sovereignty, and with it the concept of democracy aad constitutional and limited Government was enunciated by Locke. In Rousseau's General will theree is a strange combine of absolute and popular sovereignty. Liberal ideas reached full flowering in the nineteenth century in the theories of J. S. Mill and T. H. Green.

Liberalism enunciated the theory of the negative state and negative freedom in the beginning; and, as such the role of law was restricted to the minimum. However, with the on set of the Industrial Revolution and the growth of science and technology in the nineteenth century there was need of a change in the classical liberalism at least in three directions. (1) The negative concept of liberty to be replaced by the positive concept; (2) the theory of negative functions of the state to be replaced by the positive functions; and (3) a new relationship to be established between the citizen and the state.

All this presupposed an extended role of the law. Law had to have the task of social engineering. Thus, early liberal concept of the police-state developed into the concept of the welfare state in the twentieth century.

However, with the growth of liberalism, the undercurrent of the concept of absolute sovereignty was simmering underneath; and it came to the surface in different forms in the theory of General Will (Rousseau), and in the conception of the state as "the march of God on Earth" (Hegel). This tendency, as Hobhous says, prepared the ground for the emergence of Fascist and Nazi totalitarian states in the post-first world war era.

Along with liberal and absolute theories of the state, socialist/Marxist theories also emerged in the nineteenth century and gained momentum in the twentieth century. Marxists believe that since law is the projection of the interests of the predominant economic class in society, it is unable to dispense justice. To obtain justice, there is need to establish economic equality—in other words a classless and stateless society.

And, this brings us to the problem of defining the relationship between justice, law and the state.

As a matter of fact, law seeks to render justice, and, justice depends on a scale of social values. In a liberal democratic state, justice is characterized by an emphasis on personal liberty and rights and equality of opportunity. In a totalitarian state, justice is equated in preserving the existence and furthering the will of the state. In a socialist state, justice depends on egalitarian principle (mainly economic equality).

Thus, the basic postulates of justice are different according to different values. However, one element is common in all—that is *justice is fairness* (although fairness has different standards), and fairness is rendered through law, rules and regulations.

Another problem, what is the role of power in rendering justice. In other words, what is the relationship between law, power and justice ?

With the coming of the twentieth century, the notions of 'state' and 'sovereignty' were replaced by that of 'political system' and 'power', these notions were initiated by Max Wehre. He postulated that association should be called political "if and in so for as the enforcement of its order is carried out continually within a given territorial area by the application and threat of physical force on the part of the administrative staff."[2] Thus, although we her emphasised the territorial aspect of political association, relationship of authority or rule or order was also an essential characteristic of a political association. Harold Lasswell defines political science as "empirical discipline, (as) the study of the shaping and sharing of power" and "a political act (as) one performed in power perspective.' This definition makes the phenomena of control the central concern of politics. Control (shaping power) may be exercised through domination or through cooperation (a subtle form of power). It is oontrol exercised through law which links up the two poles of freedom and authority.

Authority is a particular form of power which orders or anticutates the actions of political actors. In other words, legitimate power is authority. Weher suggests that political system may claim legitimacy on three grounds—tradition, charismatic leadership and legality. The legitimacy of authority is ultimately a matter of belief concerning the rightfulness of the institutional system through which authority is exercised. The three contemporary concepts of power, legitimacy and authority are interlinked; and different emphasis on either of these elements demarcates one ideology from the other. A democratic system values legal-rational basis of authority, while a totalitarian system may rely more on tradition and leadership.

In Eastern political theory the key concept dominating the ancient speculation was the idea of 'dharma'. The science of state was known by terms like *Rajya dharma*, *Dand Niti*, *Niti Shashtra* and *Artha shastra*.

2. Here, 'law' seems to be not much different from the traditional juridical concept of law as the command of the sovereign power inasmch as enforcement of *order* is equal to enforcement of law. (In the above quotation emphasis is added).

It is interesting to note that all these term prescribed rules of right conduct and as such were coterminous with the concept of 'law'. The force of sanction behind the state (*Raja-dharma*) involved *Dand Niti*. The rules of behaviour regarding social, political and economic relationships were rooted in *Dand Niti*. *Nitishashtra*—the sciences of wisdom and right conduct-became the source of policy-making and descision-making. *Arthashashtra* meant in narrow sense the science of wealth or money; but in the broader sense it meant the science that deals with acquisition, protection and governance of territory.

In fact, ancient Indian political theory was the outcome of Indian philosophy; and, the chief mark of Indian philosophy in general was its emphasis upon the spiritual. Materialism undoubtedly had its day (for example charvak), but its influence on philosophy has been negligible. As such, political theory was also dominated by the concept of *dharma*. *Dharma* included in its fold duty, law and right (both in the sense of rightful claim and right as opposed to wrong).

The vedic literature emphasised on the fundamental aims of the state as peace, order, security and justice. The King was the upholder of law, order and morality. In the post-vedic literature, political theory was more pronounced. The epics, *Dharmasutras*, *Smriiis* and *Sutras* described the conduct of life among Arayans and their social-political organizations and religious functions and obligations.

The Key-note of Islam was equality, solidarity, brotherhood and freedom. It was another version of righteousness. The Islamic law, as embodied in shariat, recognized no distinction on the basic of birth, castes, creed, status, education, race, nationality, religion, etc. Thus, the early Islamic state was based on the principles of democracy.

However, the democratic tone of Islamic political theory underwent a sea-change in the middle ages. By the time India came under the domain of Delhi Sultanats, the state became a theocratic Islamic state. All the powers—executive, legislative and judicial—were vested in the King. The concept of absolute Kingship continued under the Mughals. *Vox Populi* had no existence. However, Akbar developed certain principles of national secular-welfare state. The duty of the state was not to rule, but to guide.

But, all said and done, Indian philosophy and its corollary political theory had lost its earlier dynamic spirit and the depth of its ideas in the middle ages. By the seventeeth century India had become the victim of British power, which sapped whatever title was left of her past glory.

However, the coming of British brought revival in education and such movements as Brahmo Samaj and Arya Samaj heralded the Indian Renaissance in the nineteenth century. Then came the national movement culminating in Indian Independence.

The Indian Renaissance sprung forth the spirit of nationalism and various western ideologies that flourished in the 19th and the 20th centuries had a unique character of their own. Liberalism, extremism, Hindu revivalisn, communism and socialism—all had one point in common to win self-government.

In the welter of these ideologies, Gandhism arose with its own majesty. The cardinal principles of Gandhism are truth, non-violence and self-government; and on these precepts arose the edifice of *Sarvodaya*, emphasising self-rule and self-restraint.

In concluding the tour of the Western and Eastern political theory, we me I return to the starting point by way of emphasising the nexus of law and political science/political theory. It is manifest from the above that different shades of political theories gave different concepts of law-moral, theological, metaphysical, positive, scientific, etc.—and conceived it (law) as the essence of an organized life being the code of conduct of human behaviour. Thus, for a student of law, political organization became an area of chief interest.

This book is second in the chain of per-law education series; and as a text book for the students of law has been able to fulfill the all-important function of explaining logically the link between political science and law. It not only explains in a lucid style the conceptions of state and government, sovereignty, natural law and various western and eastern ideologies, but also analyses with clarity various aspects of political organization as the forms of Government, its organs and classification along with the theories of representation and public opinion.

Thus, although the book is essentially a students text, it is well researched. It is informative and factually sound.

But there are certain gaps as well :

First, there is neglect of those theories and concepts that arose in the post World-War period as a result of behavioural revolution. For example, there is no mention of 'political system' or of 'a political politics.' It is also silent about the connected themes as power, influence, authority and legitimacy. All these have a bearing on rule-making, rule-executing and rule-adjudicating; and are thus closely connected with the discipline of law.

Second, the conception of Justice-social, economic and legal-also does not find a place in the volume. This omission becomes conspicuous, because the concept of justice is not only the core of political science, but the dispensation of justice is the basic function of law.

To conclude, I am inclined to think that *Political Theory And Organization* does too much and too little. It does too much, because it deals with lucidity all the themes of traditional political theory and organization that are interlinked with law. It does too little because it does not include recent political theories and processes in its fold.

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MADHYASTHAM ADHINIYAM (ARBITRATION ACT) (1990) by Indrajeet Malhotra, Eastern Book Company, 34, Lalbagh, Lucknow pp. xlvi +310, Price 60.00

One of the major problems facing law students in States like Uttar Pradesh, Bihar, Madhya Pradesh and Rajasthan where large number of students use Hindi as medium of law examination and where instructions are generally imparted in Hindi, is non-availability of standard law books in Hindi in several branches of law including Law of Arbitration. The book under review attempts to fill the long felt need of law students. This book[1] as the Preface indicates is the singular devotion of the author who took about five years to plan, prepare and produce the present work in Hindi. This will fill the need ot students, legal practitioners and persons interested in this subject.

The law of arbitration, like many other branches of law, has evolved out of the result of the difficulties experienced by courts, litigants and lawyers.[2] Be that as it may, it is a recognised as a democratic method of settling disputes of civil nature without taking recourse to the court of law. It has occupied a significant place in commercial practice and social life. Indeed it is quick, informal and cheaper method of settling disputes.

The book under review is a section-wise commentary of the Arbitration Act. The book is divided into seven Chapters. Chapter-I is introductory and is divided into two sections. Section-1 explains the meaning of arbitration and development of Law of arbitration in the pre and post-1940 period. It, *interalia*, examines the object, essential elements and kind of arbitration. Section-2 examines the various terms such as arbitration agreement, award, court, legal representative and reference in the light of decided cases. The treatment is analytical and comprehensive.

Chapter-2 is devoted to Arbitration without the intervention of the Court. Here the author has examined implied conditions of agreement, agreement that arbitrators be appointed by third party, revocation of arbitration agreement, effect of death or insolvency on arbitration agreement, power of court to appoint and remove arbitrator or umpire and in certain cases sole arbitrators, appointment of three or more arbitrators, powers of arbitrators, requisites of valid award, powers of the court to modify, remit, supersede and to pass interim award with the help of decided cases. Eventhough the author has examined various issues raised

1. Indrajeet Malhotra, *Madh yastham Adhiniyam*, 1990.
2. N. N. Sirkar, *Law of Arbitration in British India*, 1941, 1.

before the Supreme Court and High Courts he may wish to include in the next edition the decision in *Secretary to the Government, Transport Department, Madras* v. *Munuswami Mudaliar*,[3] wherein the Supreme Court was invited to consider whether the appointment of an arbitrator by a party to an arbitration agreement of a person who as an empioyee of a party would expose the arbitrator to the risk of being removed under section 5.

Chapter-3 deals with Arbitration with intervention of a court where there is no suit pending. The discussion has been documented with a wealth of case law. However, the author may wish to add the decision of two judges bench of Supreme Court in *Union of India* v. *L. K. Ahuja*[4] where in the Court reconciled two previous decisions of the Supreme Court in *Wazirchand* v. *Union of India*[5] and *Kerala State Electricity Board* v. *T. P. Kunhaliumma*[6] concerning the application of article 137 of the Schedule to the Limitation Act, 1963 on the application under Section 20 of the Arbitration Act, 1940.

Chapter-4 makes elaborate analysis of sections 21 to 25 of the Act dealing with Arbitration in suits in the light of case law.

Chapter-5 titled as "General" deals with application of Chapter-V of the Act which empowers an arbitrator to make an interim award and to award interest, power of the court to enlarge time for making award, grounds for setting aside the award, nature of jurisdiction of the court into which an award is filed, suits that are barred, arbitration agreement or award to be contested by application, power to stay legal proceedings where there is an arbitration agreement, effect of legal proceedings on arbitration, powers of court in certain situational limitation and disputes as to the arbitrator's remuneration or costs.

Chapter-6 discusses the provisions relating to appeals against the orders passed under the Act.

The last chapter titled "Miscellaneous" deals with jurisdiction of Small Causes Court, procedure and powers of court, service of notice, and among others statutory arbitration.

The High Court Rules of Allahabad, Patna, Rajasthan, Punjab and Haryana, Gujarat, Bombay, Calcutta, Karnataka, Madras and Orissa at the end have all the more enhanced the utility of the book to the readers.

3. JT 1988 (4) SC 710.
4. JT 1988 (2) SC 82.
5. A. I. R. 1967 S. C. 990.
6. A. I. R. 1977 S. C. 282.

Malhotra must be congratulated for bringing out a book on Arbitration in Hindi. The more one reads the book the more one is convinced that the law can be effectively explained in Hindi as in English. The chief merit of the book is the comprehensive explanation, analysis and discussion of the sections and case law. Further a list of headings under each section makes reference easy. However, the book would become authoritative if the author in the next edition makes a critical analysis of statutory provisions and judicial decisions.

I have no doubt that the book will be of great use to students of law of Arbitration and any one interested in dealing with complex problems relating thereto.

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PRACHIN BHARAT ME DAMPATYA MARYADA By Dr. Maheshchandra Joshi, 1988, P. 390 Rs. 150/- (Hard Bound) Rs. 120/- (Ordinary) Published by Sachidananda Prakashana, 605/1, Krishna Gali-7, Moujpur, Delhi-110053.

With all the vicissitudes the human society has gone through during the last several millienia of its existence, the institution of marriage, apart from discharging its primary function of propagating the species, has continued to retain its pristine purpose of preserving the society and promoting the values it has accepted. This pivotal role of the institution as the foundation of any civilized society can hardly be questioned in spite of the onslaughts made by the materialistic civilization of West. The coming into vogue of 'de facto' unions particularly among young men and women[1] during the last three decades in some of the advanced countries of the West generated a fear in the minds of traditional people that it may be a precursor to the disappearance of marriage as a social institution. However, such an apprehension seems to be misconceived in view of the fact that the institution of marriage has sufficient vitality to withstand the ripples created by such and similar aberrations. It is, therefore, significant that any serious study relating to the institution of marriage continues to be of topical interest and is a welcome addition to the existing literature in the field. Further, confining the study to a particular society that to a traditional one or delineating it to a specific period, as is evident from the present volume under review, will not take away its usefulness to other societies or its contemporary character.

It must be pointed out at the outset that the use of the word 'maryada', a profoundly meaningful term in connection with spousal relationship is very significant. Indeed, it is very difficult to translate

1. 'Trial Marriage' (the expression being contradictory and therefore, inapt in the realms of law) became a fashion among the university students in the United States in sixties and shocked the traditional sections of that society. Such a social arrangement devised to circumvent the legal implications of a valid marriage generated many legal problems affecting the status of parties and their off spring. In fact, some of the 'advanced' Law Schools had been seized of this problem in their effort to solve difficulties created in law. In fact, such a social arrangement was merely putting the 'compatibility factor' to test for ascertaining whether a 'durable spousal relationship' was possible. In the event of maladjustment, the parties could 'walk out' of it without any serious repercussions in the sphere of law. These participants hardly realised the debasement involved in this social arrangament of sanctioning sexual license.

this term into English language.[2] Even though the term 'maryada' connotes 'limit', 'bounds of morality' 'propriety' and so on, it reflects basically the values the Hindu society cherishes in the conduct of husband and wife, parents and children, teacher and taught and so on. This book is a scholarly study of the values of the Hindu society particularly in relation to matrimonial relationship keeping in perspective the rules evolved by this society for regulating the conduct of the spouses. Dr. Joshi has examined the evolution of the institution of marriage, its nature, the sacramental character of marriage, the formalities required to be complied with for completing the Samskara, the responsibilities and duties of the spouses and so on. The learned author has also examined thoroughly the deviation from morality, the legal and moral sanctions prescribed for such infractions.

It is refreshing to observe that Dr. Joshi, unlike pure traditional scholars, has drawn ample materials from western sources particularly in the field of anthropology and sociology. We have to point out in this context that Dr. Joshi has the unique advantage of having had the modern university education along with schooling in traditional system. With such a training, the learned author is able to examine the Hindu concepts in the light of the theories advanced by western scholars. For instance, while examining the theory of promiscuity its existence or otherwise in the Indian context, Dr. Joshi has differed from the views expressed by many reputed sociologists especially in the context of interpreting the texts drawn from Maha-Bharat and the Swetaketu anecdote. Some critics may deem this as amounting to the apologetic method in construing traditional texts. However,we should remember that it will be otherwise difficult to rebut the distorted projection of Sastraic materials. For instance, this reviewer in reminded of the interpretation put by some of the western writers on the eight forms of marriage and twelve kinds of sons recognised by the Sastras. Some of these writers who wrote at the turn of the century went to the extent of observing that Sastras promoted immorality by recognising *Paisacha* from of marriage and *kanina*, *gudhaja* and *sahodhaja* sons. It never struck these 'enlightened' scholars that great savants of ancient India while laying down the highest standards of rectitude, were practical enough to provide for such unfor-

2. Any attempt to translate the term 'maryada' into English or any other foreign language would be as futile and misleading as the translation of the term 'Dharma' by some of the western scholars. A compartmentalised perception of the concepts like religion, law, ethics and morality is alien to Hindu outlook on life and students of Hindu Jurisprudence are well conversant with the difficulties created by the inapt rendering of the term 'Dharma' by nineteenth century Indologists and jurists.

tunate situations where human beings erred. The insistence of requiring the culprit to marry the ravished girl reflected the pragmatism of providing for the unfortunate victim rather than bestowing a premium on the misconduct of the offender. Of course, the Sastras provided for the punishment of the offender as well.

Dr. Joshi must be complimented for the scholarly exposition of the topic of the drawing copiously from the Sastraic sources. In view of the fact that the author has written his work in Hindi, students who are conversant with Hindi only should be grateful to him for exposing to them authoritative socio-anthropological and Sastraic materials. It can be a good reference book to those who intend pursuing their research in Hindi. The reviewer strongly feels that cheaper subsidised editions of such scholarly works should be brought out by institutions to make them available to students of Indology, Sociology, Anthroplogy and Law.

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MASS DISASTERS AND MULTINATIONAL LIABILITY : THE BHOPAL CASE[1] : Prepared by Upendra Baxi and Thomas Paul. N. M. Tripathi Pvt. Ltd., Bombay, 1986, pp. i to xii and 230, Rs. 80/-. INCONVENIENT FORUM AND CONVENIENT CATASTROPHE : THE BHOPAL CASE[2], Prepared by Upendra Baxi, N. M. Tripathi Pvt. Ltd., Bombay, 1986, pp. 325, Rs. 100/-. VALIENT VICTIMS AND LETHAL LITIGATION : THE BHOPAL CASE,[3] Prepared by Upendra Baxi and Amita Dhanda, N. M. Tripathi Pvt. Ltd., Bombay 1990, pp. Lxix, 679, Rs. 350/-

The Stockholm Conference stated the need of spreading the environmental consciousness through education. The Water (Prevention and Control of Pollution) Act, 1974 also includes in the functions of the Central and State boards provision for dissemination of informations and organisation of mass education programmes relating to the prevention and control of water pollution (Sec. 16 (e) and (f) and Sec. 17 (c), (d) and (e)). This has been repeatedly emphasised under the Air (Prevention and Control of Pollution) Act, 1981[4] and also the Environment (Protection) Act, 1986.[5] The meeting of the experts on environment and enviromental law, convened by the Consumer Education and Research Centre and the Indian Law Institute on August, 22-24, 1986, recommended for an effective information system which would allow free 'flow of information to the people at large'.[6] It also suggested that the centrally funded universities, the research orgrnisation and the mass media must come out with specific proposals for education and educational compaigns in regard to protection and promotion of environment.[7] In this development process, the judiciary has also advocated the need for the spread of environmental literacy.[8] Apart from these cries for environment education, the right to education[9] and the right to know[10] are now being claimed as fundamental rights. This in turn imposes a duty on the State, educational institutions and all of us to educate people so as to protect and improve the natural environment. Some of the

1. *Mass Disasters.*
2. *Inconvenient Forum.*
3. *Valient Victims.*
4. See Section 16 (f), (g) and (i) and See. 17 (c).
5. See Sec. 3 (2) (ix) and (xii).
6. *Environment Protection Act: An Agenda for Implementation*, prepared by Upendra Baxi, 1987, pp. 33-36.
7. *Id.* at 12-13.
8. *M. C. Mehta* v. *Univ. Union of Delhi*, A. I. R. 1978 Del. 308.
9. *Chandel* v. *Univ.* of *Delhi*, A. I. R. 1978 Del. 308.
10. S. P. Sathe, *The Right to Know*, 1991.

leading law schools have risen to the occassion and have taken up this challenge. In this direction, the efforts of the Indian Law Institute and in particular, of Prof. Upendra Baxi, deserve our appreciations. They have brought to the day light some of the informations on the Bhopal tragedy which would have otherwise remained either 'privatised' or 'secretised'.

The Indian Law Institute has brought out three publications during a span of four years (1986-1990) on the Bhopal mass disasters. The year 1986 saw two publications : one on May 1, 1986 the *Mass Disasters*; and the second one, *Inconvenient Forum*, came out on 17th June, 1986. After a gap of four years the *Valient Victims* was published on 15th March, 1990.

It was on the night of 2/3 December, 1984, a black day in the history of world and in particular India's, environment, that a massive lethal gas, called methys isocyenate (MIC), escape from the plant of Union Carbide India Limited a subsidiary of the Union Carbide Corporation (U. S. A.) (UCC), resulted in mass disasters including, death of many human beings, animals and plants and many suffered and are suffering from its after affects. Further, there were many identified and unidentified victims and many were living and others were yet to born. The present volumes deal with the basic documents of the litigation initiated by the Union of India against the UCC in the Southern District court of New York (*Keenan's Court*). The presnt work, according to the author, makes an attempt "to highlight adequately the nature of contentions involved."

The *Mass Disasters* opens with an Introduction by Baxi which gives a resumé of the Bhopal tragedy and the claims and counter-claims of the Union Carbide Corporation (UCC) and the Government of India with regard to the question of forum for the legal battle.

Baxi calls this litigation as unique for the reasons : Firstly, it was an Indian industrial 'Hiroshima'. Secondly, the catastrophe was the direct result of the commissions and omissions by the UCC. Thirdly, it generated lot of legal battles in India and the U. S. A. Fourthly, the Government of India aggregated all claims of victims itself. Fifthly, it put the finest aspects of the American jurisprudence on trial. And lastly, it caused a lot of ferment within the Indian legal community on the question of convenient forum.

The Introduction closes with two important recommendations : Firstly, that the Indian state has to ensure the best possible relief and rehabilitation measures and also to ensure its law, policy and admini-

stration expeditiously to avoid future Bhopals in India. And secondly, the citizen of India has to ensure "a world safe from multinationals plunderous lust for power and profit." This can be done, according to Baxi, through a variety of initiatives including "public education, citizen movements concerning the right of the people to know and effectively intervene in decisions involving hazardous and ultra-hazardous enterprises". Though they are very comprehensive and high sounding recommendations but the question remains unanswered how much of them would see the light of the day? And what mechanisms and sanctions would be adopted for their successful enforcement ?

The basic documents start with the Union of India's complaint against the UCC and later on an amended consolidated complaint was also filed. The general allegations included that the multinational Union Carbide was responsible for the design and development of the plant with best information and technology in order to ensure safety. But in the present case, it was responsible for the breach of its duty for the ultra hazardous and inherently dangerous activity causing the mass disasters. There was a breach of warranty and the defendant misrepresented. And thus, the liability in such a case was absolute and strict. The plaintiff urged for appropriate damages and such other relief as the court might deem just and equitable.

The memorandum on behalf of the Union Carbide supporting the motion to dismiss the complaint on the ground of *forum non conveniens*, stated : Firstly, that the plaintiffs were foreign citizens and the accident took place in the foreign country. The *Piper*[11] and *Gilbert*[12] were cited to support this point. Secondly, the litigation would impose tremendous burdens on the courts of the U. S. and would be "vastly more expensive" or "would be a massive imposition on the time, energy and resources of the American Court." Thirdly, it would "create insurmountable problems of communicating with Indian claimants" living in the "slums" or "hutments" by the American courts and juries who were imbued with the U. S. cultural values. A supplemental memorandum in further support of the UCC motion was filed. It took the help of justice Bhagwati's speech to demonstrate the capability of the Indian courts and further pointed out that if the American courts were considered as the convenient forum, it would compel "every foreign case with an American Corporate party" to be tried in the U. S. A.

The memorandum in opposition to the UCC's motion stated mainly that the UCC had failed to establish that justice would be done by

11. *Piper Aircraft Co.* v. *Keyno*, 454 U. S. 235 (1981).
12. *Gulf Oil Corpt.* v. *Gilbert*, 330 U. S. 501 (1947).

following the doctrine of *forum non conveniens*. Further, the Indian courts were not an adequate alternative forum because of "extreme delays", the procedural and practical incapability, non-enforcebility and uncollectibility of the Indian judgment; and finally, the UCC motion was "nothing more than forum shopping." It was further argued that the private as well as the public interests favoured the retention of the American courts jurisdiction.

In the third stage came the memorandum of individual plaintiffs which *inter alia* included, that the American courts were "uniquely equipped to manage this case", the *mass disasters* case could not be decided on the cases relied upon by the defendant; the U. S. had the "most significant contact" to the particular issues in the present dispute; the present litigation, having world wide and, in particular, American ramnifications, deserved to be heard in the U. S.; when the American courts should bear the administrative burden of the disastrous malfunction of its Indian plants; and lastly, there was no problem of choice of law for the American court for the main reason that the American and the Indian substantive laws were "evolved from the same English common law tradition", and thus the doctrines controlling in the present case were "identical."

There are two affidavits in the present work. Marc S. Galanter in his affidavit advocated that India was the inconvenient forum for the present litigation. The main grounds included that, though India had a common law base but it "incompletly emerged from the heritage of colonial rule." There was "massive backlogs" and "enormous delay" in the Indian courts. Further, the tort law in India was "underdeveloped" and there was no case which dealt "with the problems arising from complex technologies" and this "reflected in a total absence of relevant experience by lawyers and judges," even the Bar in India did not presently possess the pool of skills, the fund of experience, or the organizationol capicity effectively and efficiently to pursue massive and complex litigation"; and the legal system contained a paucity of devices to promote timely resolution of complex cases. Marc S. Galanter in support of his stand took the help of law literatures and data which find place in Attachments A-J.

It is submitted that these are not fair comments on the Indian judiciary, Bar and the legal system. Though Galanter has supported his view points from the data. It may be pointed out that there were as many as fifty six thousand cases[13] instituted at the Supreme Court

13. See Attachment F. of Mare S. Galanter's Affidavit, *Id.* at 211.

alone and that too in one year and this resulted in the increase in pending cases before the Supreme Court of India. And thus, Galanter's cumulative additions of pending cases do not draw a correct picture in this regard. Further, if one examines minuetly and impartially the cases handed down by the Indian judiciary and also the role of lawyers from the grass root to the top level, the conclusion will be that the judiciary and the Bar are not only competent but also well equipped to launch any innovation.[13a] As regards the paucity in the Indian legal system, even the constitution of the U. S. did not initially provide for all the situations to come. Its present shape was slowly and gradually developed. The Indian Water Pollution, the Air Pollution and the Environment protection laws and the Indian judgments on the environmental law definitely donot sketch a gloomy picture as drawn by Galanter. To give two examples out of the dynamism and the innovations the one, if we go even to the high court level, the *Damodar Rao*[14] elevating environment to the fundamental right; and the constitution of India now provides for the fundamental duty of every citizen[15] and also the fundamental principle in the governance of the country and also the duty of the state relating to the protection and improvement of the environment.[16]

The *Mass Disester* closes with the affidavit of N. A. Palkhivala which supported the defendant's motion of India, the most convenient forum Palkhivala took the stand that the Indian judiciary was not only "wholly competent" but also "super-innovative" to deal with complex issues. As regards the Indian Bar, to say that it was ill-equipped, was, according to Palkhivala, "a slanderous reflection on the legal profession in India." It was rich in talent and culture. And lastly, the Indian legal system was capable of coping with "advances in technology in the unfolding future." The affidavit has only one Appendix which gives provisions of articles 32 and 136. In this affidavit one will find that the lawyer's approach is missing or rather it is a casual approach in such a serious litigation and for this Palkhivala gives the excuse that it would be 'supererogation to repeat the authorities and detailed documentation which have been sufficiently deployed in Mr. J. B. Dadachanji's affidavit." Moreover, the cases cited by Palkhivala were concerning a few capita-

13A. See the Bhopal District court Judgement *Supra*. Even one opens one year's A. I. R. 1987, the judicial activism is visible.

14. *T Damodar Rao* v *S. O Municipal Corpm, Hyderabad*, A. I. R. 1978 A P. 171.

15. Art. 51A (g).

16. Art. 48A.

lists, Maharajas and landlords resisting state's interference in their empire. They cannot have any comparision with the Bhopal mass disasters.

Now coming to the *Inconvenient Forum*, it opens with an Introduction by Upendra Baxi which at the outset says that the net result of Keenan's decision was "the revictimization of the Bhopal victims." Baxi examines Justice Keenan's opinion and comes to the conclusion that the learned judge "addressed himself wisely" but it has not only "erred grieviously" and demonstrated "infirmities" but also "ill-served the victims of Bhopal" an example, which "would be difficult to locate in the recent annals of American jurisprudence." Now coming to "the tasks ahead" Baxi "believe (s)" that India should appeal Judge Kennan's decision and further the Government of India must enforce the provisions of the criminal law for those who were responsible for the mass disaster. As regards the future agenda, Baxi suggests that the question of relief and rehabilitation to Bhopal victims should be a matter of high priority on the national agenda.

Justice Keenan's decision runs into thirty-three pages. The judgment is based on three main points. The first question was : did there exist an alternative forum ? To answer this question, the court examined the innovation in the Indian judicial system; the delay and backlog in Indian courts; the procedural and practical capacity of the Indian courts. In thrashing out these issues, the New York district court put a great weight on Palkhivala's affidavit, a person in whom, it seems, the court took a special note that he "served as Indian Ambassador to the United States from 1977 to 1979"; and also the affidavit of Dadachanji. But the affidavit of a professor of law was considered as "less persuasive". Further, the *Piper* was treated as an all cure medicine for the mass disaster, which in itself was not only "an evenly divided opinion" but also an unfit balance to measure the world's worst industrial disaster.

The next inquiry was which way the private interest weighed ? The court examined the sources of proof and access to witness and concluded that the private interest weighed "greatly in favor of dismissal on the grounds of *forum non conveniens*." As regards the third point concerning the public interest, it was pointed out that the administrative difficulties; the cost of litigation; the immense interest of various Indian governmental agencies; and finally, Indian law emerging as "the operative law" in such cases, and all these, being in the public interest, required the court to dismiss the motion of India being the inconvenient forum. The opinion closes with three conditions on the Union Carbide; firstly, that it shall consent to submit to the jurisdiction of the Indian judiciary and it shall

not take the defense of the period of limitation. Secondly, it shall agree to satisfy any judgement rendered by not only the first court but appellate court of India. And thirdly, the Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after the appropriate demand of the plaintiffs.

The court all through harps on America being "forum non conveniens." The learned judge viewed the whole issue, it is submitted, through the American spectacles and in this vision, he miserably missed the plights of more than one lakh victims and thousands who died. One will find in this judgment an American nationalist rather than a proucessual justice approach. This gets support from what justice Keenan wrote, for example, he was worried that, "the litigation would tax the time and resources of the American citizens",[17] (T)he cost to American taxpayers of supporting the litigation in the United States would be excessive",[18] "the supposed" blackmail" effect of dismissal", according to the learned judge "is not a significant interest of the American population.",[19] "there was no reason to press to United States judiciary to the limits of its capacity"; "(T) his court sits in one of the busiest districts in the country" and it is according to justice Keenan" a "congested centre" of litigation";[20] and therefore, he never wanted it to become more congested; and last but not the least, the learned judge was more concerned with the interest of the American based multinational corporation than the Bhopal *Mahabharat* when he took into consideration the plea that if America was considered as the convenient forum, then it would "bind all American multinationals henceforward."[21]

The other basis of the court's order were that the large documents were "in Hindi or other languages" which would require translation and the presence of many Indians at the trial would also require "to translate their testimony", all these would involve high cost. This cost factor has been repeatedly used by the District Court of the Southern district of New York. In this cost balancing, the sufferings of the large Indian population had almost no relevance. Does it not reflect a capitalist approach in administering environmental justice in the mass disaster ? It is surprising that though the court in the factual background ceremoniously narrated what happened on December 2-3, 1984 in Bhopal but it did not give any serious thinking to the sufferings

17. *Id.* at 61.
18. *Id.* at 68.
19. *Id.* at 66.
20. *Id* at 60.
21. *Id.* at 62.

of the Bhopal victims rather the court was concerned not to deprive India, the status of being the "world power in 1986" and also its judiciary to "stand tall before the world." The tallest claim of the District Court was that it had done great justice to India by not allowing "imperialism" and also "to revive a history of subservience and subjugation."[22] Is this the time to advocate such philosophy when thousands died and the large masses were victimised.

One more assault on the America's forum convenient was that, the Indian government 'regulated the Bhopal facility; and further, the various Indian governmental agencies had immence interest in "the creation, operation, licensing and regulation and investigation of the plant." As such, the court concluded that India was the convenient form. The doctrine of acquisance cannot be applied in the present catastrophe. Moreover, the above approach will allow the multinationals to pollute the environment of the developing country and disown its own baby when the question of responsibility comes. Such a high handed handling of the matter by the big power should be deprecated.

The affidavit of Dadachanji, which should have been given a place in the *Mass Disaster*, is now included in the *Inconvenient Forum*. It states briefly that the Indian courts were competent to handle the complex technical subjects, and further, there would be no judicial delay "in the present type of litigation." Thirdly, the system of discovery in India was adequate. Fourthly, the law of torts is developed in India. Fifthly, the court in its inherent power in section 151 of the Code of Civil Procedure, 1908 could implead third parties. And finally, no U. S. judgement would act" inso facto as res judicata in Indian courts.

Holman's affidavit, supporting the UCC's motion to dismiss those action on the grounds of forum non conveniens, took the first support from the nature of the documents submitted before the court. It included that the documents contained technical matters and many significant documents were not in English. Secondly, in view of the enormous documents, it would be "necessary to interview many of the hundreds of Indian.' Thirdly, there existed pervasive involvement of federal, state and local Indian government in the Bhopal plant operations, and that, the plant was a totally Indian operation.

Appendix B gives some of the leading decisions of the United State on forum non conveniens. This demonstrates that the Keenan's court could not do justice either to the American precedents or to the victims of unprecedented mass disaster. It may be pointed out that

22. See the Conclusion, *Id.* at 69.

there are interesting decisions handed down by the Supreme Court of India in administering environmental justice. In the year 1987 alone, that the Indian courts wrote sixteen judgements. In view of this development, the Indian decision/s should have been given a place in the present work.

Next comes Appendix C which had four orders subsiquently passed by the New York district court. These orders included the procedure for payment and administration of the interim relief fund; a fixed time period within which the Union Carbide would indicate its acceptance or rejection of the three conditions imposed under the previous order; and finally, in view of the defendant's willingness to comply with those conditions, the court ordered for dismissal of actions in the present case. In the Appendix C, there were notices of appeal and cross appeal and also the *amicus curiae* brief. The transcript of Chamber hearing was also included in this Appendix. In this transcript one can see the concern shown on behalf of the government of India for the delay and the enforcement of the conditions laid down in Keenan's decision.

The third volume of the *Bhopal* case, the *Valiant Victims*[23], is the bulkiest publication out of the other works for the present review. It runs into 679 pages. The journey is long but rewarding because Baxi and Dhanda take the readers to the administration of environmental justice in the *Bhopal case* from the grass root to the highest court in India. The entire work is divided into Five Parts with three Annexures. The Book opens with an Introduction, wherein, Baxi in sixty nine pages, tries to accompalish a very difficult job of giving resumé of the long and critical journey. This Part does not simply play the informative role rather it points out, at places, the misgivings and furthermore, and the most important, provides a thought provoking ground for all those who are interested in the field of law of industrial hazard.

Part I deals with the proceedings before the District Court, Bhopal. This Part mainly covers three things : the plaint and amended plaint of the Government of India; the written statement and amended written statement of the UCC; and the court's orders.

The plaint of the Union of India "replicated, almost wholly, the plaint before judge Keenan." In view of this remark of Baxi, document could have been excluded as an economic measure in the present costly venture of Rs. 350/-. The argument of the government of India centred

23. *Valiant Victims and Lethal Litigation* : *The Bhopal case* by Baxi and Dhanda, 1990.

round on two main themes. Firstly, the government of India had to initiate the action in view of Preambulary, fundamental obligations and also the *parens patriae* relationship with the Bhopal victims. Secondly, the UCC, having 'closedly held power' and also having knowledge of the consequences of the MIC plant, was obsolutely liable for its ultra hazardous and inherently dangerous activities causing castastrophic disaster. So far as the plea of *parens patriae* is concerned Baxi calls it "a pioneering innovation for the Third World jurisprudence" which has "great potency to inhibit future Bhopals inside or outside India." In a democratic set up when the government is for the people then in the disaster of the present dimension, where large population is involved, it becomes necessary that the government must play the role of *Parens Patriae*. It cannot and should not sit as an idle spectator to the commercialization of India's environment and its people by the multinationals.

Now coming to the UCC's response, Baxi calls it, 'quite scandalous' as it resorted to 'massive negation—ontological as well as functional'. In all the seventy five pages, having as many as one hundred sixteen points, the written statement of the UCC denied the avernments in the plaint and tried to shift the entire responsibility on the government of India and the government of Madhya Pradesh. The entire approach of UCC was that once India and one of its states permitted the MIC operation in Bhopal, they must bear its consequences. One can smell in this exercise a malafide, selfish and privatisation of profits motive. If this plea gets the judicial approval then the multinational corporation would be entitied to spoil the foreign ground with impunity for its commercial exercise.

The UCC's response will attract the attention of the readers on the following counts. It was urged that the present incidence was the result of a 'deliberate act.' This is an easy plea, but difficult one to be sustained. Another defensive ground was particularisation of the amount which in the mass catastrophe of the present dimension cannot be given any concretized shape. The leakage of MIC and other piosonous gases may affect not only the human beings, animals and acquetic organisms but also the plants, water, soil and countless things. Further, it may also adversely affect the present generation and the generation to come. In view of such a wide consumer forum no precise arithematical particularisation can be possible. Today the world countries are advocating for the natural instead of chemical fertilisers. Is this not enough to contradict the UCC's all claim that MIC did not pose "immediate danger" or "long term adverse genetic or carcinogenic effect" ? The plea

for application of expost facto law of article 20 (1) has no relevance to the present case as it is a safeguard available only to a person accused of crime. The other lame excuses of the UCC, which reflect its casual approach were, that such chemicals were also "stored elsewhere in India" and this was "widely practised throughout India"; and no liability for the deaths, damages or injuries of those who were living in the unauthorised hutments, colonies adjacent to the Bhopal plant.

It may be pointed that para 94 of the written statement of Union Carbide diffused the gravity of the catastrophe by the discussions in Parliament and it tried to show that the MIC leakage had no adverse effect. The Supreme Court in the *Mehta case*[24] realised the difficulty in getting an impartial view in such matter and the court had to recommend for the constitution of a panel of impartial experts to give a balanced view. The discussions in Parliament on establishment of Mathura refinery also saw for and against sides. The present writer visited Bhopal in 1989 and interviewed some of the Bhopal victims who had come to collect their share in compensation at the Regional Office of the Dena Bank and also the medical practitioners in Bhopal. To say that MIC had "only conjunctival irritation", "the babies (7 to 40 days old) had minor birth anomalies", "the air and water in Bhopal was free from toxic chemicals'', is nothing but a false statement, to which Baxi calls 'a monstrous lie'' or what Union of India says in its reply, 'an affront to the Bhopal victims'.

In the series of orders passed by District Court, Bhopal the proposal of Hon'ble justice M. W. Deo of 2nd April, 1987 to the parties for interim relief to the gas victims deserves mention. The learned judge was moved with "(T)he helplessness of the victims" with no legal relief for almost two years. Further, the court, adopting an outside ivory tower approach, also took into consideration the public pressure and also the 'very peacefully Bhopal Bandh' (order dated 18.11.87). All these led the court to conclude that in this "plight of gas victims", the task ahead was "to reach the final goal-JUSTICE-COMPENSATION". This 'fresh spring of Justice' was 'activated' by Justice Keenan's remark. This way the district court planted 'a sapling' for the interim reconciliatory process for substantial interim relief to the Bhopal victims through the inherent power under section 151 of the Civil Procedure Code In this wave length Justice Deo, directed the parties "to see that this sapling grows fast and bears the fruits of fair compensation for the gas victims." It may be submitted that the reference to 'sapling by the learned judge

24. A. I. R. 1987 S. C. 965,

is not justified because the speady justice process to the victims of mass disaster cannot afford to wait for years to allow 'sapling' to grow and further years to bear fruits.

It was unfortunate that the proposal could not materialise for nearly eight months due to counter-reply and submission and counter-submission. This time the UCC in its submission stated that such an arrangement would deny the defendant the right to defend the suit on merit; and secondly, that it would 'drop the mantle of a judge and assume the robe of an advocate', and further, that the court would descent into the arena and be liable to have its 'vision clouded with the dust of conflict'. Does this not reflect an unconcerned approach of the UCC to the unprecedented misery. In this state of affairs, the learned judge activised the law, and ordered the UCC to deposit in his court within two months a sum of three thousand five hundred million rupees for payment of 'substantial interim compensation and welfare measure for the gas victims'. This amount, according to the court, might be so' utilized and harness' as to achieve three things : firstly, disbursal of substantial interim compensation; secondly, health-care; and thirdly, generation of 'employment' potential for gas 'victims'. The above orders show the concern of the grass root court for the speedy justice to the victims of the industrial hazard and also innovative approach to handle unprecedented misery.

It was unfortunate that justice Deo's order could not deliver industrial hazard justice because the subsequent orders of the district court were routine ones posting the matter from day to day. Thus the fresh spring of justice innovated by the district court remained at the district level a mirage for the thirsty Bhopal victims.

The next journey of the *Valiant Victims*, running into more than one hundred pages of the proceedings before the Hon'ble Madhya Pradesh High Court, was not a happy one. In the whole journey the following points attract the attention most. The interim relief of Rs. 350 crores ordered by the District court was considered by justice Seth of the Madhya Pradesh High Court as 'vague' and not a 'reasonable' amount. The learned judge, while calculating the amount, confined the claims realating to deaths and personal injuries under four categories (a) for each death—Rs. 2 lakhs; (b) in each case of total permanent disability—Rs. 2 lakhs; (c) Rs. 1 lakh in each case of permanent partial disability; and (d) for each ease of temporay partial disablement it should be Rs. fifty thousand. On the basis of these guidelines the high court ordered for payment of Rs. 250 crores. Thus there was a reduction of Rs. 100 crores

which had great meaning to the hapless and helpless victims. It may be pointed out that Bhopal disaster did not simply result in deaths and serious personal injuries but it had many fold wide dimensions. The high court did not sling on this wide frequency and to that extent the juridical arithmetic did not do justice with the variety of objects of the mass catastrophe.

The second casualty was the acceptance of the recusal application on recusal of justice Deo. The basis for the conclusion was that the learned judge of the District court, Bhopal imposed the liability of Rs. 350 crores on the UCC' 'without recording a clear finding with regard to a prima facie case in favour of the plantiff for the purpose.' The learned judge of the high court shifted the approach not to look to the judge's mind 'but to look at the mind of the party'. It is unfortunate that the court missed a reasonable balanced approach. In such case the court should have applied the test of the mind of a reasonable person rather than that of the party and this is the safest test. In applying the test of the mind of party, justice Seth concluded that justice Deo's order was such as could create a reasonable apprehension in the mind of the defendant. This according to justice Seth was 'the most disturbing.' The result was that the application for transferring the suit pending in justice Deo's court to any other court was allowed. This was not all. The juridical justice of justice Seth went a step futher and directed that *some more experienced* judge may be posted at Bhopal to try the suit (emphesis supplied). 'The words 'some more experiened judge' clearly reads the mind of justice Seth who, it is submitted, was doubting the expertee or bona fide of justice Deo in handling the mass disaster. It is surprising that justice Seth on the other hand starts with the premise that 'it is not intended by this court to cast any reflection on the learned Judge.' One can smell in this exercise the juridical superiority complex in the herarchial judicial structure. If one examines minutely justice Deo's order on interim relief dated 17.12.1987, as though he may not get a commercial man's balancesheet and this is not even possible in the present Hiroshima, but paras 25 and 26 of the order are enough to show that the learned judge had in fact seriously applied his mind while adjudicating on the interim relief amount. His balancing approach can be deduced from his calculations of persons dead, suffered serious and lesser serious injuries and also taking stock of all the progress in the case so far, the facts and figures (though not disputed) which have come on record and the material funished during settlement efforts made by justice Keenan. Is this the reward that the grass root court should get for its 'judicial duty' with 'judicial conscience' and great concern for the

ghastly tragedy ? It is pity that the superior court making tall claim of superiority, instead of making headway adopted a retrogate step in the administration of justice to the Bhopal victims.

At the last leg of the longest journey of the *Valiant Victims*, running into two hundred forty four pages, comes the proceedings before the highest court of India, Part IV contains : the Special leave to appeals on interim relief of both the parties; different orders of the Supreme Court, affidavits and counter-affidavits of both the parties; and finally, the judgement of the Supreme Court on the constitutionality of Bhopal Gas Leak Disaster (Processing of claims) Act, 1985.

In the special leave petitions of both the parties three points deserve mention. The UCC is now demanding that the 'no fault was' a concept unknown to jurisprudence around the world (p. 435) and further that the 'judicial legislation' was plainly impermissible (p. 436). In both the cases the UCC, having colour blind vision overlooks the Indian judicial dynamism. There was no inhibition on the courts to make known the unknown. Had this been the position then the emerging frontiers of modern jurisprudence of the world would not have seen the present shape. To talk of inhibition on the judicial legislation, the position in India is that the court has even gone further to make judicial constitutional legislation (amendment).

The petition of the Union of India brings a new dimension to the already expansive article 21. This article, according to the Union of India, was an enabling article which conferred on the state a power to to enact laws to deprive a person of his life and liberty. This was, according to their petition, designed to protect public interest viz. to preserve and protect the life and liberty of every person without being interferred with by any person' (p. 477). The concept of enabling provision in the fundamental right Part instead of better protecting the rights would weave an antithesis thread in their texture.

The result of the special leave petitions was the settlement of the 14th February, 1989. The order was signed by five judges of the Supreme Court. The order opens with the justification for the settlement which included : 'complex issues of law and fact', 'enormity of human suffering', 'pressing urgency', and 'immediate and substantial relief to victims of the disaster.' After considering carefully the above matters for 'several days', the Supreme Court opined that the present case was 'pre-eminently fit for an overall settlement between the parties' and it was 'just, equitable and reasonable' to pass the order (p. 526). The shortest worded order in the entire journey of the *Bhopal* case stated : firstly, that the

UCC shall pay a sum of U. S. dollars 470 millions to the Union of India in full settlement of all claims, right and liabilities related to and arising out of the Bhopal disaster; secondly, the aforesaid sum shall be paid by the UCC on or before 31st March, 1989; and finally, in 'effectuation of the settlement' all the existing and future civil and criminal proceedings shall stand 'concluded' or 'quashed' wherever these may be pending.

It is submitted that the order instead of helping the victims has further more victimised them for the following reasons. Firstly, the final value of all the claims, rights and liabilities is now fixed at U.S. dollars 470 millions (Rs. 750 crores). The juridical arithematic arrived in the subsequent order and tabulated hy Baxi (p. Lv) leaves many gaps and casualties. For example, for thirty thousand cases of permanent total or partial disabilities the amount was Rs. 250 crores; whereas for 1,50,000 cases of minor injuries and loss of personal livestock the total amount was Rupees 225 crores. Further, for permanent total disability the amount individually payable was fixed at Rs. 2 lakhs and for death it was Rs. 1 to 3 lakhs, and in case of injury of utmost severity the price fixed was Rs. 4 lakhs each. The total number of cases worked out were 2,05,000 but the total population of Bhopal and all those who happened to be in Bhopal during the Deeember 2-3, 1984, if calculated on the basis of various reports on the *Zaharili Gas Kand* and the proceedings before various courts, would definately show a very high wave length. The second infermity is with regard to the full settlement. Both the special leave petitions were against the interim relief: One demanding more money and the other claiming no liability. In this demand and cross demand the present order all of a sudden jumps to the full settlement for which no party had worked out before. Thirdly, the present order put a complete ban on all claims, rights and liabilities of the past and also arising in future. Thus it restricted completey the existing and future scope of judicial review of the mass catastrophe. Is not this verdict contravening the basic structure? Fourthly, the present order completely immuned all those who were parties to the disaster from any criminal liability whatsoever in the present matter. This is further clarified in the subsequent order that the aforesaid amount was 'for the benefit of all victims' and 'not as fines, penalties or punitive damages.' It is submitted that the apex court and the Union of India, in the economics of the Bhopal catastrophe, bartered the criminal liability for the sake of the American dollars. Was the court entitled to 'quash' and the Union of India to claim -extinguish' all the criminal proceedings? Will it not encourage the rich accused to purchase immunity from criminal liability, a position which has no place in the civilised criminal

jurisprudence? Is not the present 'benefit' for the victims, taking the colour of alms to the Bhopal victims? The court itself confessed that the problems of very survival for a large number of victim's greatly over-shadowed the excellence and niceties of legal principles.' Is this confession and also the above drama, not enough to disbelieve the 'just, equitable and reasonable' claim of the Supreme Court in the present case? And finally, the injudicious juridical exercise is reflected in the Supreme Court's order where it stated that the parties would file a memorandum of settlement to 'enable' the court to issue 'consequential directions.' This shows that it is in fact not an order of the court, but a proposal from the court to the parties.

It may be pointed out that the order of the court evoked, says Baxi, mass protests in Bhopal and Delhi, some led by 'victims who crowded the lawns of the Supreme Court of India and the Indian Law Institute' (p. Xlix). The Supreme Court of India in its order of 4th May, 1989 also takes the cognizance of the agitated public opinion. It opined that 'the course of judgement could not be reached or altered or determined by the agitational pressures.' It further shared that, 'if a decision was wrong, the process of correction must be in a manner recognised by law'. But the court did not stop here, it went to examine the truth, and came to the conclusion that 'the factual allegations were 'conflicting' which made it difficult' to distinguish between truth from false-hood and half-truth, and to distinguish as to who speaks for whom' (p. 548). Once the 'agitational pressures' come to the juridical mind, howfar the outcome will not be biased is a doubtful proposition.

Part IV closes with the Supreme Court judgment on the constitutionality of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. The constitutionality of this Act was mainly challenged on the ground of the violation of the fundamental rights in articles 14 and 21 and also the principle of natural justice. Though the court turned down the plea but at the same time it was of the opinion that "justice has not *appeared to have been done*" in the instant case (emphasis supplied). Looking to the facts and circumstances of the case being 'one of those rare occasions', the court confessed that, 'to do a great right' it was 'permissible sometimes to do *a little wrong*' (p. 613) (emphasis supplied).

Before coming to the salient points of this decision, it may be pointed out that the computerised posting of cases in the Supreme Court created an embarassing situation before the court[25] that before deciding the constitutional validity of the Act of 1985, the court adjudged as valid

25. See the Court's embaraçement, *id.* at 622.

the May settlement which was accepted by the Union of India, parens patriae, a status conferred under the present legislation. This means that had the court ruled otherwise in the matter of constitutionality of the instant statute, Union of India could not have validly represented the victims and the entire exercises of February and May, 1989 would have been futile.

Moreover in this judgment, though the Bench consisted of five judges, they were not the same as in the previous orders. It had five different judges and even in these judges : Sabyasachi Mukherji, C. J. wrote the judgment for himself and Saikia, J., Justice K. N. Singh wrote a separate but concurring opinion; and Ranganathan, J. for self and Justice Ahamdi, though generally concurring with their Brethers recorded, 'somewhat different' approach on 'some issues'. The Chief Justice put separate judges in the present case to avoid bias[26] but the apparent injustice and the court's above mentioned confession, do not rule out the possibility of bias in the matter.

Some of the points which attract the attention are : firstly, the state, according to Chief Justice Mukherji, must 'protect and fight for the right of citizens[27] who were not in a position to 'assert and secure' them. And in that role, the learned Chief Justice, permitted the state even 'to deprive some rights of the individual victims.' This approach will more activise the fundamental rights. Secondly, the learned Chief Justice ruled[28] that before entering into any settlement affecting the rights and claims of the victims some kind of notice should be given to the victims. The Act no doubt created parens patriae relationship between the Union of India and the victims but they could not be deprived of the right of information and representation. Thirdly, the court suggested some aftermath treatments of the traumatic experience which included : an expert body for industrial planning; creation of an industrial disaster fund; a fresh industrial legislation; and last but not the least, the international code of conduct for transnationals must find wider implementation and enforcement.

The present judgment also attracts some criticisms. Firstly, the Chief Justice advocated secrecy jurisprudence in case of further parti-

26 See the apprehension in this regard, *ibid.*

27. Mukherji, C. J. and other judges talk of 'citizen' only whereas, the constitutional validity of the Act was mainly challenged under Arts. 14 and 21 whose protection is availab'e to non-citizens as well.

28. See Ranganathan, J (for self and Ahamdi, J.) who throws the ball in the court of the victims instead of the court, *id.* at 630.

culars and opined that "it was neither warranted by the principle of natural justice nor consistent with justice of the case otherwise it might geopardise further action." When the sapling of the right to information and right to know is gaining ground in the Indian soil,[29] will not the secrecy regime eclipse its growth. Secondly, the court, althrough was very sensitive for the speedy justice, but Mukherji, C. J., in the present case wanted 'time to lapse because the heat of the moment, may calm down and proper atmosphere restored' (p. 616). Does heat 'refer to agitational pressure' ? If so, then the judiciary itself is inviting such pressure which will instal further proceedings by the interested pressure group. Then the question comes, how long the court will wait for the 'proper atmosphere' to be restored. Will this restore the tall claim in the present case of 'restoring the credibility' ? Thirdly, the Chief Justice advocated for tilting of the balance in administering justice rather than balanced scales justice. Fourthly, Justice Ranganathan refuted the charge of 'surprise treatment'. Further the learned judge on the one hand demanded 'serious consideration' in the matter but casually handled the constitutionality of the Act. He was of the opinion that, 'the Act is *not so draconian* in its contents (emphasis supplied). Is this not an example of wavering juridical mind ? And last but not the least, is the surrogation or surrender of the fundamental rights in articles 14, 21 and also their enforcement in article 32, which itself is a fundamental right, without ones consent through a legislation, permissible under the constitution of India ? This was the question on which neither the attention of the court was drawn nor the court touched upon this aspect.

The three Annexures ends the *Valiant Victims*' journey which leaves behind the victims for the endless voyage to the processual justice and also Bhopal's environment to degrade further. This does not mean that the *Bhopal* case exercises were futile. It gave some solace to the victims; a jolt, though not a thunderous one, to the multinational corporations; and last but not the least, it created a world-wide awareness of the saddest catastrophe so that Bhopal do not reoccur again. The three exercises open new challenges before the legislature, the executive and the judiciary to handle the multinational technology implosion and Bhopal like explosion.

The Mahabharat of the *Bhopal* from the *Mass Diasters* to the *Valiant Victims* having with one thousand two hundred thirty four pages, is an important and valuable contribution in the multi-facet fields of law. It is an expansive mine where all those interested, in the development process, technology hazard, juridical and law approach as to mass disaster,

29. See for the interesting discourses, S. P. Sathe, The Right to know, 1991.

would find valuable informations. The Indian Law Institute and those who have prepared the three volumes, and in particular Baxi, deserve appreciations. The present publications fulfil the constitutional and statutory obligations noted in the beginning of this review, of making available to people the right to education of the Bhopal tragedy. But it is pity that since the publication of the *Mass Disaster* in May 1, 1986 and down to 15th March, 1990 of the *Valiant Victims*, not many have used this education. Our non-participatory approach in such serious matter would allow the multinationals to keep at ransom our lives and lives of animals, plants and even the very existence of our environment. The entire exercises give a base for the future course of action. The industrial hazard justice from the grass root to the apex level, being the first contribution in the law field, will activise more such exercises in other areas as well. The documentation is chronological having continous link and keeps the reader eager to know what is next. And in this skelton documentation, Baxi's critical appraisals of the *Bhopal* case provide life and blood, to the present publication.

All the three volumes also deserve credit for flawless printing which is exceptional in the Indian Law publications. The present literature is thus a piece of work which must find a place not only on the shelves of the Libraries but also with all the consumers of law and the modern technology inside and outside India. The review closes with the sad part in the long but fruitful Bhopal journey and that is, its rich economy of Rs. 530, (cost of the entire set and more particularly the third Vol. for Rs. 350/-) an amount which will be beyond the reach of an ordinary Indian reader. Is this not a negation of the right to know, information and education ? In such an exercise what is important is duty oriented rather than a business like approach and this will help the sapling of the right to education, knowledge and information to take firm roots in the Indian soil.

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I

The Press Council of India has been statutorily established[1] with twin objectives—preserving the freedom of the Press and to maintain and improve the standard of news-papers and news agencies.[2] To achieve these ends, it performs various functions set out in section 13 of the Press Council Act, 1978. It entertains and enquires into complaints of interference with the freedom of press on the one hand and those of violation of journalistic ethics and public taste on the other.[3]

II

The Book under review[4] is a case book brought out with the collaborative efforts of the Indian Law Institute and the Press Council of India. It is a companion volume to an earlier publication under the same auspices—*Violation of Journalistic Ethics and Public Taste*, 1984. This earlier book contained adjudications of the Press Council of India along with the principles enunciated therein in the field of journalistic ethics and public taste. The present volume contains those adjudications where the Press Council has enquired into the allegations of interference with the freedom of the Press. The utility of this volume is further enhanced by the most erudite and thought provoking preface by Upendra Baxi nicely analysing the various issues.[5] To take the Preface first, Baxi has raised some very pertinent questions on the adjudications of the Press Council in this area. He rightly pointed out that in most of the cases before the Council, small or medium regional newspapers were involved either as complainant or respondant whereas the National

1. The Press Council of India was established in July 1966 under the Press Council Act, 1965. It was abolished by an Ordinance from 1st January, 1976 and was restablished in 1976 under the Press Council Act, 1978. It is working since then
2. *See* Section 13 (1) of the Press Council Act, 1978 (hereinafter the Act).
3. In case of erring newspapers, news a encies, editors and journalists, it has certain punitive powers like warning, admonishion and censure. It can also compel a newspaper to publish an adverse findings of the Press Council. See section 14 of the Act. But in those cases where it finds interference into the freedom of Press by the govt. or other authorties, it can only make observations on their conduct. *See* section 15 (4) of the Act.
4. *Violation of Freedom of the Press* (1986) (Hereinafter called *Compendium*).
5. *Compendium*, Preface, ix-xvi.

newspapers did not figure in these adjudications.[6] This raises several interesting questions : Does this mean that the small or medium regional newspapers are subject to pressures by various authorities including government while the national newspapers are not so subjected ? Or that the small and medium newspapers feel the pressure most their dependance of the government for various facilities and favours, like accreditation, free transport and other facilities, advertisements etc. Can the big national newspapers, being financially more stable and sound[7] withstand these pressures ? Or is there any reluctance on the part of the big newspapers to approach the Press Council ? Does this reluctance indicate their distrust in the Press Council ?

Baxi laments the lesser use of *suo motu* jurisdiction by the Press Council[8] and advocates "a more vigorous, proactive development of its *suo motu* jurisdiction."[9] He is quite right in saying so. The Press Council is not only an adjudicative body but it also has an over-seers function to monitor the press freedom in the country and to comment upon those tendencies likely to impede the growth of free press[10] *Suo motu* action by the Press Council is an important tool in its overseeing function. Initially, there was some reluctance on the part of the Press Council to initiate *suo motu* proceedings. Second Chairman of the Press Council, Justice Rajagopala Ayyangar had pointed out certain "theoretical as well as practical reasons" for the hesitation of the Council to take *suo motu* actions.[11] He wanted the council to observe a judicial detachment and avoid acting both as accuser and judge."[12] But the Grover Council has used the *suo motu* jurisdiction quite often.[12a] All the nine *sou motu* initiations reported were pertaining to the period when justice Grover was the Chairman of the Press Council. However, the manner in which *suo motu* actions are proceeded with leaves much to be desired. They are treated the way an individual complaint is treated. If the parties involved are not interested or do not respond to the Press

6. *Id.* at ix
7. *See* the *Report of the Second Press Commission*, Vol. I. 1982, 109-110.
8. Only nine out of 133 cases collected in the *Compendium* are *suo motu* initiations. Baxi wrongly mentions six Preface at x.
9. *Compendium*, at X.
10 *See* Section 13 (2) of the Act.
11. See Introduction to Gautam Adhikari, *Press Councils-The Indian Experience*, 1971, x-xi.
12. *Id.* at X.
12a. Between 1979 to 1985 there were in all 28 *suo motu* initiations. Though the fate of many of them is not known. See the various Annual *Reports* from 1979 to 1985.

Council, the proceedings are generally abondoned. It seems that the Press Council has taken the Inquiry regulations formulated by it rather too literally. Regulation 13 of the Press Council (Procedure for Inquiry) Regulations, 1979 provides that even in case of *suo motu* actions, the procedure followed would be the same as if it were a complaint. But *suo motu* jurisdiction of the Press Council is actually an activist jurisdiction and should be treated as such. In *suo motu* action, the wishes of the parties should not be of much significance because issues involved are wider and are not restricted to individual newspaper or journalist. The Press Council has vast powers of a civil court under section 15 of the Act in respect of summoning and enforcing the attendance of persons and requisitioning any document including public records. The Press Council must assert itself by the effective use of its powers under section 15. That will make its *sou motu* jurisdiction meaningful and will enhance its prestige as a public institution out to protect the freedom of press.

III

The Press works under varions stresses and strains inmical to its free working. They may take any form from physical coercion including intimidation, to economic coercion, to withdrawing certain facilities necessary for news gathering, etc. These pressures are sometimes exerted with a view to compell the newspapers and the newspapermen 'to toe the line.' Sometimes favour are conferred to particular newspapers so as to influence their policy. The test of a free press is that it does not sucumb to any of these pressures.

The *Compendium* contains 133 adjudications of the Press Council covering the period from 1966 to 1974 and from 1979 to June 1984. Reading these adjudications gives a fairly good idea of the ways the press in India can be subjudicated to. These adjudications have been conveniently classified into four categories : 'Pressurisation and Harassment of newspapermen'; 'Accreditation and Freedom'; 'Advertisement and Freedom'; and 'Miscellaneous adjudications'. Maximum nnmber of adjudication are rendered in first category (fifty) followed by third (forty seven) fourth (twenty three) and second (thirteen). In each chapter the pattern followed is the same. First part of each chapter contains the facts of the case along with the decision of the Press Council rendered therein. In the second part of the chapter the principles enunciated or deduceable from those cases have been digested.

Government and its functionaries come out to be the biggest source of threat to the freedom of press.[13] However, there are other organisa-

13. Majority of the complaints are against the governments and their officers.

tions or 'centers of power' which threaten the free press. They include, political parties,[13a] trade unions[14] and public and private corporations.[15] There are internal pressures as well over the editors and journalists exercised by the proprietors and managers of the newspapers. The fact that only two complaints[16] (and that too very insignificant) are reported in the *compendium* is no indication that such pressures do not exist. The editors and the journalists perhaps do not want to complain against their employer and many of them prefer to resign when they think they cannot pull on with the management. A case of great significance had arisen before the Press Council in November, 1974 on the question of removal of B. G. Verghese from the editorship of the Hindustan Times by the Management.[17] But before the Press Council could finally adjudicate upon the matter, it was abolished by an ordinance in December 1975.

The value of the *Compendium* lies in the fact that it has collected at one place, those principles developed by the Press Council which should govern the relationship between the fourth estate on the one hand and the government and other organisations on the other. These principles, it may be noted, are not based on any legal doctrines but on the common sense notions of what is fair and just. The book is a constant reminder to those interested in Press freedom about its pit falls. It gives an idea about the operational hazards involved in maintaining a free press. The book will be helpful to those who are champions of the freedom of Press. A great service to the Democretic Republic of India. The efforts which have gone into the preparation of this *compendium* have open new era in the freedom of Press.

V. P. MANGOTRA*

13a. *Id* at 7.
14. *Compendium*, 108.
15. *Id.* at 115, 117, 120, 6-7, 71, 74, 82.
16. *Id.* at 114, 122.
17. See N K. Trikha, *The Press Council*, 1989, 77-90. K. K. Biral challenged the jurisdiction of the Press Council to entertain the complaint in Delhi High Court which held in favour of the Press Council. See *K. K. Birla* v. *The Press Council*, 1976 ILR (1) Delhi 753.

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LABOUR AND INDUSTRIAL LAW by D. L. Malik, Fourth Edition, Price Rs 120/-

Law must change with temper and mood of time. Labour Law, being basically humanizing law, has kept pace, with the idea of human justice. The fact is that man cannot be tied enternally to man-made rules. Hence, Law must undergo change. That is why the concept of contract, crime and property are in the continuing process of change and modification. The quality and essence of law is that it is eternally proportional to the change of time, place and needs of man. If any branch of Law has expressly answered the above description, it is undoubtedly the branch of labour law.

Labour Law, an off-spring of 20th century is the law relating to an animating being—a sort of life pulsating with nerve.[1] This sensitized branch of law has its own socio-economic imperatives-touching the human dignity on the one hand and economics of demand and supply on the other Unlike the traditional law, it makes the substantial departure from the theory of contractual freedom and sanctity of property. From this angle, this special brach of law has atleast three-fold qualities. *One*, subsisting contract can be modified; and if necessary, a new contract can be formed in the interest of socio-economic and political justice ;[2] *two*, traditional concepts of civil law relating to *resjudicata*, estoppel, and necessary parties may not be honoured and a new way of path of least resistence may be followed; *three*, the group approach or association may be more important than the individual. An award is binding not only on the parties to the issue but on whole lot of the workers in the context;[3] *fourth*, the judicial approach avoids the generalization or laying down any rigid principles. Hand Book of labour and industrial law authored by Sri P. L. Mallik presents the panoramic picture of twenty-seven central enactments of different hue. At the outset, it may be pointed out that the above four indicia differenciate this branch of law from other set of law.

The learned author's treatment with different laws of labour without any catogarisation precipitates the confusion with the law. To be precise, broadly a student of law may put the labour law in three broad catogaries. *One*, Free enterprize area ; *two*, Social security statues; and *third*, Minimum standard statutes. The Industrial Disputes Act.,

1. *National Textile worker's Union*, v. *P. R. Ramkrishnan*, A. I. R., 1983, S C. 75.
2. W. I. A. Association, A. I. R., 1949, F. C. III, *Bharat Bank Ltd.*, v. *Its Employees*, (1950) S. C. R. 459.
3. The Industrial Disputes Act, 1947, Section 18.

1947; The Trade Unions Act, 1926; Industrial Employment (Standing Orders) Act, 1946, would fall in the first category. Under the social security legislation would come enactments like Workmen Compensation Act, 1923, Maternity Benefit Act, 1961, Employees' State Insurance Act, 1948, Employees' Provident and Mis. Provisions Act, 1952. Minimum Wages Act, 1948; and such other law which put norm for standard observance of objectives of welfarism would comprise the third category. It may be that some enactments may not clearly fall in anyone of the three but that does not detract the utility of such distinction.

Before we proceed further, it may be pointed out that historical account of labour law would have enriched the appreciation and perception of the historical forces at work. History unfolds the process of the law and paves the way for understanding the 'mysteries' of law. The mechanical reproduction without any link in between the social situation and the law can not clear the hazy path of law, which is needed for clear understanding of 'Law growth' and its purposeful orientation. Historical account with brief introduction would have further enriched the quality of the work.

Treatment of certain important Acts does not give the spectrum of judicial response. Bonded Labour system (Abolition) Act, 1976; Child Labour (Prohibition and Regulation) Act, 1986 lack the mention of the judicial response. Declaration, identification of the bonded labour and their rehabilitation are the important processes of bonded labour which have been deeply taken into account even by the highest Court.

The social security legislation is another branch of labour law which has revolutioned the social side of the labour process. In this area, the learned writer has appreciated the law from different angles and has pointed out the judicial response. But some vital aspects have not been dealt with. In the context of Employees' Provident Fund and Mis. Act. 1952, the concept of 'Composite Factory' as evolved by Courts does not find a respectable place in the treatment of the matter.[4] Indeed, it is worth noticing that the idea of composite factory is the judicial innovation so as to disable the employer to exploit the situation and avoid the parameters of the law which is meant for total obedience of the measure.[5] The concept of factory is an age-old concept which has served the purpose of extending the horizen of the law under the

4. Employees' Provint Fund Act, 1952, Section 2 (g) defines 'Factory'.
5. *Regional Provident Fund* Commr. Co. A. I. R. 1962 S. C. 1936; *Associated Industries Private, Lld., v. Reg. P. F. Commr.* A. I. R. 1995 S. C. 314; *Union of India v. Ogale Glass*, Works, (1971) 2 L. L. J. 513 (S. C.).

stresses and strains of industrial and technological development. But the statutary definition may not cover all the places and processes which are comprehended within the put view of factory. Factory has got a industrial history and with the development of science and technology, the concept of factory has complex growth and wide dimension. It would be in the interest of labour relations science to give the wide coverage to such a growing industrial phenomena.

Though as a whole, the Hand Book of Labour Law is lacking introduction, some sort of introduction precedes the discussion of the E.S.I. Act, 1948. The Act is discussed in some particular material but the learned author has not pinpointed certain special features of the Act. These features may relate to the following. First and foremost quality of the Act is that it confers benefits in cash or kind.[6] Moreover, this Act, being welfare orientation, divides the concept of Employer into Principal employer and immediate employer.[7] The age-old *laiseeza fairs* concept of contract of service and contract for services has been done away with under the Act and principal employer is liable for contribution even for the act or omission of immediate employer. It is a different matter that immediate employer is enablee to get compensation from the principal employer. Moreover other common law barriers have been fused by adopting various statutory mechanism. The doctrine of *'rescue cases'* has been employed to neutralize the effect of *volenti-non-fit injuria*[8]. Even the doctrine of 'arising out of and in course of employment' has been diluted.[9] Further. the doctrine of welfarism has been employed to the extent of making the employee to submit to the doctor at any rate, even if he is unwilling. Moreover, the statatory measures require that the employee must admit himself in the hospital and would not leave without prior permission of the authority concerned.[10] Even the present day problem of pollution has been taken into account and liability has been fixed on the employer in the interest of general public.

It is notable that the mechanism of inspectorate does figure prominently in the social statutes such as E. S. T. Act., 1948; Maternity Benifit Act, 1961. But the point to note is that while in the former the inspector is not invested to pass order quasi-judicially, he is so empowered in the later Act. It is a debatable point whether the process of

6. Employees State Insurance Act., 1948, Section 56.
7. Employees State Insurance Act., 1948 sections 2 (13) and 2 (17).
8 Employees State Insurance, 1948, Section 51D.
9. Employees State Insurance, Act, 1948, Section 51A.
10. E. S. I. Act Section 64.

order is the consequence of quasi-judicial power or semi-judicial power in Industrial Law.

The learned author of the Hand Book on Labour and Industrial Law has made commendable attempts in the Free-enterprize area relating to three Acts as we have already seen. But few comments are desirable. Industrial adjudication under Industrial Disputes Act, 1947 flows in two-fold channels. *One*, under section 10 read along with section 12 of I. D. Act; and *two*, under section 33 of the I. D. Act. The apex court has evolved the doctrine of *prime facie case* under section 33 of the I. D. Act., whereas, under section 10 of the I. D. Act., there is a full-fledged enquiry on merits. The learned author does not seem to have hinted at such an important distinction evolved by the Supreme Court since *Atherton west case.*[11] It is to be remarked that the consequence of such a distinction is that in view of section 33, if an order is passed, the appropriate government may again refer the matter of industrial dispute; whereas, adjudication under section 10 of the I. D. Act does not give any such result or legal consequence.

The Industrial Employment (St. order) Act, 1946, is an important enactment of the Free-Enterprize area. The object of the Act is to render the terms and conditions of employment into writing. And, for this purpose, a mechanism of certification of standing order is provided under the Act. After certification, these standing orders become 'rule'[12] and have legal force. But question has arisen as to the true nature of these standing orders certified under the above Act. Whether they are contractual or statutory or remain at the level of award or the like. Even the Supreme Court response is not very clear. The learned author has not paid requisite attention in this regard. The controversy ought to have figured in the present work some where in some form. The science of law relating to labour relations has begun to carve out its conceptual area and a lot of new ideas have come to play a significant role in this senstive branch of human relations.

The right to form union is fundamental right[13] and right to strike has been fastened at the constitutional plan. The learned writer does not think fit to give any introduction to the trade union movement in India. Labour being basically 'life korle' gets accelerated with collective strength and moves forward. The Supreme Court response coupled with the constitutional provision of Articles 19 and 21 has given sustenance

11. Atherton West Comp., Lt. v. Sutimill, Mazdoor, Union 1953 2 L.L.J. 312.
12. See, Yogendra Singh, Nature of Standing Orders, J.I.L. I., 1967, Vo. 19, No. 3.
13. The Constitutional of India, Art, 19 (1) (c).

to such a right. *Guarat Tube. Ltd.*[14] and *Kamani Ltd.*[15] have added strength and succour to the onward march of the trade union movement. Right to employment, being fundamental, is intimately connected with right to livalihood which has been held as fundamental right. Such treatment by the author being absent does not present the picture of the law in its entirity.

YOGENDRA SINGH*

14. A. I. R., 1980 S. C.
15. A. I. R , 1989 S. C.-9.

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